SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

Tabled and ordered to be printed

Issue No. 4 of 1996

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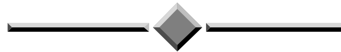
NOTE TO MEMBERS AND READERS OF THE ALERT DIGEST



Members and other readers may note that the Committee has included responses from Ministers to various points raised in Section A, dealing with Bills being reported on for the first time.

The Committee decided to seek information from Ministers prior to the finalisation of this Alert Digest because the time between the sittings of Parliament allowed such an exchange of information on this occasion. The rationale for this was to enable the Committee to put its views, and any response to those views by the relevant Minister to the House simultaneously. It is hoped that this will better facilitate debate on these issues.

Tony Elliott MLA
Chairman

SECTION A - BILLS REPORTED UPON IN THIS ISSUE

1. EDUCATION (OVERSEAS STUDENTS) BILL

Background

1.1 This Bill was introduced into Parliament on 15 May 1996 by the Honourable R J Quinn MLA, Minister for Education.

1.2 The object of this Bill is to introduce State legislation to regulate the provision of education services to overseas students. The Explanatory Note states that the Bill establishes a framework for -

the orderly conduct of programs of education and training for overseas students by:

- *the registration of education service providers who provide education and training courses to overseas students; and*
- *the registration of education and training courses that are provided for overseas students.*

1.3 The State is introducing this legislation to ensure that there is no void left by an equivalent Commonwealth Act (*Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*) which is due to expire on 1 January 1997. All States and Territories are making similar arrangements to cover the area previously dealt with by the Commonwealth legislation.

Sufficiently clear and precise drafting? - Part 2 - Registration

1.4 The Committee notes that although this part deals with matters like registration, renewal and transfer of registration, registration certificates, procedures for suspension or cancellation of registration and so on, the period of registration is not specified in the Bill. As registration is a central issue to the Bill, it could be argued that the period of registration should be specified in the Bill.

1.5 In response to this point, the Minister provided the following information to the Committee:

Under the Bill as drafted, the period of registration is referred to in clause 9(4)(a)(iv) and (b)(iv)(B). The length of the registration period would be the period determined by the chief executive as part of the task of determining the conditions attaching to registration (in relation to which registration criteria are applied). The registration criteria are to be prescribed under a regulation, and the criteria could include a provision to assist in the determination of the registration period.

> *It may, however, be more appropriate to add a new subsection (5) to clause 9 to provide that a registration period is not to exceed 5 years. The department will give further consideration to amending the Bill in the Committee of the Whole to provide that a registration period is not to exceed five years.*

1.6 The Committee thanks the Minister for this information.

Delegation of administrative power to appropriate persons? Clause 33

1.7 Clause 33 provides:

> ***Delegation***
>
> ***33.*** *The chief executive may delegate the chief executive's powers under this Act to an officer or employee of the Department.*

1.8 The Committee has, for some time, been closely monitoring whether the delegation of powers within Acts are appropriate. Section 4(3)(c) of the *Legislative Standards Act* 1992 provides that:

> ***(3)*** *Whether the legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:*
>
> ***(c)*** *allows the delegation of administrative power only in appropriate cases and to appropriate persons.*

1.9 The Committee is fully aware of the contents of s. 27A of the *Acts Interpretation Act 1954*, dealing with delegation of powers. It has considered the question of appropriate delegation of power on several previous occasions when it evaluated the effect of s. 27A together with responses to its queries from Ministers. The Committee remains unconvinced that s. 27A is the ultimate solution to ensuring appropriate delegation of power.

1.10 In circumstances where the powers which may be delegated are extensive, may affect the rights or legitimate expectations of others, or appear to require particular expertise and/or experience, the Committee has sought further qualification on the powers of delegation. In the Committee's view circumstances arising under cl. 33 also come within this category. Amongst the chief executive's powers under this Bill are the granting, suspension or cancellation of registration for providers and courses. It would therefore be consistent for the Committee to adopt the view that the power of delegation in cl. 33 should be limited so that the chief executive's powers can only be delegated to an "appropriately qualified" officer or employee of the Department.

1.11 The Minister responded as follows on this point:

> *The department accepts that the words the Committee suggests should be inserted, could add a dimension to clause 33 that section 27A of the Acts Interpretation Act 1954 does not provide. However, the department has serious concerns about the "review consequences" that such a limitation has on powers of appointment. It appears to the department that regardless of what formulation of words is used, such a limitation opens up the possibility that a delegation's validity could be called into question.*

1.12 The requirement that the delegation be to an "appropriately qualified person" would open up a delegation to challenge that the delegate was not appropriately qualified. If, and only if, this challenge were successful, a court might rule that all decisions made by the delegate were invalidated. However, this would only occur if the court took the view that the "delegate" was not appropriately qualified. This is not a conclusion which judges would reach lightly, not least because of the potential consequences. If that is the judgement of the court, the major problem is not that the decisions are invalidated but that inappropriate delegations are being made - contrary to the clear intentions of the Parliament as expressed within the *Legislative Standards Act*.

1.13 The Committee is not prepared to support such broad delegations merely to prevent the invalidation of delegations against which the *Legislative Standards Act* requires the Committee to guard.

1.14 The best ways to avoid any uncertainty is to ensure that delegations of significant powers should NOT be made to very broad categories of persons. When legislation is being drafted, departmental officers should consider the important issue of who might appropriately exercise the administrative powers the legislation will create, taking into account any necessary qualifications, experience or level of appointment. The Bill should then confer the power on an appropriate office and limit delegation to those who might appropriately exercise the power. If the issue has been considered in advance and incorporated in the Bill (or in regulations), there is no need for the court to consider the issue at a later stage.

1.15 In reviewing Bills presented to the house, the committee will always examine the categories of persons to whom the Bill authorises delegation. If it feels that the category is too widely drawn, it will suggest that the minister consider including a narrower category in the Bill or that the Bill restrict delegation to "appropriate persons" to reflect the requirements of the *Legislative Standards Act*.

1.16 The Committee thanks the Minister for the information provided.

1.17 The Committee has given this issue detailed consideration and has resolved to adopt the following policy on this point:

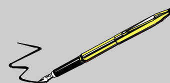
- **That the terms of sections 24B and 27A of the *Acts Interpretation Act 1954* do not exhaustively cover the requirements of the fundamental legislative principles as set out in the *Legislative Standards Act 1992* sections 4(3)(c), (4)(a) and (5)(e).**

- **The Committee will therefore apply the principles contained in the *Legislative Standards Act 1992* [1] to each case.**

- **Where a power being delegated is significant, the Committee prefers that those to whom the power can be delegated should be limited and the qualifications or office specified either in the legislation or in regulations (in which case the delegations could not be made until the regulations are passed).**

- **Where, nonetheless, significant powers are delegated to a broad category of persons, the Committee has formed the view that the authorising Act or subordinate legislation should require the delegate to be "appropriately qualified"[2].**

1.18 The Committee brings this comment to the attention of the Minister and requests that the Minister consider redrafting this provision accordingly.



NOTE TO READERS

THE COMMITTEE ALSO BRINGS THE FORMAL ADOPTION OF THIS POLICY ON DELEGATION OF POWERS (POLICY NO. 1 1996) TO THE ATTENTION OF ALL READERS.

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[1] **Section 4(3)** - whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation -
(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons;

Section 4(4) - whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill -
(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons;

Section 4(5) - whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation -
(e) allows the subdelegation of a power delegated by an Act only -
 (i) in appropriate cases and to appropriate persons; and
 (ii) if authorised by an Act.

[2] "**qualified**" to include a reference to formal qualification(s) and / or experience

Delegation of legislative power in appropriate cases? - Clause 34(2)(b)

1.19 This sub-section provides that the Governor in Council may make regulations under this Act and that a regulation may:

> *(b) create offences and prescribe penalties of not more than 20 penalty units for each offence.*

1.20 The Committee has some concerns over the delegation of legislative power to create offences and prescribe penalties even at a maximum of 20 penalty units for each offence.

1.21 The Committee recognises the merit of delegating some legislative power to assist the effectiveness of the Act. The Committee also recognises that there may be some circumstances when such offences may not be obvious at the time that the Bill is drafted.

1.22 Having made these observations, however, the Committee is of the view that sub-clauses such as this one should be further defined by providing a description of the kind of offences that might be created. If any types of offences are foreseeably necessary these should be categorised in the Bill.

1.23 In the alternative, if it is difficult to foresee the types of offences that would have to be created, a sub-clause such as this could be inserted with a sunset clause. This would allow the Act to operate for a period of, say, two years, so that the offences to be prescribed can be identified and included in the Act by a subsequent amendment prior to the expiry of the sunset clause.

1.24 Another aspect of the delegation of legislative power to create offences and prescribe penalties that is of substantial concern, is that these offences and penalties should not affect the rights and liberties of individuals or impose obligations on them.

1.25 The Committee sought information from the Minister on these views and concerns, and received the following response:

> *As the Committee is aware, a regulation made for this purpose would be subject to the following constraints¾*
>
> - *the regulation must relate to a matter clearly within the 4 corners of the Act*
> - *the regulation must be laid before the Legislative Assembly and is subject to Committee scrutiny and disallowance.*

All content for the initial regulations proposed under this Bill has not yet been settled, and experience suggests that matters will arise from time to time that can be appropriately addressed by further regulation.

The Committee has suggested the regulation-making power include a description of the kind of offences that might be created. I consider that it is undesirable that the Act be continually amended in its regulation-making powers merely to ensure that the regulation can be enforced.

The department is of the view that it is unlikely that offences created under regulations made under this Bill, when passed, will be significant in number.

1.26 The Committee has considered the Minister's views. The question whether they meet the requirement that a Bill has sufficient regard to the institution of Parliament (by, for example, allowing the delegation of legislative power only in appropriate cases and sufficiently subjects the exercise of that power to be the scrutiny of the Legislative Assembly[3]) is, however, not fully answered in the affirmative.

1.27 One issue in the Minister's reply which the Committee wishes to clarify relates to disallowance. Members of the Executive frequently adopt the view that anything questionable (in terms of FLPs) and done by way of subordinate legislation is redeemed by the fact that such subordinate legislation is disallowable.

1.28 The Committee does not support this view for the following reasons:

- objectionable material contained in subordinate legislation can be in force as part of the law for weeks or even months before disallowance can be moved in respect thereof; and

- all action taken under such objectionable provision/s remain valid even if the relevant provision is disallowed.[4]

1.29 The Committee thanks the Minister for the information provided.

1.30 The Committee has given this issue detailed consideration and has resolved to adopt the following formal policy on this point:

1.31 The Committee accepts that legislative power to create offences and prescribe penalties may be delegated in limited circumstances provided the following safeguards are observed:

- **rights and liberties of individuals should not be affected, and the obligations imposed on persons by such delegated legislation should be limited; and**

- **the maximum penalties should be limited, generally to 20 penalty units; and**

[3] *Legislative Standards Act, s. 4(4)(a) and (b)*

[4] Pursuant to s. 51(3) of the *Statutory Instruments Act*

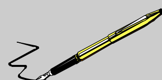
- **where possible, the types of regulation to be made under such provisions, which are foreseeable at the time of drafting the Bill, should be specified in the Bill; or**

- **where the types of regulation to be made are not reasonably foreseeable at the time of drafting the Bill, a sunset clause (for a period not exceeding two years) should be set in respect of the relevant provision to allow time to identify the necessary penalties and offences.**

  If further offences and penalties are required that do not fall within the types of regulation outlined in the Bill, they can be added by amendment to the principal Act. The principal means of creating offences should always be through Acts of Parliament rather than delegated legislation.

1.32 Where provisions in regulations are made pursuant to delegated legislative power to create offences and prescribe penalties without having regard to these safeguards, the Committee will consider moving for the disallowance of the relevant provisions.

NOTE TO READERS



THE COMMITTEE ALSO BRINGS THE FORMAL ADOPTION OF THIS POLICY ON THE DELEGATION OF LEGISLATIVE POWER TO CREATE OFFENCES AND PRESCRIBE PENALTIES (POLICY NO. 2 1996) TO THE ATTENTION OF ALL READERS.

Other features of the Bill deserving comment from the Committee

1.33 In addition to the points raised above, the Committee has noted the care taken to draft this Bill in accordance with fundamental legislative principles. In particular the Committee was impressed with the protection afforded to individual rights, liberties and interests in the following provisions:

- Clause 7(3) - requires a person to give the chief executive *all the co-operation, information and help reasonably necessary for the chief executive to investigate….* The drafting of this section is preferable to the phrase “any information” which is also frequently used.

- Clause 11(1) - procedure for suspension or cancellation of registration, requirements for written notice

The Committee notes, however, that this procedure does not follow automatically on the Minister’s exercise of his discretion in cl. 11(1).

The Committee would prefer to see the section amended to ensure that this result is achieved. An amendment as (indicated in bold, standard type) in something similar to the following terms would therefore be preferable:

> ***11(1)*** *If the chief executive believes a ground exists to suspend or cancel a registration (the* ***"proposed action"****), the chief executive may* **initiate the suspension or cancellation process and in these circumstances the chief executive must** *give the holder of the registration written notice.*

- Clause 23(1)(c) - requiring a Magistrates Court to comply with natural justice on appeal.
- Clause 27(2) and cl. 30(3) and (4) - allow for reasonable excuse for not complying before a penalty applies.
- Clause 32 - provides protection for the financial interests of overseas students.

1.34 More generally, clauses 11 to 13 and Part 3 appear to be a well structured package to deal with the suspension and cancellation of licences. The package takes into account the interests of both the providers and the students.

1.35 A file of clauses which the Committee considers may represent best practice will be maintained in the Committee Office.

1.36 The Committee commends the Minister and the drafters on these aspects of the Bill.

2. LOCAL GOVERNMENT (MORAYFIELD SHOPPING CENTRE ZONING) BILL 1996

Background

2.1 This Bill was introduced into Parliament on 15 May 1996 by the Honourable D E McCauley MLA, Minister for Local Government and Planning.

2.2 The objectives of the Bill, as stated in the Explanatory Notes, are:

- *to rezone an area of land as part of a major shopping centre development, and*
- *to provide for planning deeds between the development company and the Caboolture Shire Council by way of regulation.*

Sufficient regard to the institution of Parliament by authorising the amendment of an Act only by another Act (a Henry VIII clause) ? - Clause 5

2.3 Clause 5 of the Bill provides as follows:

Matters taken to be lawful

5. *Anything done on the Morayfield Shopping Centre land under a planning deed is lawful.*

2.4 As drafted, the Committee regards this as a Henry VIII clause which has been defined as follows:

A "Henry VIII clause" is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.[5].

2.5 The Committee's views on Henry VIII clauses are explored in para 3.7 below.

2.6 The rationale behind the Committee's view is that this clause allows a planning deed, made pursuant to a Regulation, to make lawful an act that would otherwise be unlawful under another Act.

2.7 In addition to the concerns raised about the fact of a subordinate instrument amending an Act of Parliament, the Committee is also concerned about the identification of laws being overridden. Clause 5 would allow the planning deed to override clauses of other legislation which are not identified. The question that therefore arises is what matters would be unlawful in the absence of cl. 5? What legislation is the wording of cl. 5 aiming to override?

[5] Queensland Law Reform Commission (1990), Report No. 39 *Henry VIII Clauses*, Brisbane, p. 1.

2.8 The Committee sought more information on what might be overridden clause 5. The Minister indicated that:

> *Clause 5 relates specifically to matters contained in the planning deed. These deeds are designed to cover the technical detail of conditions required by Councils, such as headwork contributions, open space provision, traffic connections, street works, landscaping and the like. ... A major retail development proposal for example, often requires improvements to traffic intersections some distance from the shopping centre site... Although the applicant may be prepared to accept such a condition, it can be open to litigation by a retail competitor seeking to demonstrate that no clear nexus between the project or the approval condition exists, and that works beyond the application site cannot be required as part of an approval...."*

2.9 The Minister indicated that

> *"Clause 5 is not aiming to override other legislation, but rather to ensure that conditions of approval contained in a planning deed which are acceptable to both the Council and the applicant, can be relied on in the absence of a more definitive code in the planning legislation. Similarly, Clause 5 is not seeking to override the provisions of planning scheme (which also has to comply with planning legislation) ..."*
>
> *"The Committee's concern over the potential broader application of the clause in relation to non-planning legislation (such as traffic codes) is however noted and will be taken into consideration when the Bill is dealt with further."*

2.10 The Committee is of the view that the clause is too broadly drafted and that this breadth of drafting has produced a Henry VIII Clause. It is pleased to see this concern acknowledged by the Minister and looks forward to seeing the scope of the clause suitably limited.

2.11 The Committee thanks the Minister for the information provided.

2.12 The Committee is of the view that clause 5, as drafted, is too broad and constitutes a Henry VIII clause contrary to fundamental legislative principles.

2.13 The Committee is currently preparing a report to Parliament on Henry VIII clauses.

2.14 The Committee notes that the Minister has acknowledged the concern and has indicated that it will be taken into consideration when the Bill is dealt with further.

2.15 The Committee recommends cutting down the scope of cl. 5 of this Bill to ensure that it no longer constitutes a Henry VIII clause.

Unambiguous and drafted in a sufficiently clear and precise way? - Clause 9

2.16 The Committee notes the words used in cl. 9(2)(a), (b) and (3) which variously state what certain matters "are taken to be".

2.17 The Committee was uncertain as to whether these words were declaratory in effect. When this point was brought to the Minister's attention she advised that this is used as a deeming provision. The use of the words "deemed to be" would seem to express this more clearly.

2.18 The Committee continues to be concerned about the clarity and precision of the terms "taken to be" and considers that the words "deemed to be" are more appropriate for a deeming provision.

Sufficient regard to rights and liberties of individuals?

2.19 The Committee notes that the Minister's second reading speech indicates a concern about future litigation on "technical matters of law" and that such litigation may be taken to delay rival developments rather than on the merits. The remedy for this is to review the planning legislation. The Minister is rightly planning to engage in such a review and is not seeking to change the planning legislation on the basis of this one case.

2.20 The Department of Local Government and Planning informs the Committee that an action in the Supreme Court can be expected and that the disappointed party has until 25 July 1996 to commence such action.

2.21 The introduction of legislation that stops Supreme Court action is not action which is taken lightly. It has the potential to extinguish legal rights which parties are in the process of enforcing. It also has the potential to involve Parliament in individual cases and has implications for the relationship between courts and Parliament.

2.22 This is a practice that should be avoided wherever possible. The remedy must lie in the review of procedures, not in one off legislation.

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3. LOCAL GOVERNMENT (ROBINA TOWN CENTRE PLANNING AGREEMENT) AMENDMENT BILL 1996

Background

3.1 This Bill was introduced into Parliament on 15 May 1996 by the Honourable D E McCauley MLA, Minister for Local Government and Planning and was passed unamended on the following day as an urgent Bill.

3.2 The objectives of the legislation are stated in the Explanatory Notes to be:

- *to alter the site covered by the planning agreement which is the subject of the Local Government (Robina Town Centre Planning Agreement) Act 1992;*
- *to facilitate the construction of the Robina Railway Station; and*
- *to provide for the appropriate zoning of that land.*

Sufficient regard to the institution of Parliament by authorising the amendment of an Act only by another Act (A Henry VIII Clause)?

3.3 The Committee notes that both the original Act (*Local Government (Robina Town Centre Planning Agreement) Act 1992*) and this Amendment Bill contain Henry VIII clauses which allow primary legislation to be amended by Regulation.

> *A ("Henry VIII clause") is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.*[6].

3.4 The "planning agreement" is the subject of the principal Act and is set out in the schedule to that Act. Section 5(1) of the principal Act states that the planning agreement, so far as it applies to the site, has the force of law. Section 14(4) of the *Acts Interpretation Act 1954* provides that a schedule is part of the Act. Section 2(b) of the principal Act and amendments to that section incorporated in this Amendment Bill allow the principal Act to be amended by Regulation.

3.5 The Committee is aware that the original Henry VIII clause (s. 2(b)) is contained in the original Act, however, this Amendment Bill replaces the original Henry VIII clause with a new set of definitions including the following:

[6] Queensland Law Reform Commission (1990), Report No. 39 *Henry VIII Clauses*, Brisbane, p. 1.

> *"**Further agreement**" means an amending agreement, made by the parties named in it, the proposed form of which was approved under a Regulation.*

This is the clause that effectively allows the schedule containing the planning agreement (which is part of the Act) to be amended by Regulation.

3.6 Section 4(4)(c) of the *Legislative Standards Act* specifically states that:

> ***(4)** whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill¾*
>
> *(c) authorises the amendment of an Act only by another Act.*

3.7 This Committee and its predecessor, the Committee of Subordinate Legislation has been concerned over the use of Henry VIII clauses since its inception in 1975 and has consistently reported to Parliament condemning the practice and pleaded with Ministers not to employ these types of clauses. The following extracts clearly illustrate the views previously expressed:

> *It is the Committee's firm belief that if a matter is sufficiently important to be incorporated in an Act, it ought to be amended only by an Act. If the matter is of such lesser importance that it can be amended by subordinate legislation, then it ought to be written in subordinate legislation in the first instance.*[7]
>
> *The solution to this problem lies in Parliament's own hands, for as long as Parliament permits the inclusion in bills of clauses which allow the amendment of acts by (regulations), it will continue to place the scrutiny and control of its legislation outside its own power. The Committee urges the Parliament to exercise continuing vigilance regarding such measures in future legislation.*[8]

3.8 The Committee is of the view that the original Act and this Amendment Bill contain Henry VIII clauses contrary to the requirements in the fundamental legislative principles.

3.9 The Committee is currently preparing a report to Parliament on Henry VIII clauses. One of the matters being considered within that report is the use of Henry VIII clauses in Acts incorporating agreements.

[7] Committee of Subordinate Legislation (1984) "Fourteenth Report of the Committee of Subordinate Legislation", Government Printer, Brisbane, p 2.
[8] Committee of Subordinate Legislation (1979) "Sixth Report of the committee of Subordinate Legislation", Government Printer, Brisbane, p 2.

4. MURRAY-DARLING BASIN BILL

Background

4.1 This Bill was introduced on 16 May 1996 by the Honourable H W T Hobbs MLA, Minister for Natural Resources.

4.2 The Bill allows Parliament to approve the Murray-Darling Basin Agreement which was signed by the Commonwealth and the Governments of New South Wales, Victoria and South Australia in 1987, and was updated in 1992 when Queensland agreed to become a member. The Agreement deals with the water, land and other environmental resources of the Murray-Darling Basin, 25% of which is in Queensland.

4.3 The Bill also provides for the appointment of commissioners and deputy commissioners from Queensland to take part in the Murray-Darling Basin Commission decision making process and provides the Commission with powers and functions as defined in the Agreement, to operate in Queensland.[9]

Sufficient regard to the institution of Parliament by authorising the amendment of an Act only by another Act (a Henry VIII Clause)?

4.4 The Committee notes that the Agreement contained in the Schedule to the Bill can be amended by means other than a further Act of Parliament. Section 14(4) of the *Acts Interpretation Act 1954* provides that a Schedule is part of the Act. Section 50(7) of the Agreement in effect provides that the Agreement can be amended by approval of the Ministerial Council. Section 134(4) of the Agreement makes a similar provision.

4.5 Allowing a schedule to an Act to be amended as outlined above without a further Act of Parliament being passed to achieve the amendments is regarded by the Committee as a Henry VIII clause. Furthermore, the Committee views the amendment of an Act of Parliament by one member of the Queensland Executive, participating in a Ministerial Council decision, as a matter of particular concern.

4.6 The Committee notes, however, that an amendment under s. 134(4) of the Agreement must be laid before the House or Houses of Parliament of each of the parties participating in the Agreement within 15 days. If this procedure is not followed the amendment is void and has no effect.[10] In addition, the Committee notes that s. 134(8) provides that any of the participating Parliaments may pass a resolution disallowing the subject amendment, in which case it ceases to have effect.

[9] Information drawn the Explanatory Notes and Second Reading Speech.
[10] Section 154(6) and (7) of the Agreement.

4.7 While the Committee applauds these provisions requiring presentation of amendments to the agreement to affected Parliaments, allowing them the opportunity to disallow those amendments, the amendment of an Act of Parliament is still being carried out consequent on the agreement of one member of the Executive. The Committee therefore has concerns about this procedure.

4.8 However, the Committee is also cognisant of the attendant problems of national schemes of legislation where several or all Australian jurisdictions enter into agreements and have to make subsequent amending arrangements in conformity. The issue of Henry VIII clauses appears to be one almost inevitably arising in these circumstances.

4.9 In the circumstances of this Bill, the Committee notes that the agreement itself requires it to be approved by an Act of Parliament. The Committee also notes that Queensland entered this agreement some period after it was negotiated and its terms settled by the other participating jurisdictions.

4.10 The Committee, however, remains of the view that this Bill contains Henry VIII clauses contrary to the requirements in the fundamental legislative principles.

4.11 The Committee (and its predecessor) have consistently expressed opposition to the use of Henry VIII clauses for the last 21 years. This historical aspect is further discussed at paragraph 3.7 of this Digest.

4.12 The Committee is currently preparing a Report to Parliament on Henry VIII clauses. Some of the matters being considered within that Report are the use of Henry VIII clauses in Acts (incorporating agreements) and in national schemes of legislation.

4.13 The Committee continues to urge Ministers to explore alternatives to, and avoid the use of, Henry VIII clauses when participating in national schemes of legislation.

5. PLANT PROTECTION AMENDMENT BILL 1996

Background

5.1 This Bill was introduced into Parliament on 15 May 1996 by the Honourable T J Perrett MLA, Minister for Primary Industries, Fisheries and Forestry and was passed as an urgent Bill on the following day without amendment.

5.2 The objectives of the legislation as stated in the Explanatory Notes were to amend the *Plant Protection Act 1989* to:

- facilitate the issuing of certificates on the status of plants by inspectors;
- facilitate the movement of plants both within Queensland and nationally through a system of accreditation of persons to issue assurance certificates;
- confirm the effect of inspectors' approvals already issued in relation to fruit coming out of the papaya fruit fly pest quarantine area;
- make certain amendments to regulation making provisions; and
- specify certain penalties for offences stipulated in the Act.

Retrospective application? - Clause 2

5.3 Clause 2 of Bill provides:

Section 22 is taken to have commenced on 20 October 1995.

5.4 Clause 22 inserts a proposed s. 35A (dealing with validations) into the Act. The new section confirms the validity of inspectors' approvals issued under specified regulations (which regulations provided that fruit could not be taken out of the declared pest quarantine areas without an inspector's written approval).

5.5 Clauses 2 and 22 therefore ensure, by retrospective validation, that actions taken by inspectors under the Regulations were valid.

5.6 The Committee does not object to curative retrospective legislation per se. However, it always takes care in examining clauses with potential retrospective effect to ensure that no rights and liberties are adversely affected or obligations imposed retrospectively. The Committee then reports to Parliament on the results of such scrutiny.

5.7 The Committee does not have any concerns with respect to this retrospective clause.

Delegation of legislative power in appropriate cases? - Clause 21(s. 35(2)(b))

5.8 This sub-section provides that the Governor in Council may make regulations under this Act and that a regulation may:

> *(b) create offences and prescribe penalties of not more than 20 penalty units for each offence.*

5.9 The Committee has some concerns over the delegation of legislative power to create offences and prescribe penalties even at a maximum of 20 penalty units for each offence.

5.10 This issue is discussed in some detail in paragraphs 1.22 - 1.29 and the Committee sets out its current views on the issue in paragraphs 1.31 and 1.32.

5.11 The Committee however, recognises the merit of delegating some legislative power to assist the effectiveness of the Act. The Committee also recognises that there may be some circumstances when such offences may not be obvious at the time that the Bill is drafted.

5.12 In the circumstances of this urgent Bill, and despite its reservations and general caution about the delegation of such powers, the Committee will confine itself to requiring that the rights and liberties of individuals which are the subject of the *Legislative Standards Act* should not be affected and the obligations imposed on persons should be limited.

6. QUEENSLAND LAW SOCIETY LEGISLATION AMENDMENT BILL 1996

Background

6.1 This Bill was introduced into Parliament on 16 May 1996 by the Honourable D E Beanland MLA, Attorney- General and Minister for Justice.

6.2 In his Second Reading Speech the Minister provides background on the establishment of the Legal Practitioners Fidelity Guarantee Fund. The Fund was set up to ensure that there was a fund from which to reimburse persons who suffer pecuniary loss as a result of stealing or fraudulent misappropriation by a solicitor of money or property entrusted to the solicitor in the course of their practice. Over time solicitor's practices have extended to brokering contributory mortgages (*where money provided by two or more persons is pooled and lent to one borrower on a first mortgage basis.*)[11]

6.3 This Bill moves to exclude certain mortgages from coverage by the Fidelity Guarantee Fund. This exclusion is specified to apply in respect of instructions given by the client after the date of commencement of the Amendment Bill.

6.4 The Bill includes several safeguards for example:

- requiring solicitors to notify their clients in advance of the lack of cover by the fund;
- requiring solicitors to receive specific authorisation from their clients to proceed;
- providing that failure to comply with these requirements will constitute professional misconduct.

6.5 The Bill also stipulates that there is no compensation under s. 188 of the *Land Title Act 1994* for any loss occasioned by the unlawful conduct of a solicitor acting contrary to these amendment provisions.

Retrospective Application?

6.6 Clause 2 of the Bill provides:

This Act is taken to have commenced on 16 May 1996.

The Bill was introduced into the House on 16 May 1996 and is stated to commence from that day rather than on the date of assent or a date set by proclamation which is the usual practice.

[11] Page 2 of the Second Reading Speech

6.7 The Committee always takes care in examining clauses with potentially retrospective effect to ensure that no rights and liberties are adversely affected or obligations imposed retrospectively, and reports to Parliament on the results of such scrutiny.[12]

6.8 The Explanatory Note on this point is very thorough and deals with any potential concerns:

> *The Bill is not retrospective in that if there is any loss arising from an excluded mortgage in respect of which instructions were given to a solicitor prior to the date of commencement of the amendment, that loss will still be covered by the Fidelity Fund. It is only those excluded mortgages which have not yet been arranged which will be excluded from the coverage of the Fund.*
>
> *However, in a limited respect, the Bill could be said to be retrospective, because it will apply as and from the date of introduction of the Bill into the House. Where instructions are given to a solicitor as and from that date in respect of an excluded mortgage, any loss arising from or out of the excluded mortgage will not be covered by the Fund. However, also as and from that date, solicitors will be required to notify their clients of the fact that the Fund no longer applies. Therefore, clients will be aware of the effect*

6.9 The Committee is therefore not concerned about the commencement clause in this Bill as persons potentially affected by the changes to the law are expressly required to not only be notified, but to give their written authorisation of any action to be taken under the law as amended. The Committee also notes that the Queensland Law Society provided its members with a document on the changes being introduced in the Bill entitled *Mortgage Lending - Urgent Legislative Update*.

6.10 The Committee is therefore satisfied that all persons affected by these amendments will not be disadvantaged by its commencement clause.

6.11 The Committee has been pleased to note the safeguards provided in this amendment legislation for future clients who will be affected by this amendment, namely:

- **the requirement that the practitioner give the client notice of the effect of s. 24A and a copy thereof;**
- **the requirement for the client's authorisation to use an amount for an excluded mortgage;**
- **the provision that a practitioner contravening these requirements commits professional misconduct.**

[12] Section 4(3)(g) of the *Legislative Standards Act 1992*.

Unambiguous and sufficiently clear and precise drafting? - Clause 4

6.12 In November 1994 the then Committee of Subordinate Legislation reported to the House on a subordinate instrument entitled *The Queensland Law Society (Approval of Indemnity Amendment Rule (No. 1)) Regulation 1994*.[13] One of the issues dealt with in that Report concerned a definition contained in the subject instrument which, in the Committee's view, did not meet the requisite standards for clarity and precision. The definition in question was that of "*practicing practitioner*".

6.13 The Committee expressed the following view on the term "*practicing practitioner*":

> *This term is defined in the principal act as follows:*
>
> > *Any solicitor or conveyancer who directly or indirectly practises in Queensland :prima facie a solicitor or conveyancer who draws or prepares any document relating to real or personal estate or any memorandum or articles of association of any company, or signs any instrument as correct for the purposes of registration, or who receives in trust the moneys of any person shall be deemed to be a practising practitioner: the term does not include a solicitor, or conveyancer in any Commonwealth or State Department acting in the course of his official duties.*
>
> *It appears to the Committee that this term is tautologous. In its ordinary sense the word "practitioner" means a professional or practical worker engaged in actual practice (not retired nor merely qualified). In the Committee's view the word "practitioner" would more accurately and adequately represent this category of person.*[14]

6.14 The Committee then made the following recommendation:

> *That the abovementioned aspects of the nomenclature of the Indemnity Rules be revised and replaced by more precise and accurate terminology during the course of the impending review of the legal profession.*[15]

6.15 Due to the then imminent legislative changes to the legal profession in Queensland, the Committee accepted that a change to the Regulation to take cognisance of the Committee's view was not feasible. The Committee's view was stated as follows:

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[13] Report on the Queensland Law Society (Approval of Indemnity Amendment Rule (No. 1)) Regulation 1994.

[14] Report on the Queensland Law Society (Approval of Indemnity Amendment Rule (No. 1)) Regulation 1994, para 2.4 and 2.5

[15] Report on the Queensland Law Society (Approval of Indemnity Amendment Rule (No. 1)) Regulation 1994 para 2.10

> *Ultimately the regulation remained unchanged although the Law Society undertook to take the Committee's views on nomenclature into consideration during the course of the expected review of the legal profession in Queensland. The Committee was prepared to accept this undertaking but resolved to bring its views to the attention of the Parliament.*

6.16 The Committee was concerned that one year and six months later this "imminent" review of the legal profession has not yet taken place and that this definition continues on the statue book.

6.17 In a letter responding to the views of the Committee, the present Attorney-General and Minister for Justice made the following points:

- *It is necessary under the Queensland Law Society Act to distinguish between a solicitor and a practising solicitor.*
- *The term "practitioner" is used rather than "solicitor" because the Act still refers to solicitors and conveyancers. The latter being a more cumbersome phrase.*
- *The definitions provided in the Act for "practitioner" and "practising practitioner" override any ordinary dictionary definition of those words.*
- *In respect of the "imminent review" of the legal profession, which would have resulted in the rewrite of the Queensland Law Society Act, has not been undertaken. The previous Government made a number of decisions in June 1994 in relation to reform of the legal profession. These had not come to fruition when the Government changed in February this year.*

6.18 The Committee is aware of, and does not take issue with, the first three points about the above. The Committee particularly noted the fact that the words "solicitor" and "practising solicitor" used by the Attorney in his letter were eminently clear in their meaning, were not tautologous and, in short, were in plain English.

6.19 The Committee thanks the Attorney General for his correspondence on this issue.

6.20 It is a matter of concern and regret to the Committee that whilst Queensland is making great progress in legislative drafting by having most of its Statute Book drafted in plain English, outmoded and unnecessarily confusing language continues in legislation dealing with legal profession.

6.21 The Committee urges the Attorney General to have the drafting of this Act and its associated instruments updated to keep pace with the rest of the Statute Book.

Sufficiently clear and precise drafting? - Clause 6

6.22 The Committee (and its predecessor the Subordinate Legislation Committee) has for a long time been of the view that legislation should be drafted in such a way as to make it accessible to the general public. The Committee has therefore, on a number of occasions, commented on Bills which cannot be fully comprehended without reference to other extraneous documents or legislation.

6.23 Clause 6 amends the *Land Title Act 1994* by inserting a reference to unlawful conduct mentioned in s. 24A of the *Queensland Law Society Act 1952*. Clearly, unless the reader of the legislation is a solicitor, it would be difficult to know the nature of the unlawful conduct in question.

6.24 The Committee is of the view that it would considerably assist persons using the *Land Title Act* to have further information provided on the effect of s. 24A. A footnote providing the heading to s. 24A (as is done in cl. 4) of the Bill would provide some additional information for the reader. It would, however, be of greater assistance if a very brief explanation was also attached as to the nature of the "certain mortgages" for which there is no protection under the fund.

6.25 In correspondence addressing the concern, the Attorney General responded:

> *In order to avoid the person having to consult the Queensland Law Society Act at all, the explanation would be unwieldy and lengthy because of the fact that the exclusion is somewhat complicated, and would involve advice not only as to the effect of section 24A and 24B, but also of section 24, wherein "unlawful conduct" is ultimately defined.*
>
> *Even if the explanation as given in the Explanatory Notes (ie, "any loss in connection with an excluded mortgage in terms of section 24A is not compensable under section 188) or the heading to section 24A ("Fund offers no protection for certain mortgages") were used, the person would still need to refer to the Queensland Law Society Act. In the circumstances, it seems inappropriate to include a footnote which may give an incomplete explanation.*

6.26 The Committee thanks the Attorney General for his comments.

6.27 The Committee maintains the view which it has long held and often expressed that the practice of signposting (which cross-references to external legislation) makes legislation less accessible and user-friendly to the lay person.

7. SUGAR INDUSTRY AMENDMENT BILL 1996

Background

7.1 This Bill was introduced into Parliament on the 15 May 1996 by the Honourable T J Perrett MLA, Minister for Primary Industries, Fisheries and Forestry.

7.2 The objectives of the legislation as outlined in the Explanatory Notes are to amend the *Sugar Industry Act 1991* to:

- allow the establishment of new mills;
- implement the recommendations contained in the local area negotiation and dispute resolution report to the responsible Minister which recommended the use of local area negotiation and dispute resolution procedures;
- to facilitate the transfer of bulk sugar terminal operations (BSTOs) back to the Queensland Sugar Corporation;
- to continue the exclusive control, management, operation and maintenance of bulk sugar terminal facilities by the Queensland Sugar Corporation; and
- to allow greater flexibility in the period of contractual agreements between sugar cane growers and millers.

Sufficient regard to the institution of Parliament? - Clause 32(s. 245)

7.3 The issue of transitional regulation making powers has already been dealt with by the Committee in its Alert Digests numbered 2 and 3 of 1996.

7.4 Proposed s. 245 of this Bill allows an Act of Parliament to be amended and supplemented by way of executive action in regulations, which may be given retrospective effect. Section 245 provides as follows:

> ***Transitional regulations***
>
> ***245.(1)*** *A regulation may make provision about any matter for which¾*
>
> *(a) it is necessary or convenient to make provision to assist¾*
>
> *(i) the negotiation of, and resolution of disputes about, awards; or*
>
> *(ii) the establishment or operation of a new mill authorised under section 105A including any of the following¾*

(A) the constitution and membership of a local board for the mill and the board's functions;

(B) the corporation's acquisition of sugar manufactured at the mill, the delivery of the sugar to the corporation and payment for the sugar;

(C) the making of an award for the mill and the award;

(D) assignments of land to the mill and farm peaks for the assignments;

(E) the management of the sugar harvest for assignments to the mill;

(F) the granting to the mill owner of easements and permits to use land; or

(iii) on the repeal of the Transport Infrastructure Act 1994, section 237¾ the transition from the operation of a bulk sugar terminal by a BSTO as the delegate of the corporation to the operation of the terminal by the corporation; or

*(iv) the transition from the operation of this Act before its amendment by the Sugar Industry Amendment Act 1996 (the "**amending Act**") to its operation after amendment by all or any of the provisions of the amendment Act; and*

(b) this Act does not make provision or sufficient provision

(2) *A regulation under this section may have retrospective operation to a day not earlier than the commencement of the amendment Act, section 1.*

(3) *A regulation under this section may have effect despite any provision of this Act other than this section.*

(4) *This section expires 2 years after it commences or, if an earlier day is fixed under a regulation, the earlier day.*

(5) *In this section¾*

"BSTO" *has the same meaning as in section 244.*

7.5 Three serious issues therefore arise for consideration: the question of whether there has been an appropriate delegation of legislative power, the issue of retrospectivity and the question of Henry VIII clauses.

- Appropriate delegation of legislative power?

7.6 Proposed s. 245(1)(b) allows regulations to be made about any matter for which *this Act does not make provision or sufficient provision*. It clearly anticipates that the Bill may be inadequate and provides for that shortcoming to be corrected by regulation.

7.7 In the Committee's view, this is not an appropriate delegation of legislative power. Since the predecessor to this Committee (the Subordinate Legislation Committee) was established in 1975 it has consistently maintained that if a matter is of sufficient importance to be included in an Act of Parliament, that is the only appropriate place for it to be dealt with. Such a significant matter can not appropriately be dealt with by subordinate legislation.

7.8 The Committee therefore recommends the removal of s. 245(1)(b) in cl. 32 of this Bill.

- Rights and liberties retrospectively affected or obligations retrospectively imposed?

7.9 Proposed s. 245(2) allows transitional regulations to have retrospective operation to a date not earlier than the commencement of the amending Act.

7.10 The Committee does not object to curative retrospective legislation without significant effects on the rights and liberties of citizens. However, when the delegation of legislative power is as broad as it is under sub-section (2), subordinate legislation should not be allowed to have retrospective operation.

7.11 The Committee has the power to recommend the disallowance of regulations that retrospectively affect the rights and liberties of citizens and will exercise its responsibilities under the *Legislative Standards Act* with vigour. However, the Committee's preference is that primary legislation should more clearly circumscribe the delegated legislative power and retrospective legislation, with the potential to adversely affect rights and liberties, should be subject to the scrutiny of parliamentary debate.

7.12 The Committee recommends the removal of proposed s. 245(2) from this Bill.

- A Henry VIII clause?

7.13 Proposed s. 245(3) provides that a regulation dealing with transitional matters *may have effect despite any provision of this Act other than this section.*

7.14 Section 4 of the *Legislative Standards Act 1992*, dealing with fundamental legislative principles, states that those principles include requiring that legislation have sufficient regard for the institution of Parliament. Sub-section (4)(c) of that section provides that whether a Bill has sufficient regard for the institution of Parliament depends on, for example, *whether the Bill authorises the amendment of an Act only by another Act*.

7.15 Proposed s. 245(3) clearly provides for the amendment of an Act by a regulation. This is what is typically called a "Henry VIII clause". These clauses have been defined as follows:

> *A "Henry VIII clause" is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.*[16]

7.16 The Committee notes that this regulation making power has a sunset clause. The Committee, however, remains of the view that if any changes are required to the Act, such amendments should be carried out by statute and not by regulation.

- <u>Ministerial comments on these concerns</u>

7.17 The concerns were raised with respect to proposed s. 245 were brought to the Minister's attention. He addressed them as follows:

> *Regarding the comments about clause 32 (section 245) of the Sugar Industry Amendment Bill 1996, I accept that it is arguable that such a provision is not consistent with fundamental legislative principles. Sufficient regard was given to fundamental legislative principles when the Bill was being drafted.*
>
> *Section 245 has been included in the Bill because of the novelty and complexity of the matters the Bill deals with, particularly, the provisions relating to the new local area negotiations and dispute resolution procedures and the establishment of new mills. For instance, no new mill has been established in Queensland for approximately seventy years and there has been significant changes in the structure and operation of the sugar industry since that time.*
>
> *Unforseen circumstances or problems cannot be anticipated until these provisions are put into practical effect. It also needs to be remembered that the matters provided for in the Bill must operate in a commercial environment. Any problems or difficulties that arise need to be addressed quickly otherwise individuals may be adversely affected particularly, where outlays have been made in anticipation of a new mill being established. In this regard, section 245 is intended to operate to protect individual's rights and not to detract from them.*

[16] Queensland Law Reform Commission (1990), Report No. 39, *Henry VIII Clauses*, Brisbane, p. 1.

It is also relevant to note that section 245 will only operate for a limited period of two years. This will allow sufficient opportunity for industry to put into practice the provisions of the Bill and any potential difficulties to surface.

7.18 The Committee thanks the Minister for the information provided, which has assisted it in its discussions.

7.19 The Committee is currently preparing a report to Parliament on Henry VIII. In that report, the Committee will formalise its position on all aspects of Henry VIII clauses, including, the use of such clauses in transitional and savings provisions.

7.20 In respect of this particular Bill, the Committee notes the points made by the Minister and thanks him for his correspondence. The Committee is, however, not persuaded that the Bill deals with matters so unique and complex that they cannot be covered by legislation; nor that unforseen matters could not be sufficiently dealt with by a subsequent amendment Bill.

7.21 The Committee therefore recommends the removal of the offending Henry VIII provision, proposed s. 245(3).

Sufficiency of Explanatory Notes?

7.22 Section 23(1)(d) and (f) of the *Legislative standards Act 1992* provide as follows:

Content of explanatory note for Bill

23.(1) *An explanatory note for a Bill must include the following information about the Bill in clear and precise language¾*

(d) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives and why the alternative was not adopted;

(f) a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency

- Alternatives to the Bill

7.23 The Committee has formed the view that the section of the Explanatory Note on alternatives to the Bill was particularly well considered and well drafted. The Committee encourages other Departments to note the contents of this

section and to utilise a similar assessment process where appropriate in other Explanatory Notes.

7.24 The Committee notes the value of the information provided in this section of the Explanatory Note and commends the drafters thereon.

- Consistency with fundamental legislative principles

7.25 The section of the Explanatory Note on the Sugar Industry Amendment Bill 1996 provides:

> ***Consistency with fundamental legislative principles***
>
> *The provisions of the Bill are consistent with fundamental legislative principles as set out in the Legislative Standards Act 1992.*

7.26 Given the comments of the Committee with respect to cl. 32, on three separate grounds, the Committee cannot accept this statement. Even if the view were taken that having a retrospective Henry VIII clause is justified by the circumstances (and therefore "pays sufficient regard" to the relevant principles), the issues should be canvassed in the Explanatory Note. The Committee finds it difficult to avoid concluding that the Note is both inaccurate and misleading. The most charitable view is that it is clearly inadequate.

7.27 The Committee requests that particular care be taken to draft Explanatory Notes accurately when assessing their consistency or otherwise with the fundamental legislative principles.

7.28 It is better to raise an issue concerning fundamental legislative principles and defend the legislation than to ignore the issue

SECTION B - COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

8. EDUCATION (WORK EXPERIENCE) BILL 1995

Background

8.1 This Bill was introduced by the Honourable R J Quinn MLA, on 17 April 1996. It was passed, unamended, on 2 May 1996.

8.2 The Committee commented on the Bill at pages 11 - 12 of its Alert Digest No. 2 of 1996. The Minister's response is published in full in Appendix A of the Alert Digest, while excerpts thereof are referred to below.

Sufficiently clear and precise drafting?

8.3 The Committee expressed concerns (when the Bill had been introduced on a previous occasion in 1995) that the drafting of the Bill was not sufficiently clear and precise to enable a lay person to understand its contents without referring to a number of other statutes.

8.4 When the Bill was introduced in 1996 by the Honourable R J Quinn MLA, however, it had been amended to overcome the Committee's concerns.

8.5 In the interim the Committee had noted that the issue of crossreferencing was being reviewed as part of a general review of the *Acts Interpretation Act 1954*. The Committee therefore requested that the Attorney-General (as the Minister responsible for the administration of that Act) include the Committee in the consultation process on this issue.

8.6 In his response to this request, the Attorney General informed the Committee as follows:

> *... that review* [of the *Acts Interpretation Act 1954*] *is currently in abeyance.*
>
> *I should point out that, while responsibility for the administration of the Act comes within my portfolio* [amendments of a drafting nature] … *have been largely under the aegis of the Office of the Parliamentary Counsel with minimal, if any, reference to officers of my department.*
>
> *Nevertheless, I can assure you that, if and when the review of this Act is recommended, your concerns will be brought to the attention of responsible officers to enable the defects you mention to be addressed.*

8.7 The Committee thanks the Attorney for his consideration of the issue at hand and for his undertaking to have the Committee concerns taken into consideration.

9. ENVIRONMENTAL PROTECTION AMENDMENT BILL 1996

Background

9.1 This Bill was introduced into Parliament on 1 May 1996 by the Honourable B G Littleproud MLA, Minister for Environment and was passed, unamended on 14 May 1996.

9.2 The Committee commented on this Bill at pages 5 - 11 of its Alert Digest No. 3 of 1996. The Minister's response to concerns raised by the Committee is published in full in Appendix A of this Alert Digest, while excerpts thereof are referred to below.

Delegated legislative power? sufficiently subject to the scrutiny of the Legislative Assembly? - Clause 17(s. 196(3))

9.3 The Committee referred to the fact that Parliament had delegated legislative power to local governments, but that local laws were not subordinate legislation, and therefore not subject to disallowance. The Committee observed that as this delegated legislation was not subject to any scrutiny of the Parliament, it might be thought to be in breach of fundamental legislative principles (FLPs). Alternatively, the Committee observed that Parliament may be acknowledging another principle in permitting local governments to have a degree of autonomy in their deliberations and expecting them to recognise FLPs themselves.

9.4 The Minister's response accorded with the latter observation above. In part, the Minister made the following statements:

> *The Committee has correctly identified that it is a fundamental principle that local government be given sufficient autonomy to conduct its business. Local Governments are responsible to their electorates and Parliament should not lightly oversee or interfere with the exercise of this responsibility.*
>
> *The Local Government Act 1993 clearly enshrines the principles of autonomous local government and provides adequate safeguards against the improper exercise of local government law making powers. To interfere in this process would be unnecessary and inappropriate.*

9.5 The Committee is happy to acknowledge and respect the degree of autonomy given to local governments and suggested that this might qualify for the status of a fundamental legislative principle.

9.6 However, in recognising the autonomous responsibility of Local Government for its law making with limited intervention by the Minister and Governor in

Council, this does not mean that they should have the autonomy to ignore fundamental legislative principles.

9.7 The Committee is of the view that consideration should be given to the process of Local Government legislation to ensure that sufficient regard is given to fundamental legislative principles.

9.8 In keeping with the respect owed to democratically elected bodies, the principal source of scrutiny should be within councils. The role of state departments in such scrutiny might well be primarily advisory rather than directive. To require such a system does no more to compromise the responsible autonomy of local government than the *Legislative Standards Act* compromises the autonomy of the Queensland Parliament.

9.9 The Committee thanks the Minister for the Environment for his observations which have been noted.

9.10 The Committee brings the content of Alert Digests 3 and 4 of 1996 dealing with this Bill, to the attention of the Minister for Local Government and Planning.

9.11 The Committee urges the Minister for Local Government and Planning to consider the best means by which Local Government by-laws may be scrutinised for their compliance with fundamental legislative principles. In keeping with the autonomous responsibility of Local Government, such processes should be largely within local government.

9.12 The Committee requests that the Minister for Local Government and Planning keep it informed of any changes introduced pursuant to this recommendation

Sufficiency of Explanatory Notes? - Clause 17

9.13 The Committee made the observation that the Explanatory Note with respect to one of the clauses appeared not to sufficiently deal with the full contents of the corresponding clause in the Bill. The Minister responded in part:

> *The Explanatory Notes clearly met this (Legislative Standards Act 1992) requirement with respect to the section in question. ... The Explanatory Notes are accurate in respect of the way cl. 17 amends s. 196(3), and as required, explains the purpose and intended operation of the clause.*[17]

9.14 The Committee accepts the Minister's position and thanks him for his comments.

[17] Letter from the Hon Brian Littleproud, Minister for Environment Received 20 June 1996, p. 2.

Sufficiently clear and precise drafting? - Clause 24 (s. 240(2) and (3))

9.15 The Committee originally reported on a cross-reference in the amendment Bill to legislation that is repealed in the Bill and expressed the view that this was not desirable because it would impede persons relying on laws that had been updated from finding the relevant reference. The Minister advised in part:

> *I understand that the Office of the Queensland Parliamentary Counsel have arranged for a footnote to s. 240 to be included in the next reprint of the legislation. The footnote will be of the following form:*
>
> > *The Environmental Protection Amendment Act 1996, s. 13, amended by s. 68 only by, in subsection (1) omitting "of issue of a licence" and substituting "a licence takes effect".*

9.16 The Committee thanks the Minister for the amendment and for the speed with which it has been included in Reprint No. 2 of this Act.

Retrospective validations - General comment on cl. 27 (Part 3) of the Bill

9.17 In its last Alert Digest, the Committee observed:

> *As a general rule, the practice of making retrospectively validating legislation is not one which the Committee endorses. Where such law adversely affects rights and liberties, or imposes obligations it may breach FLPs. However, there are some occasions in which retrospective legislation may be justified. In this case, the drafting of the first amending regulation*[18] *would appear to have produced a number of unintended consequences that would have unfairly penalised citizens if allowed to stand.*
>
> *However, where the Committee accepts that retrospective changes to legislation are justified, the Committee does not support the granting of broad authority to make regulations with retrospective effect. The Committee would prefer that retrospective validation is done by legislation. If any retrospective regulation making power is permitted, it should be tightly constrained.*

9.18 The Committee then stated that it would prefer that retrospective validation be by legislation rather than regulation, especially under a broad delegated power.

9.19 The Minister's response to these comments by the Committee was as follows:

> *As a general principle, I concur with the Committee's view that retrospective validation by regulation is undesirable. However, there may be circumstances such as urgency and no opportunity to recall*

[18] Environmental Protection (Interim) Amendment Regulation (No. 2) 1996

> *Parliament where some emergency provisions are appropriate and retrospective regulation may be necessary to overcome unintended and potentially inequitable consequences of some legislation. I am advised that your Committee has commented on similar provisions in the Local Government Amendment Act 1996 and the Suncorp Insurance and Financial Amendment Bill 1996.*
>
> *Your Committee's comments in each of these cases will be considered in the preparation of future legislation as it is my intention that legislation will be drafted in such a way that validation is not required.*

9.20 The Committee notes the Minister's views as to the circumstances under which such retrospective validation by regulation may be acceptable. While not re-opening the merits of the use of retrospective regulation in this case, the Committee retains its strong preference for retrospective changes to be by legislation and that any retrospectivity in delegated legislation be tightly constrained.

9.21 The Committee appreciates the Minister's concurrence with the Committee's view that retrospective validation by regulation is undesirable. The Committee particularly appreciates that the Minister has stated an express intention that the Committee's comments should be considered in the preparation of future legislation which will be drafted in a way so as not to require validation.

10. JUSTICES (WARRANTS) AMENDMENT BILL 1996

Background

10.1 This Bill was introduced on 1 May 1996 by the Honourable D E Beanland MLA, Attorney General and Minister for Justice. As at the publication of this Alert Digest the Bill had not yet been passed.

10.2 The Committee commented on this Bill on page 13 of its Alert Digest No. 3 of 1996. The Minister responded to these comments in a letter dated 13 June 1996 which is published in full in Appendix A of this Alert Digest. Excerpts of the letter are referred to below.

Exercise of delegated legislative power sufficiently subject to the scrutiny of the Legislative Assembly? - Clause 5 (s. 67)

10.3 The Committee originally expressed the view that the "approved procedures" to be inserted into the *Justices Act 1886* relating to computer warrants, should contain clear safeguards against fraud and the possible misuse of the computerised warrant system. Furthermore, the Committee expressed the view that Parliament should be able to review the sufficiency of such safeguards and they should therefore be prescribed under regulation only.

10.4 In his response to the Committee the Minister expressed the view that:

> *... the Bill itself contains sufficient safeguards to ensure computer warrants are not misused.*

10.5 The Minister referred to the fact that the Bill required the same information to be contained on the computer system as is currently required for the warrant system when issued in writing. He also referred to the fact that the Bill provided for written versions of warrants to be automatically cancelled after eight hours. The Minister therefore did not see a need for any further safeguards to be contained in the approved procedures. On the contrary, the Minister informed the Committee that:

> *The approved procedures will consist of technical and operational matters regarding information transfer between the Department of Justice and the Queensland Police Service, and the handling of computer warrants by the Police Service. It is not necessary that such administrative details be contained in a regulation.*

10.6 One of the Committee's concerns was that both the Parliament and the Committee should be able to see the approved procedures. In respect of this point the Minister advised:

The requirement to have the procedures for computer warrants approved by regulation will give the Parliament an opportunity to scrutinise the approval of the procedures. In order for the procedures to be approved by the Governor-in-Council it will be necessary that they accompany the approving regulation.

10.7 The Committee notes that, although the Governor-in-Council will review the procedures, they will not accompany the regulation into Parliament.

10.8 The Committee thanks the Attorney General for the information provided on this issue and appreciates the Attorney's concern with safeguards in this matter. This is particularly important given the inherent fallibility of all information technology in that it can be manipulated by "hackers" from both inside and outside the court houses and police stations linked to the relevant network. Any such misuse can adversely affect the rights and liberties of citizens. Accordingly, the Committee has sought to ensure that the procedures for issuing and creating warrants are provided within regulations except where the reporting of safeguards would compromise their effectiveness.

10.9 The Committee refers this matter to Parliament for debate.

11. SUNCORP INSURANCE AND FINANCE AMENDMENT BILL 1996

Background

11.1 This Bill was introduced on 1 May 1996 by the Honourable J M Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts. The Bill was passed with some amendments on 15 May 1996.

11.2 The Committee commented on this Bill at pages 15 to 19 of its Alert Digest No. 3 of 1996. The Minister's response to these comments is published in full in Appendix A of this Alert Digest.

11.3 As the Bill has been debated in Parliament and passed, the issues do not need to be revisited in detail.

Matter appropriate to subordinate legislation? - Clause 7 (s. 37E(5))

11.4 The Committee observed that proposed s. 37E(5) allows an exemption from liability to pay State tax to be made by regulation. The Committee referred to its long held view that taxation is a matter which should only be dealt with by primary legislation and therefore recommended that any exemptions from State tax should be granted only by an Act of Parliament.

11.5 The Minister's response to these comments and recommendations by the Committee was to state the view that such an amendment was unnecessary and that:

> *... there is sufficient opportunity for review of such regulations by Parliament under the process established through ss. 49 and 50 of the Statutory Instruments Act 1992.*

11.6 The Committee notes the Treasurer's views, however, it wishes to clarify its own views on one point in particular.

11.7 Where the Committee considers that matter is more appropriately dealt with in an Act of Parliament (for example, when Acts are amended by regulation pursuant to Henry VIII clauses; and in circumstances such as these where significant subject matter is being dealt with in regulations rather than in principal legislation), the fact that the instruments can be disallowed pursuant to ss. 49 and 59 of the *Statutory Instruments Act* does not cure the objection. The fact that a subordinate instrument might be disallowed does not overcome the Committee's concerns because if it is not disallowed the inappropriate matter continues in the regulation. In the case of Henry VIII clauses, the potential

disallowance at the subordinate legislation phase merely acts on the results of the offending clause, which continues in the principal Act

11.8 The Committee thanks the Treasurer for the information provided, however, it maintains its view that exemptions from State tax dealt with in proposed s. 37E(5) of this Act should only have been permitted to be granted by an Act of Parliament and not by regulation.

Sufficient regard to the institution of Parliament? - Clause 15 (s. 48P)

11.9 The Committee reported in its Alert Digest that the transitional regulation making powers in proposed s. 48P allowed an Act of Parliament to be amended and supplemented by way of Executive action in regulations, which may be given retrospective effect. The Committee therefore recommended the removal of proposed s. 48P(1)(b), (2) and (3). These offending subsections of proposed s. 48P dealt with, what was in the Committee's view, an inappropriate delegation of legislative power, retrospectivity, and Henry VIII clauses.

11.10 The Treasurer responded to the Committee's comments as follows:

> *It is my view that such amendments are unnecessary, and have the potential to frustrate the primary intent of the legislation, namely the restructuring of Suncorp. The power to make regulations to deal with the matters to which these sections refer are essential to ensure that the restructuring can take effect within the necessary timeframe. Specifically, this must occur by 1 July 1996. In the unlikely event that a matter has been overlooked in the Bill, or a matter arises subsequent to its passage which impacts on the capacity of Suncorp to achieve its restructure, a requirement for any necessary amendment to be by way of statute would effectively prevent the restructure taking place.*
>
> *It is my view that there is sufficient opportunity for review of such regulations by the Parliament under the process established through sections 49 and 50 of the Statutory Instruments Act 1992. To the extent that such regulations impact retrospectively on rights and liberties of citizens, this would be appropriate grounds for the Parliament to disallow the regulations.*

11.11 The Committee refers to an attachment to the Treasurer's letter responding to some of the detailed points in the Alert Digest. Several times it reiterated the view that ss. 49 and 50 of the *Statutory Instruments Act* provided sufficient safeguards. With respect to all such comments, the Committee holds to its views expressed in Alert Digest No. 3 of 1996 and in 11.6 - 11.7 above.

11.12 The Committee thanks the Treasurer for the information provided, however, it maintains the views expressed under this section in Alert Digest No. 3 of 1996.

Commercial time constraints

11.13 The existence of commercial deadlines was given as a reason for the broad delegations of power under cl. 15 that included the authorisation of retrospective provisions and a Henry VIII clause.

11.14 The *Legislative Standards Act* does not make the principles contained therein absolutes. It contemplates that sometimes the principles contained therein may be overridden by other considerations. Under such circumstances sufficient regard may be paid to the principles despite the fact that other considerations prevailed. The Committee is mindful of such possibilities and will be considering these issues in its report on Henry VIII clauses.

11.15 However, it is the task of the Committee to exercise caution over these arguments and the Committee will continue to make recommendations to Parliament of the kind contained in Alert Digest No. 3 of 1996.

Practical economic effects

11.16 The Alert Digest states that:

> *In the Committee's view a regulation making power granting a broad discretion on such a significant issue should only be cautiously granted by Parliament, and then only with clear guidelines to limit the discretion.*
>
> *Despite this observation, whilst Suncorp remains a fully government owned corporation, this provision is not a cause for concern as it has little practical effect on State finances. Any reduction in tax paid to the State increases the value of the State owned enterprise by the same amount. There may even be net savings in transaction costs because the tax does not have to be calculated and transmitted. Any extra revenue in the hands of Suncorp can, it is presumed, be returned to the State as a dividend. Some might prefer more transparency and equivalence, requiring identical treatment of State and non-State enterprises. However, that is a question of policy for the government of the day and does not raise issues of legislative standards.*

11.17 The attachment to the Treasurer's letter agrees with the view that this provision has no practical effect on State finances. However, it then goes on to say that:

> *The assertion that this is true only if Suncorp remains fully in Government ownership is misleading, in that any increased value of the enterprise resulting from taxes not paid would be reflected in any sale price.*

11.18 It should be pointed out that Alert Digest No. 3 of 1996 did not assert that "this is only true if Suncorp remains fully in Government ownership." It suggested that no practical issue arises under that circumstance.

11.19 It did not canvas whether reduced taxes are fully reflected in the sale price of corporations. It did not buy into that economic argument, just as it avoided issues of transparency and equivalence in the Alert Digest. These issues are firmly left to policy of the government of the day.

11.20 The Committee did make the general point that it would be cautious about the granting of a very broad discretion to exempt any corporation from all state taxes.

11.21 The Committee thanks the Treasurer for her comments and will take them into account in formulating its approach to similar legislation in future.

11.22