SCRUTINY OF LEGISLATION
COMMITTEE

ALERT DIGEST

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SECTION A - BILLS REPORTED UPON IN THIS ISSUE

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1. COMPETITION POLICY REFORM (QUEENSLAND) BILL 1996

Background

1.1 This Bill was first introduced into Parliament on 2 November 1995 by the former Treasurer, the Honourable K E De Lacy MLA.

1.2 The Bill was not, however, passed by the House prior to the prorogation of Parliament on 11 March 1996 and as a consequence it lapsed.

1.3 The Bill was reintroduced (unchanged) on 1 May 1996 by the Honourable J M Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts.

Previous comments by the Committee on this Bill

1.4 The Committee commented on this Bill at pages 3 to 5 of its Alert Digest No. 3 of 1995, when it was first introduced. Because the Bill is unchanged, the Committee has nothing to add and the original comments are reproduced below for convenience.

1.5 The object of this legislation is stated in the Explanatory Note:

> *The Bill enacts legislation that will give effect in Queensland to the reform of competition policy, as endorsed by the Council of Australian Governments and as recommended by the Hilmer Report.*

1.6 For convenience the acronyms used in this chapter are set out below:

- *FLP - Fundamental legislative principle*
- *NSL - National scheme legislation*
- *TPA - Trade Practices Act 1974*
- *TPC - Trade Practices Commission*

1.7 The Competition Code involves a slightly reworked form of "the schedule version" of the Trade Practices Act 1974 (TPA), certain other parts of the TPA and regulations made under the TPA.

1.8 National Scheme Legislation (NSL) involves the negotiation of legislation by the Executives of the Commonwealth and the States. This poses significant difficulties for all Parliaments asked to consider such legislation. These problems have been considered by all scrutiny committees nationally in a national discussion paper entitled "The Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles" (particularly paragraphs 2.12 to 2.19). It is hoped that

the process embarked upon by all scrutiny committees (of which the discussion paper is the first stage) will result in a satisfactory scrutiny process being developed for NSL. In the meantime it is best that potential conflicts between National Scheme Legislation and FLPs be highlighted in order to better inform the general discussion and to ensure that Parliaments, Federal as well as State, are aware of what they are agreeing to.

Amendment of an Act by another Act?

1.9 The Explanatory memorandum highlights two potential conflicts with FLPs.

1.10 The first potential conflict concerns the ability of Queensland to make regulations exempting behaviour that would otherwise be in breach of the TPA under s. 51(1). These exemptions have a two year maximum and can be renewed only by an Act of the Queensland Parliament. The ability to grant exemptions is not uncommon. From the beginning the former Trade Practices Commission (TPC) had the ability to authorise anti-competitive behaviour. The safeguards include the possibility of disallowance, the two year time limit and the fact that they cannot be remade.

1.11 The second potential conflict concerns amendment to the Competition Code. As the Bill would apply Commonwealth law, amendments made to the TPA apply to the Queensland Competition Code. Some amendments would be by legislation, some by regulation. It could be said that the Queensland Bill incorporates the entire Competition Code into an Act of Queensland Parliament. It could then be argued that when the TPA regulations are altered by further regulations, they are also changing the Queensland Act. However, this argument is not a cause for concern. The purpose of the Queensland law is to incorporate both the TPA and TPA regulations into Queensland law. The fact that regulations could be changed by regulations should not be a cause for concern.

1.12 In any case there are four safeguards:

- *under the Conduct Code Agreement, modifications to the Competition Code will not be made until "fully participating jurisdictions" have been consulted;*
- *such amendments cannot take effect for at least two months (s. 6(1)(a));*
- *the Queensland Government can disallow the amendment by regulation (s. 6(1)(b)); and*
- *disallowing regulations are themselves subject to disallowance by the Queensland Parliament.*

1.13 Indeed, given the legislative power of the Commonwealth in this area, it arguably gives the State a greater say in the effect of competition policy than if the Commonwealth Parliament legislated under its existing powers.

1.14 This gives rise to another potential conflict with FLPs - the ability of a Queensland regulation to affect the operation of a Commonwealth Act that effectively amends the Competition Code which is a part of a Queensland Act.

1.15 However, the reasons for this are to permit disallowance of Commonwealth amendments when the Queensland Parliament is not sitting. This serves to protect the legislative competence of the Queensland Parliament. This could be seen as justifying what would otherwise be a breach of an FLP - or it could be seen as positively enhancing the institution of Parliament in Queensland.

1.16 In either case, it would seem to show sufficient regard for the institution of Parliament and is not in breach of the relevant FLP (s 2 (a) in general or 4 (4) (c) in particular).

1.17 It should be noted that the consequence of too much use of the power of disallowance allows the Commonwealth Minister to declare by notice in the Government Gazette that a State has made significant modifications to the Competition Code (s. 150K of the TPA). From July 1996, this has very serious consequences for the State:

- *it loses Commonwealth financial assistance grants arising under Hilmer;*
- *it ceases to have a vote in modifications to the Competition Code;*
- *it ceases to have a say in appointments to the ACCC (Australian Competition Policy and Consumer Commission);*
- *it ceases to be able to exempt conduct under s. 51(1).*

1.18 The State's only protection from a decision by a Commonwealth Minister under s. 150K is that it is reviewable under Commonwealth Administrative Law.

1.19 The effect of the agreement is that States lose most of their freedom of manoeuvre in their own right in competition policy but do have a say within a national body. This is not uncommon under National Schemes.

1.20 Regulations made under this Bill can exempt behaviour that would otherwise be in breach of the Competition Code, that would be enacted into Queensland law by the Bill. They could also prevent the applications of amendments to the Competition Code by the Commonwealth Parliament.

1.21 Although these could be characterised as instances of the legislation authorising the amendment of an Act other than by another Act, these provisions do have sufficient regard to the institution of Parliament. Indeed they may be seen as positively enhancing it.

1.22 In consultation with other scrutiny committees, this Committee will be carefully considering the best means of dealing with the potential difficulties of national scheme legislation.

Previous response by former Minister to Committee's comments

1.23 The former Treasurer, the Honourable K E De Lacy MLA in his letter of 28 November 1995[1] expressed some concerns that the first paragraph in the

[1] Published in full in Appendix A of this Alert Digest

shaded box above could lead to confusion by giving the impression that authorisations of anti-competitive behaviour by the Trade Practices Commission (TPC) are subject to disallowance.

1.24 The Committee has been surprised at the suggested confusion. The Committee was referring to potential conflict with the fundamental legislative principle that had already been addressed in the Explanatory Notes. The reference to the TPC is merely to indicate that the provision of exemptions has long been built into the scheme of the TPA. It is not unreasonable for Queensland to be permitted to grant temporary general exemptions, especially given the safeguards to which the Committee refer.

1.25 The Committee thanks the former Treasurer for his consideration of its comments in relation to the Competition Policy Reform (Qld) Bill 1995. The Committee trusts that the above passage sufficiently clarifies matters to overcome any concerns.

2. ENVIRONMENTAL PROTECTION AMENDMENT BILL 1996

Background

2.1 This Bill was introduced into Parliament on 1 May 1996 by the Honourable B.G. Littleproud MLA, Minister for the Environment.

2.2 There are two main objectives to this Bill:

- Firstly, it seeks to make provision retrospectively for the consequences flowing from two pieces of subordinate legislation. It would appear that the first regulation[2] attempted to impose a moratorium on the licensing and approval requirements of this legislative package. The action taken was, however, to have too broad an effect, necessitating a further regulation[3] to achieve the requisite result in a more limited way.

  Both regulations anticipated in their Explanatory Memoranda that anomalies may arise from the amendments and that they would be *dealt with retrospectively through amendments to the Act or Regulation.*

  It would appear that this Bill now seeks to rectify some of those consequences of the regulations by retrospectively validating:

  > *actions taken by both administering authorities and the public during the period covered by these two pieces of subordinate legislation.*[4]

- The Bill also effects some amendments dealing with *minor drafting issues and administrative problems* arising during implementation of the *Environmental Protection Act 1994* (the Act).

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

2.3 The question of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly is one of the means of assessing whether legislation has sufficient regard to the institution of Parliament under s.4(4)(b) of the *Legislative Standards Act*, which deals with fundamental legislative principles.

2.4 Section 196 of the Act allows the Governor in Council to "devolve" the administration and enforcement of all matters under the Act (including the whole or part of an environmental protection policy, but not the chapter dealing

[2] Environmental Protection (Interim) Regulation Amendment (No.2) 1996
[3] Environmental Protection (Interim) Regulation Amendment (No. 3) 1996
[4] Explanatory Notes pp 1 - 2

generally with environmental protection policies) to a local government, by regulation.

2.5 This allows for a significant sub-delegation of both administrative and legislative power to local governments. The local governments may (by s.196(3)) make local laws imposing fees[5] or local laws:

> *about any matter for which it is necessary or convenient to make provision for carrying out or giving effect to the devolved matter.*

2.6 Local laws are declared by s.9(2)(a) of the *Statutory Instruments Act 1992* not to be subordinate legislation. The consequence of this is that there is no statutory requirement for the local laws to be notified in the Government Gazette nor tabled in the Legislative Assembly. Local laws are therefore also not subject to disallowance, should the Parliament object to their exercise of the sub-delegated legislative power.

2.7 As this does not subject the delegated legislation to any scrutiny of Parliament, it might be thought that this breaches FLPs in not providing for sufficient scrutiny. It might be argued that this section nonetheless pays sufficient regard to the institution of Parliament in that there is another principle that Parliament acknowledges - that it should pay sufficient regard to the institutions of local government by permitting a degree of autonomy in their deliberations and expecting them to recognise FLPs themselves.

2.8 The question therefore arising for the consideration of Parliament, however, is whether these provisions in the Act, and the proposed amendments to the Bill, sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly.

2.9 As an alternative, Parliament may require that an exercise of delegated legislative power be made by Regulation to allow the Parliament and this Committee to assess whether such power has been appropriately exercised.

Sufficiency of Explanatory Notes? - Clause 17

2.10 The Committee notes that the effect of s.196(3)(b) is not dealt with in the corresponding paragraph of the Explanatory Note which should contain a simple explanation of the purpose and intended operation of each clause of the Bill.[6]

2.11 The Committee also notes the opening paragraph of the Explanatory Notes which points out that, as a consequence of the Act being drafted in modern language and according to current drafting practice, some clauses and sub-

[5] Although, in the case of fees prescribed by regulation, may not impose fees higher than prescribed
[6] Section 23(1)(h) of the Legislative Standards Act 1992

clauses *require little or no further explanation* and those parts will merely be *repeated or summarised in general terms only*.

2.12 The Committee is not, however, of the view that the drafting of the sub-clause in question is such as not to require being addressed at all in the Explanatory Note.

2.13 The Committee brings this omission to the attention of the Minister. The Committee comments on the content of Explanatory Notes in an attempt to ensure that if a query should arise with respect to the interpretation of this sub-clause, and recourse is had to the Explanatory Notes (amongst other documents), the contents of those Notes will provide further information to assist in making a determination on interpretation.

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

2.14 Section 68 of the Act as it currently stands defines the term "anniversary day" by reference to the day of issue of a licence. The Bill proposes to amend this by referring instead to the day a licence takes effect (see clause 13 of the Bill).

2.15 In clause 24 of the Bill, however, s.240(2) and (3) provide:

> ***(2)*** *Section 68 continues to apply to the licence for the anniversary for which the notice was given.*
>
> ***(3)*** *In this section¾*
>
> ***"section 68"*** *means section 68 before its amendment by the Environmental Protection Amendment Act 1996.*

2.16 As a matter of policy, the Committee considers that cross references should not be made to law that has been repealed because those who rely on laws that have been updated by either reprints or by CD-ROM access will not be able to find the relevant reference.

2.17 The Committee is of the view that this drafting is not sufficiently clear and precise. The Committee does not question the intended operation of this section but the way in which it has been drafted by referring in an amendment Bill to the meaning of s. 68 prior to its amendment in this Bill. The previously existing definition in s. 68 being referred to is not an entire body of law but one simple concept.

2.18 The Committee is therefore of the view that the drafting could be more clear and precise by stating, for example, that the anniversary day applicable in subsection (2) refers to the day of issue of a licence.

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

2.19 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[7] would appear to have produced a number of unintended consequences that would have unfairly penalised citizens if allowed to stand.

2.20 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.

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

Sufficient regard to the institution of Parliament? Clause 27 (s.251)

2.22 The issue of transitional regulation making powers is also dealt with by the Committee in Chapter 5 of this Alert Digest and in Alert Digest No. 2 of 1996 with respect to the Local Government Amendment Bill 1996. The views expressed in those segments will be largely repeated here.

2.23 Proposed s.251 of this Bill allows an Act of Parliament to be amended and supplemented by regulations which may be given retrospective effect. The section provides as follows:

> *Special regulation-making power*
>
> ***251.(1)*** *A regulation may be made about any matter of a savings, transitional or validating nature for which¾*
>
> (a) *it is necessary or convenient to make provision because of an amending regulation; and*
>
> (b) *this part does not make provision or enough provision.*
>
> **(2)** *The regulation may be given retrospective operation to a date not earlier than the date of commencement of the amending regulation for which it is made.*
>
> **(3)** *The regulation has effect despite any other provision of this Act.*

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

2.24 The Committee recognises that this regulation making power is specifically there to deal with matters of a saving, transitional or validating nature. However, the scope and impact of the regulation making power is therefore substantially broader than may be found in other transitional sections. It should be noted that it should be easier to be precise about matters of a savings or validating nature because it should be relatively easy to determine that which is to be saved and those acts which are to be validated. Savings and validations, deal with the past and not with the future. Accordingly, they are not required to deal with the uncertainties of the future, only the uncertainties of the past.

2.25 The Committee notes the rationale for the insertion of this section which is stated as follows in the Explanatory Notes:

> *Section 251 provides a regulation making power able to override the provision of the Environmental Protection Act 1994. This power is limited to the making of provisions of a transitional nature which relate only to matters arising from the Environmental Protection (Interim) Regulation Amendment (No. 2) 1996 and the Environmental Protection (Interim) Regulation Amendment (No. 3) 1996. This regulation making power is necessary as there may be matters arising from these regulation amendments which were unforeseeable at the time of drafting this amendment act.*

2.26 The Committee points out that the second sentence in this paragraph incorrectly refers only to transitional arrangements whereas the section grants regulation making powers with respect to savings and validating arrangements too.

2.27 The Committee continues to be concerned about the breadth of the regulation making powers being granted. In particular, three serious issues have arisen for the Committee's consideration: the question of whether there has been an inappropriate delegation of legislative power, the issue of retrospectivity and the question of Henry VIII clauses.

- <u>Appropriate delegation of legislative power?</u>

2.28 Section 251(1)(b) allows a regulation to be made about any matter of a savings, transitional or validating nature *for which this part does not make provision or enough provision*. This sub-clause therefore clearly anticipates that the Bill may be inadequate and matter which otherwise would have been of sufficient importance to be dealt with in the Act will now be dealt with by regulation.

2.29 In the Committee's view, this is not an appropriate delegation of legislative power. Since the predecessor of 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.

2.30 The Committee therefore recommends the removal of proposed s. 251(1)(b).

- Rights and liberties retrospectively affected or obligations retrospectively imposed**?**

2.31 Proposed sub-section (2) of s. 251 allows any regulations made under the broad regulation making power to be given retrospective operation. This sub-clause is, however, limited to matters arising from the two amendment Regulations already referred to in this chapter.[8]

2.32 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-clause (2), subordinate legislation should not be allowed to have retrospective operation.

2.33 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* as required. 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.

2.34 The Committee recommends the removal of proposed s. 251(2) from this Bill.

- A Henry VIII clause?

2.35 Proposed s. 251(3) of clause 27 of this Bill specifically provides that regulations made about any matter of savings, transitional or validating nature under this section have priority over any other provisions of this Act. In other words, these regulations may amend and have precedence over any other provisions of this Act of Parliament.

2.36 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.*

[8] Environmental Protection (Interim) Regulation Amendment (No. 2) 1996; Environmental Protection (Interim) Regulation Amendment (No. 3) 1996

2.37 Proposed s. 251(3) clearly provides for the amendment of an Act by a regulation. This is what is typically called a "Henry VIII clause". These clauses are 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.*[9]

2.38 The Committee notes that this regulation making power, together with the whole section on validations, has a sunset clause and expires on 1 March 1997. 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.

2.39 The Committee is currently preparing a report to Parliament on Henry VIII clauses which it hopes to table in the near future. In that report, the Committee will firmly establish its position on all aspects of Henry VIII clauses, including, the use of such clauses in transitional or savings provisions.

2.40 The Committee recommends the removal of the offending Henry VIII clause, proposed s. 251(3).

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

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3. JUSTICES (WARRANTS) AMENDMENT BILL 1996

Background

3.1 This Bill was introduced on 1 May 1996 by the Honourable D E. Beanland MLA, Attorney-General and Minister for Justice.

3.2 The objective of this Bill is to enable the electronic issue and management of warrants by making suitable amendments to the *Justices Act 1886*. This system would replace the current practice of dealing with manually produced warrants on hard copy.

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

3.3 Section 67, proposed to be inserted into the *Justices Act 1886*, provides for "approved procedures" to be made in accordance with which computer warrants may be created. The proposed section allows these approved procedures to be either prescribed under regulation, approved under a regulation or by a combination of those two methods.

3.4 Clearly the issuing and execution of a warrant can have substantial effects on the rights and liberties of individuals. It is therefore essential that various safeguards be introduced in these approved procedures. In particular, it would appear that there should be clear safeguards against fraud and the possible misuse of the computerised warrant system.

3.5 The Committee is therefore concerned to ensure the safeguards that are introduced into the approval procedures adequately protect the rights and liberties of individuals. The only way that both Parliament and the Committee will be able to ensure this protection, however, is to either have the safeguards incorporated into this Bill or to have them prescribed by regulation. Under the circumstances the Committee is of the view that the latter course of action is preferable.

3.6 The Committee would not be satisfied with the options for making approved procedures in s.67(1)(b) and (c) of the Bill because Parliament (and therefore the Committee) does not have the opportunity to examine the procedures being approved by Regulation.

3.7 The Committee therefore recommends that, to enable Parliament to ensure that sufficient safeguards are put in place when establishing the computer warrant system, the approved procedures be prescribed under regulation only.

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4. SUNCORP INSURANCE AND FINANCE AMENDMENT BILL 1996

Background

4.1 This Bill was introduced on 1 May 1996 by the Honourable J M. Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts.

4.2 The Bill proposes amendments to the *Suncorp Insurance and Finance Act 1985*. The Explanatory Notes state that this Bill has three objectives:

- to enable the Suncorp Board to effect a restructuring of its business;
- to allow Suncorp's insurance and superannuation operations to be subject to independent prudential supervision by the Insurance and Superannuation Commission; and
- to allow for the State Tax Equivalent Regime to apply to wholly-owned subsidiaries of Suncorp.

Sufficient regard to the institution of Parliament? - Clause 7 (s.37E(5))

4.3 Proposed s.37E(1) to (4) essentially establish that Suncorp and its subsidiaries are not exempt from State tax, and are subject to any legislation imposing State tax.

4.4 Section 37E(5) then provides:

> ***(5)*** *A regulation may exempt the corporation or a subsidiary from liability to pay a State tax (in whole or part).*

4.5 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.

4.6 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.

4.7 The Committee merely brings these observations to the attention of Parliament.

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

4.8 Proposed s. 37E(5) allows an exemption from liability to pay a state tax to be made by regulation.

4.9 Section 4(5)(c) of the *Legislative Standards Act* states that subordinate legislation would have sufficient regard for the institution of Parliament if it dealt only with matters appropriate to subordinate legislation.

4.10 This Committee has long held the view that taxation is a matter which should only be dealt with by primary legislation.

4.11 The Committee therefore recommends that any exemptions from State tax in question should be granted only by an Act of Parliament.

Sufficient regard to the institution of Parliament? - Clause 7 (s.37F(3)(b))

4.12 Proposed section 37F deals with liability for Commonwealth tax equivalents. Section 37F(1) and (2) essentially establish that Suncorp and its subsidiaries are liable to pay income tax equivalents to the Treasurer. Subsection 37F(3)(b) enables the Treasurer to apply the Tax equivalents manual with all necessary and additional changes.

4.13 This section may be seen to be giving the Treasurer considerable powers to grant exemptions from taxation. Once again, as long as Suncorp is a wholly owned Government corporation this is not a cause for concern, as it has little practical effect on State finances for the same reasons as stated in relation to s.37E, above.

4.14 The Committee merely brings these observations to the attention of Parliament.

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

4.15 The issue of transitional regulation making powers has already been dealt with by the Committee in Chapter 3 of this Alert Digest and in Alert Digest No. 2 of 1996 with respect to the Local Government Amendment Bill 1996. The views expressed in those segments will be largely be repeated here.

4.16 Proposed s. 48P allows an Act of Parliament to be amended and supplemented by way of executive action in regulations, which may be given retrospective effect. Section 48P provides as follows:

Transitional regulations

48P.(1) *A regulation may make provision about any matter for which¾*

(a) it is necessary or convenient to make provision to assist the transition from the operation of this Act before its amendment by the Suncorp Insurance and Finance Amendment Act 1996 (the ***"amending Act"****) to its operation after amendment by all or any of the provisions of the amending Act; and*

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

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

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

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

- Appropriate delegation of legislative power?

4.18 Proposed s. 48P(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.

4.19 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.

4.20 The Committee therefore recommends the removal of s. 48P(1)(b) in cl. 15 of this Bill.

- Rights and liberties retrospectively affected or obligations retrospectively imposed?

4.21 Proposed s. 48P allows transitional regulations to have retrospective operation to a date not earlier than the commencement of the amending Act.

4.22 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.

4.23 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.

4.24 The Committee recommends the removal of proposed s. 48P(2) from this Bill.

- A Henry VIII clause?

4.25 Proposed s. 48P(3) provides that a regulation dealing with transitional matters *may have effect despite any provision of this Act other than this section*.

4.26 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*.

4.27 Proposed s. 48P(3) clearly provides for the amendment of an Act by a regulation. This is what is typically called a "Henry VIII clause". These clauses are 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.*[10]

4.28 The Committee notes that this regulation making power, together with the whole section on validations, has a sunset clause and expires on 1 March 1997. 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.

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

4.29 The Committee is currently preparing a report to Parliament on Henry VIII clauses which it hopes to table in the near future. In that report, the Committee will firmly establish its position on all aspects of Henry VIII clauses, including, the use of such clauses in transitional or savings provisions.

4.30 The Committee recommends the removal of the offending Henry VIII clause, proposed s. 48P(3).

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SECTION B - COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

5. CONSTITUTION (PARLIAMENTARY SECRETARIES) AMENDMENT BILL 1996

Background

5.1 This Bill was introduced on 17 April 1996 by the Honourable R E Borbidge MLA, Premier and passed unamended by the House on 30 April 1996. The Bill was commented upon by the Committee at pages 3 to 5 of its Alert Digest No. 2 of 1996.

5.2 The Premier's response to queries raised by the Committee is published in full in Appendix A of this Alert Digest, excerpts of which are referred to below.

Sufficient regard to rights and liberties of individuals? - Clause 59(3) of the *Constitution Act 1867*

5.3 The Committee raised two questions in the course of its comments on this Bill. In the first, the Committee sought clarification from the Premier as to whether the appointment and termination of a Parliamentary Secretary will be the subject of a statement to the Parliament by the Premier, as is the practice for the appointment and termination of Ministers.

5.4 The Premier responded as follows:

> *During the Committee stage of the Bill I informed the House that when Parliamentarians are appointed as Parliamentary Secretaries, and when the appointment of a Parliamentary Secretary is terminated, the Legislative Assembly will be informed.*[11]

5.5 The Committee thanks the Premier for providing this information.

Sufficient regard to the institution of Parliament? - Clause 58 of the *Constitution Act 1867*

5.6 The Committee expressed the view in Alert Digest No. 2 of 1996 that it was desirable for the functions of Parliamentary Secretaries to be allocated in writing or even to be stipulated in the Bill.

[11] Correspondence from the Honourable R E Borbidge MLA, Premier, dated 3 May 1996, p. 1

5.7 The Premier responded to this point as follows:

> *I consider it is not possible or desirable to set out in the Bill, at the outset, what will be the functions of a Parliamentary Secretary. The reasons for this position were set out adequately in the Committee stage of the Bill.*[12]

5.8 The Committee also observed that the broad discretion conferred on the Premier in cl. 58 may be regarded as having insufficient regard to the institution of Parliament. The Committee commented that the terms of the section are so wide that, if taken literally:

> *… the section might mean that legislative or judicial functions might be delegated to Parliamentary Secretaries. Even within executive powers, wide powers could be allocated to Parliamentary Secretaries.*

5.9 The Premier referred to the Committee's concern about the breadth of the section in question during the Committee stage of debate on the Bill:

> *I was a little concerned about the suggestion that Parliamentary Secretaries could be delegated legislative and judicial functions. I am a little uncertain as to what the Committee means. Presumably, under most pieces of legislation the Minister can only delegate his or her powers to an officer of the department or possibly to another Minister of the Crown. I cannot conceive of any circumstances in which a situation could arise whereby a Parliamentary Secretary could be delegated legislative powers of this type. As for the judicial functions, I would have thought that with the separation of powers doctrine, Ministers would not themselves have such powers to delegate in the first instance. Setting out in writing the breadth of the delegation to a Parliamentary Secretary would not cure this problem, if it in fact existed. … I do not believe that the delegation of legislative and judicial functions is a practical problem.*

5.10 The Committee has not at any stage thought that there was any intention to delegate legislative or judicial functions to Parliamentary Secretaries. The point being made by the Committee was that this was an amendment to the Queensland Constitution and its drafting was so broad that it might be interpreted as permitting such a delegation of power to be made at some future time.

5.11 The Committee agrees fully with the Premier's observations on the separation of powers and the impropriety of delegating legislative or judicial functions to Parliamentary Secretaries. The Committee was not suggesting that this government had contemplated such delegation but was illustrating the point that the section is so broadly drafted as to allow such powers to be allocated under it. Clearly the broad scope of the section does not reflect the intent of

[12] Correspondence from the Honourable R E Borbidge, Premier, dated 3 May 1996, p. 1

the Premier. The Committee merely sought to confine the drafting of the section to the more limited goals it took to be intended.

5.12 The Committee noted with interest the Premier's remarks during debate when he referred to "delegated" powers several times. It would appear from the Premier's words that the powers envisaged to be granted under the section would be the delegated executive powers of the Premier and Ministers. However, the drafting of proposed s. 58 of the *Constitution Act* is not restricted to the allocation of delegated powers. Again, the Committee was merely seeking to limit the scope of the power to that which was intended.

5.13 The Committee wishes to thank the Premier for clarifying these issues.

5.14 The Committee also thanks the Premier for his support of the work of the Committee and the co-operative approach adopted in accommodating the Committee's views.

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6. LAND AMENDMENT Bill 1996

Background

6.1 This Bill was introduced into the House on 17 April 1996 by the Honourable H W T Hobbs MLA, Minister for Natural Resources. The Bill was passed on 2 The Committee commented upon this Bill in its Alert Digest No.2 of 1996 at pages 13 - 14.

Unambiguous and drafted in a sufficiently clear and precise way? - Clause 183A

6.2 The Committee had raised a query in its last Alert Digest as to the meaning of the words "undue increase" in cl. 183A(1), given the applications for the discretion suggested in the Second Reading Speech.

6.3 The Minister addressed this query as follows in the second reading debate on this Bill:

> *That committee pointed out that the term I had used in my second-reading speech, "dire hardship", may tend to be reflected in the legislation. I would like to state exactly what is intended. …*
>
> *During the course of my second-reading speech, I made a statement in relation to provisions allowing me to set rentals with "the flexibility to extend this provision in future to those categories of people or industry which could be deemed unviable or incapable of paying increased rental without dire hardship." It has come to my attention that this statement may be interpreted narrowly to imply that I may extend this provision in the future to cover all cases of rental hardship which occur as a result of rental increases. This is not my intention, as appropriate hardship provisions exist in the current legislation. As I mentioned in my second-reading speech, I intend to apply this provision to leases in the grazing and agricultural category for the year 1996-97. However, the provision has been drafted with sufficient flexibility to allow its application to grazing and agricultural leases and other lease categories, local government areas, classes on land use and/or any other combination of those, for a given rental period at the discretion of the Minister. I think that should resolve that matter for the Scrutiny of Legislation Committee and the rest of the Parliament.*[13]

[13] Extract from Hansard, 2 May 1996, p. 919

6.4 The Committee's query had been raised with the Minister prior to the publication of the Alert Digest when the Minister indicated that the point would be addressed in the House. The Committee thanks the Minister for addressing its queries and his co-operative approach to the Committee's work.

7. LOCAL GOVERNMENT AMENDMENT Bill 1996

Background

7.1 This Bill was introduced on 18 April 1996 by the Honourable D E McCauley MLA, Minister for Local Government and Planning. It was passed by the House on 2 May 1996 with an amendment (not arising from a matter raised by the Committee).

7.2 The Committee reported on the Bill in its Alert Digest No.2 of 1996 at pages 15 - 21.

Sufficient Regard to rights and liberties of individuals and to the institution of Parliament?

7.3 The Committee raised several queries in the previous Alert Digest with respect to whether the Bill had paid sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

7.4 The Minister provided a lengthy response to these comments, which is reproduced in Appendix A of this Digest.

7.5 The Committee notes the Minister's response. The Committee appreciates that this Bill was drafted under difficult circumstances, however, it retains the views expressed on these points in its previous Alert Digest.

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8. PETROLEUM AMENDMENT BILL 1996

Background

8.1 This Bill was introduced into the House on 17 April 1996 by the Honourable T J G Gilmore MLA, Minister for Mines and Energy, and was passed unamended on the same day.

8.2 The Committee commented on this Bill in its Alert Digest No.2 of 1996.

Obligations imposed retrospectively - Clause 150(4)

8.3 In its last Alert Digest, the Committee sought information from the Minister on what action, if any, could be taken by the State with respect to persons who have extracted coal seam gas (under their authority to mine coal) up to the date of commencement of this Act.

8.4 The Committee also expressed concern at the possibility of any obligations, charges or fines being imposed, or revenue being sought retrospectively.

8.5 The Minister provided an assurance to the Committee on this point even before the Alert Digest No.2/96 was printed and provided this further reassurance by correspondence[14]:

> *I believe no action could be justified in imposing retrospective obligations, consequent to Clause 150(4), on companies who have extracted coal seam gas under an authority to mine coal up to the date of commencement of the Act.*
>
> *I am satisfied that where coal seam gas has been extracted or released prior to that date it has been done, in all cases except one as a necessary consequence of mining to preserve mine safety and not to separately exploit the coal seam gas.*
>
> *In the one case where coal seam gas has been separately extracted, specific rights to coal seam gas as a mineral hydrocarbon under the Mineral Resources Act were sought and granted with appropriate royalty arrangements being established.*
>
> *Accordingly, no retrospective obligations are contemplated or considered justifiable.*

8.6 The Committee thanks the Minister for this response which dispels any concerns previously held.

[14] The letter from the Minister is reproduced in full in Appendix A of this Alert Digest.

8.7 The Committee also wishes to thank the Minister for providing an immediate reassurance on this issue when it was first raised with him, prior to the publication of the last Digest. That assurance now stands as part of the record to ensure that all persons who were informed of the Committees concerns are now also aware of the resolution of those concerns.

8.8