SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE
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BILLS EXAMINED BUT NOT REPORTED ON *

NATURAL RESOURCES AND MINES LEGISLATION AMENDMENT BILL 2002 **

* These bills were considered to raise no issues within the committee's terms of reference.

** See the section of this Alert Digest dealing with Amendments to Bills.

SECTION A

BILLS REPORTED ON

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to "extrinsic material" in the interpretation of a provision of an Act in certain circumstances. The definition of "extrinsic material" provided in that section includes:

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted[1]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[2] of a provision may therefore be considered as extrinsic material in its interpretation.

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1 Section 14B(3)(c) *Acts Interpretation Act 1954*.

2 The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 *Acts Interpretation Act 1954*.

SECTION A – BILLS REPORTED ON

1. DRUGS MISUSE AMENDMENT BILL 2002

Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 14 May 2002.

2. The object of the bill, as indicated by the Explanatory Notes, is:

> *To amend the Drugs Misuse Act 1986 (the Act) to facilitate the commercial production of industrial cannabis sativa fibre and seed (also known as industrial hemp). This bill will continue the process of industry development for the Queensland industrial hemp industry that commenced in 1998 with controlled field trials and plant breeding research.*
>
> *Within prescribed limits, the Bill will allow for the growing, plant breeding and research of cannabis sativa for use as commercial fibre and seed products.*
>
> *The bill will also allow the processing and marketing of, and trade in, industrial cannabis sativa fibre and seed and their derivative products.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[3]

♦ **Clause 7 (proposed s.61)**

3. Clause 7 inserts into the *Drugs Misuse Act 1986* proposed s.61. This provision enables the chief executive to make investigations about applicants or licensees and relevant associated persons, to determine whether the applicant or licensee is a suitable person to hold a licence. Sections 61(2) and (7) empower the chief executive to require the commissioner of the police service to provide a report about the criminal history of any such person. The chief executive can then have regard to that criminal history when deciding whether the applicant or other person is a suitable person to hold a licence.

4. Section 61(8) displaces the "rehabilitation period" provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Accordingly all convictions, no matter how old, will need to be disclosed to the chief executive.

5. Proposed s.62 imposes a general confidentiality obligation upon departmental staff, including the chief executive, in relation to the further release of information about a person's criminal history, although it does authorise release of that information for stipulated purposes. It also provides that the chief executive must destroy the report as soon as practicable after considering it.

6. Section 61(5) provides that, when and if the chief executive asks the commissioner of the police service to provide a written report on an applicant's criminal history, the applicant or licensee must consent to their fingerprints being taken by a police officer to facilitate the

[3] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

commissioner's inquiries. Section 61(9) again limits the use which may be made of the fingerprints, and requires that they be destroyed as soon as practicable after the commissioner has reported.

7. Both these aspects of proposed s.61 impact upon applicants and licensees.

8. The committee notes that proposed s.61 requires disclosure of convictions which would otherwise have the benefit of the "rehabilitation period" provisions of the *Criminal Law (Rehabilitation of Offenders) Act*, and that applicants and licensees must submit to having their fingerprints taken.

9. The committee refers to Parliament the question of whether these provisions have sufficient regard to the rights of applicants and licensees.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[4]

- **Clause 7 (proposed ss.98 to 111 inclusive)**

10. Clause 7 inserts into the *Drugs Misuse Act* a significant number of provisions conferring entry and post-entry powers upon inspectors.

11. The powers of entry are conferred by proposed s.98(1), which authorises entry where the occupier consents, or where an inspector:

> *(b)…reasonably suspects any delay in entering the place will result in the concealment or destruction of anything at the place that is –*
>
> *(i) evidence of an offence against this Act; or*
>
> *(ii) being used to commit, continue or repeat, an offence.*

12. The committee notes that s.98 makes no provision for entry pursuant to a warrant. The committee assumes it is intended that the only grounds upon which inspectors may enter are those set out in s.98(1).

13. The entry power contained in s.98(1)(b) is quite significant.

14. Proposed s.100 imposes a minor restriction upon this power by providing that if the occupier of the place is present when the inspector intends to enter, the inspector must tell or make a reasonable attempt to tell the occupier the purpose of the entry and that the inspector is permitted under the Act to enter without consent.

15. Proposed ss.101 to s.111 inclusive confer an extensive range of post-entry powers, generally similar to those employed in a number of bills previously examined by the committee.

[4] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

16. Whilst these powers are quite wide, the committee recognises the significant efforts which have been made in drafting many of them to take account of fundamental legislative principles.

17. In relation to the powers of entry, the Explanatory Notes state:

> *These powers are considered necessary to maintain the integrity of the licensing system and confidence that those suspected of contravening the Act will not benefit from doing so by destroying evidence of that contravention.*

18. The committee notes that cl.7 of the bill confers upon inspectors a power of entry, in stipulated circumstances, without consent or the need for a warrant. The committee further notes that once entry has been effected the bill confers on inspectors a wide range of additional powers.

19. The committee draws to the attention of Parliament the nature and extent of these entry and post-entry powers.

Does the legislation provide appropriate protection against self-incrimination?[5]

- **Clause 7 (proposed s.103 and s.108)**

20. Proposed s.102 (inserted by cl.7) provides that an inspector may require a person at a place entered by the inspector to give the inspector reasonable help to exercise his or her powers, including for example, to produce a document or give information. Proposed s.103(1) provides that a person of whom such a requirement is made must comply, unless the person has a reasonable excuse.

21. Section 103(2) provides that it is a reasonable excuse that compliance might tend to incriminate the person, but s.103(3) provides this exemption does not apply if the requirement is to produce "a document required to be held or kept by the person under (the Act)".

22. Proposed s.107 (also inserted by cl.7) provides that an inspector may require a person to make available for inspection, at a stated reasonable time and place, "a document required to be held or kept by the person under (the Act)", or a document "in the person's possession and about a stated matter relating to (the Act)". Proposed s.108(1) provides that a person of whom such a requirement is made must comply, unless the person has a reasonable excuse. Section 108(2) provides that it is a reasonable excuse that production might tend to incriminate the person, but s.108(3) provides that this exemption does not apply if the document "is required to be held or kept by the person under (the Act)".

23. Provisions similar to those mentioned above have appeared in a number of bills considered by the committee in recent years.

24. The committee's views on provisions denying persons the benefit of the rule against self-incrimination are well known.[6] In short, the committee normally considers such provisions are only potentially justifiable if:

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[5] Section 4(3)(f) of the Legislative Standards Act 1992 provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

- *the matters concerned are matters peculiarly within the knowledge of the persons denied the benefit of the self-incrimination rule, and which it would be difficult or impossible to establish via any alternative evidentiary means*
- *the bill prohibits the use of the information obtained in prosecutions against the person*
- *in order to secure this restriction of the use of the information obtained, the person should not be required to fulfil any conditions such as formally claiming the right.*

25. The bill does not appear to contain any express restriction on the use of the information obtained through production of the relevant documents or provision of the relevant information ("derivative use immunity").

26. The committee notes that cls.103 and 108 deny persons the benefit of the rule against self-incrimination in relation to the compulsory production of documents required to be held or kept under the bill. The committee generally opposes the removal of the benefit of the self-incrimination rule, and usually only considers it potentially justifiable if certain conditions (mentioned above) are satisfied.

27. The committee refers to Parliament the question of whether the denial of the benefit of the self-incrimination rule by cls.103 and 108 is justifiable.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[7]

♦ **Clause 7 (proposed s.48)**

28. Clause 7 inserts into the *Drugs Misuse Act 1986* a new Part 5B (proposed ss.44-115 inclusive). Part 5B provides exemptions from the strict prohibitions imposed by the Act, for persons licensed under Part 5B in relation to the commercial production of industrial cannabis. Proposed s.47 lists a comprehensive range of activities by licensees which are authorised under Part 5B, and states that these activities are lawful despite the prohibitions which would otherwise be imposed by specified sections of the Act.

29. Proposed s.48, however, provides as follows:

> *(1) A regulation may authorise a person other than a licensee to perform activities stated under a regulation for the person for the time and on the conditions stated in the regulation.*

30. This provision, which expressly authorises changes to the application of the legislation by means of regulation, is clearly a "Henry VIII Clause" within the definition adopted by the committee.[8] Given the range of general prohibitions imposed by the *Drugs Misuse Act*, and the level of associated penalties, proposed s.48 is a quite significant provision.

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6 See, for example, the committee's report on the *Queensland Building Tribunal Bill 1999* (Alert Digest No.13 of 1999 at pages 31 – 32) and the *Guardianship and Administration Bill 1999* (Alert Digest No. 1 of 2000 at pages 7 – 8).

7 Section 4(4)(v) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

8 See the committee's report on *The Use of "Henry VIII Clauses" in Queensland Legislation*, January 1997.

31. The committee's concerns about "Henry VIII Clauses" are well known. Alternatively, the question arises as to whether a provision such as s.48 simply involves an inappropriate delegation of legislative power.[9]

32. The Explanatory Notes state, in relation to s.48:

> *This new section recognises that as part of the process of the commercial production of industrial help there will be persons, in addition to licensed researchers and growers, who will be handling cannabis plants and seeds. It would be administratively cumbersome and impractical to require all persons to be licensed. Accordingly, these persons will be afforded protection from otherwise illegal activities under the Act on conditions specified in the regulation.*
>
> *Such persons will be for example, carriers engaged or employed by licensed researchers and growers; persons employed by licensed researchers and growers to help with the planting, growing and/or harvesting of cannabis plants or seeds; or inspectors appointed under the Act who, as part of their duties, may possess cannabis plants or seeds whilst, for example, undertaking random sampling under the Act.*

33. Most of the categories of persons mentioned in the Explanatory Notes are, in the opinion of the committee, somewhat unsurprising.

34. The committee notes that proposed s.48 (inserted by cl.7) enables regulations to be made exempting persons other than licensees from the provisions of the Act, in relation to activities stipulated in the regulation. In the context of the *Drugs Misuse Act 1986*, this is a significant provision. It is, in the committee's view, clearly a "Henry VIII Clause".

35. The committee seeks information from the Attorney as to why the categories of persons intended to be benefited by s.48 could not be stipulated in the bill itself, rather than being dealt with in the manner currently proposed.

Does the legislation provide for the reversal of onus of proof in criminal proceedings without adequate justification?[10]

- **Clause 7 (proposed s.112 and 113)**

36. Amongst the numerous provisions inserted into the *Drugs Misuse Act* by this bill are proposed s.112 and 113.

37. Proposed s.112 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes their executive officers).

38. Proposed s.113 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

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9 See s.4(4)(a) of the *Legislative Standards Act 1992*.

10 Section 4(3)(d) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

39. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.

40. Proposed ss.112 and 113, which are in a form routinely employed in many bills examined by the committee, both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

41. The Explanatory Notes state, in relation to proposed s.113:

> *The clause is included because provisions that a corporation may contravene are serious infringements of the Act in relation to the misuse of drugs and it is appropriate that an executive officer, who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, should be accountable. Further, placing the onus to prove the defence on the executive officer is justified because the facts that support the defence will usually be entirely within the defendant's knowledge and would be impossible for the prosecutor to prove in the negative.*

42. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations.

43. Whilst the difficulties of determining liability in certain circumstances (for example, corporations) are appreciated, the committee as a general rule does not endorse such provisions.

44. The committee refers to Parliament the question of whether proposed ss.112 and 113 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

2. JUSTICE AND OTHER LEGISLATION (MISCELLANEOUS PROVISIONS) BILL 2002

Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 14 May 2002.

2. The objects of the bill, as indicated by the Minister in his Second Reading Speech, are:

> *(to make) minor or technical amendments to a number of statutes to correct errors, omit obsolete references and improve operational efficiency.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[11]

♦ **Clause 9**

3. Clause 9 inserts into the *Coroners Act 1958* a new s.59AA (national coronial database). Subsection (1) of this section enables the Minister administering that Act to:

> *enter into an arrangement with a government or non-government entity responsible for maintaining a database about coronial inquiries and investigations for the inclusion in the database of stated information obtained under this Act ("**relevant information**").*

4. This potentially enables a wide range of information, including information of a confidential and/or personal nature, to be conveyed by the State to another entity. This may be either a government or non-government entity, provided it is responsible for maintaining a relevant database.

5. A provision of this nature obviously raises issues in terms of privacy. The Explanatory Notes indicate that the provision has been inserted with the Monash University Centre for Coronial Information (MUNCCI), which has developed a national coronial database, particularly in mind. However, there would be nothing to prevent the information also being made available to other organisations.

6. The committee notes that proposed s.59AA(2) provides a range of safeguards. The Minister may only enter into these arrangements if satisfied that:

- the entity has a legitimate interest in storing the relevant information
- it will make that information available only to persons with a legitimate interest in obtaining it; and
- reasonable conditions for making the information available to database users will be enforced.

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[11] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

7. Participation in a national coronial database scheme will obviously produce a range of public benefits, which should be weighed against any potential loss of privacy.

8. The committee notes that cl.9 enables information about coronial inquiries and investigations to be made available to non-government and government entities for database storage. The committee further notes that a range of safeguards is incorporated in the section inserted by cl.9.

9. The committee refers to Parliament the question of whether the provisions of cl.9 are reasonable in the circumstances.

- **Clause 23 (proposed ss.230A and 230B)**

10. Clause 23 inserts into the *Guardianship and Administration Act 2000* proposed ss.230A and 230B. These provisions enable the chief executive to make investigations about a person seeking to be appointed as a "community visitor" under that Act. Section 230A empowers the chief executive to require the commissioner of the police service to provide a written report about the criminal history of any such person. The chief executive can then have regard to that criminal history when deciding whether to appoint the person.

11. In its report on the bill for the principal Act (the *Guardianship and Administration Bill 1999*),[12] the committee drew attention to the fact that the definition of "criminal history" in the Dictionary to the principal Act is broadly framed (it includes charges as well as convictions) and excludes the "rehabilitation period" provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. In the principal Act, these provisions applied only to persons seeking appointment as guardians or administrators.

12. This bill now extends those provisions to persons seeking appointment as community visitors.

13. The Explanatory Notes to the current bill state, in relation to this matter:

> *The proposed amendment overrides the protection* (of the *Criminal Law (Rehabilitation of Offenders) Act*) *but can be justified on the basis that such community visitors will be working with a vulnerable group in the community. The chief executive needs to ensure that the appointed community visitors have appropriate life histories to work with people with a capacity impairment. The rights of applicants under the proposed amendment have been protected by providing that the chief executive can only use the information obtained through the police checks to assess the applicant's suitability and for no other purpose.*

14. The committee notes that cl.23 of the bill extends the current provisions of the *Guardianship and Administration Act 2000,* in relation to criminal history disclosures, to persons seeking appointment as community visitors.

15. The committee refers to Parliament the question of whether the provisions of cl.23 have sufficient regard to the rights of those persons.

[12] See Alert Digest No.1 of 2002 at pages 2-3.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[13]

- **Clause 2(3)**

16. Clause 2 of the bill provides that a number of its provisions are taken to have commenced on various past dates.

17. In the case of all but one of these provisions, the committee is satisfied that the provisions are either not adverse to individuals or simply state expressly what could have previously been inferred from the relevant statute.

18. The only provision which appears to raise any issues is cl.2(3), which declares that cl.45 of the bill is taken to have commenced on 1 July 1999. Clause 45 inserts into the *Public Trustee Act 1978* a new s.19A. This section provides, in part, that interest earned by the Public Trustee on amounts invested in his common fund must, after first paying interest to the estates whose funds formed part of the amounts invested, be paid towards operating and capital expenses of the Public Trust Office.

19. It appears from the Explanatory Notes (see page 4) that application of remaining funds towards operating and capital expenses of the Office is an established practice of the Public Trustee, and that it was previously authorised by a regulation which expired on 1 July 1999. Clause 45 will effectively validate all such applications of funds during the intervening period.

20. The practice of making retrospectively validating legislation is not one which the committee endorses because such law could adversely affect rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. The committee does, however, recognise that there are occasions on which curative retrospective legislation, without significant effects on rights and liberties of individuals is justified to correct unintended legislative consequences.

21. In the present case, the Explanatory Notes state that the beneficiaries of the estates whose funds were invested are not adversely affected, as those estates have at all times been entitled to only a prescribed rate of return on investment. In other words, they had no entitlement to any additional amount of interest earned by the fund. On that basis, the statement in the Explanatory Notes that "no rights are adversely affected" would appear to be correct. The surplus funds would presumably have simply been State monies.

22. The committee notes that cl.45 retrospectively validates the application of surplus interest payments from the Public Trustee common fund to the operating and capital expenses of that office since 1 July 1999. The background to this provision is dealt with the in the Explanatory Notes.

23. The committee has been unable to identify any adverse effects of this retrospective provision upon individuals.

[13] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

3. MARITIME SAFETY QUEENSLAND BILL 2002

Background

1. The Honourable S D Bredhauer MP, Minister for Transport and Minister for Main Roads, introduced this bill into the Legislative Assembly on 8 May 2002.

2. The object of the bill, as indicated by the Explanatory Notes, is:

> *to establish a separate maritime agency attached to Queensland Transport in order to:*
>
> - *reduce duplication of responsibility in the delivery of essential maritime services;*
> - *increase the focus of essential maritime services on delivering safety and environmental outcomes;*
> - *provide a lasting solution for pilotage service delivery and training of marine pilots in Queensland; and*
> - *provide a whole of state marine pollution preparedness and response capability that includes the services currently provided by port authorities.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[14]

♦ **Clause 15(5)**

3. The bill creates a separate maritime agency attached to the Department of Transport, in order to centralise the performance of a range of essential maritime services, particularly the provision of pilotage services and marine pollution response. The agency will perform certain functions presently carried out by port authorities.

4. To implement this regime, cl.15 of the bill contains a number of transitional provisions relating to performance of pilotage services, either under contract for services or under employment contracts. All contracts for services are now deemed to be with the new Maritime Safety Agency (MSQ), which takes the place of the department or port authority which was previously a party to those contracts, and MSQ becomes the employer of any employees performing the services under an employment contract. Employees retain their accrued rights and entitlements (such as long service, recreation and sick leave).

5. Sub-clause 15(5) provides as follows:

> ***(5)*** *Compensation is not recoverable from the chief executive, the State or anyone else in relation to the transfer from a port authority to MSQ of the rights and obligations under a contract to which this section applies.*

6. In the opinion of the committee, this provision is unlikely to be of great significance. Clause 15(2) specifically protects the accrued entitlements of employees. In the case of contractors, it merely substitutes MSQ (which is essentially an arm of the State) for the department or

[14] Section 4(2)(a of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

port authority, and it is difficult to identify any adverse consequences which might be caused to any person by this statutory substitution.

7. The committee notes that cl.15(5) of the bill provides that compensation is not recoverable in relation to the transfer from a port authority to MSQ of the rights and obligations of any person under contracts for services, and employment contracts, in relation to the performance of pilotage services.

8. The committee is unable to identify any significant adverse effect of this provision upon any person.

♦ **Clause 15(6)**

9. As mentioned above, cl.15 contains transitional provisions which generally preserve the legal effect of contracts for services entered into by persons with the department or port authority for the supply of pilotage services. These services, as defined in the Dictionary to the bill, mean maritime services that provide for:

- the piloted movement of ships; or
- the transfer of a pilot onto or off a ship.

10. Clause 15(6) provides as follows:

> ***(6)*** *This section does not apply to a contract, prescribed under a regulation, that provides for the transfer of a pilot onto or off a ship.*

11. This sub-clause raises several issues. Firstly, it is a "Henry VIII Clause" within the definition of that term that has been adopted by the committee.[15] It also raises the broader issue of whether it simply constitutes an inappropriate delegation of legislative power.[16]

12. However, the predominant issue appears to be whether the capacity of this provision to deny certain contractors and employees the benefit of the provisions of cl.15, where the services that their contract relates to are the transfer of a pilot onto or off a ship, has sufficient regard to the rights of those contractors and employees.

13. The overall effect of a regulation made under cl.15(6) is not entirely clear. On the one hand, there would be no statutory transfer of relevant contracts and employment to MSQ: on the other, the bar on compensation contained in cl.15(5) would not apply.

14. Neither the Minister's Second Reading Speech nor the Explanatory Notes refer to the likely effect of this provision.

15. The committee notes that cl.15(6) authorises the making of a regulation which would deprive particular contractors or employees of the benefits conferred by cl.15, in relation to the

[15] See the committee's report on the *Use of "Henry VIII Clauses" in Queensland Legislation*, January 1997.

[16] See s.4(4a) of the *Legislative Standards Act 1992,* which provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

transfer of pilots onto or off ships.

16. The committee seeks information from the Minister as to the circumstances in which this provision is likely to be utilised, and the effects which it is likely to have upon the rights of relevant contractors and employees.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[17]

- **Clause 2(2)**

17. Clause 2(2) of the bill provides that the provisions of the bill, with the exception of those referred to in cl.2(1), commence on 1 July 2002.

18. Accordingly, if the bill is not passed during the sitting week commencing 18 June 2002, it will take effect retrospectively. Although not expressly stated in the Minister's Second Reading Speech or the Explanatory Notes, the committee assumes it is the Minister's intention to progress this bill through Parliament during that sitting week.

19. The committee notes that most of the provisions of this bill are to commence on 1 July 2002, and that if this bill is not passed during the sitting week commencing 18 June 2002 it will necessarily have retrospective effect.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[18]

- **Clause 2(1)**

20. Clause 2(1) provides as follows:

> *(1) Schedule 1, part 2 commences on a day to be fixed by proclamation.*

21. An examination of schedule 1 to the bill does not reveal any clearly marked "parts". It is clear from the Explanatory Notes that the "schedule 1, part 2" provisions referred to in cl.2(1) are those provisions of the schedule which amend the *Transport Operations (Marine Pollution) Act 1995*. However, the committee considers the clarity of the bill would be greatly enhanced if the "parts" of schedule 1 were clearly marked.

22. The committee draws this drafting issue to the attention of the Minister.

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17 Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

18 Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

4. POLICE POWERS AND RESPONSIBILITIES AND ANOTHER ACT AMENDMENT BILL 2002

Background

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 8 May 2002.

2. The object of the bill, as indicated by the Explanatory Notes, is:

> (to allow) *for the seizure and impoundment or forfeiture of vehicles being driven in contravention of certain provisions of the Criminal Code and the Transport Operations (Road Use Management) Act 1995. Additionally, the Bill provides a method of addressing further type of "hoonish" behaviour referred to as "lapping", which is the subject of constant complaints to police. Lapping involves vehicles being driven repeatedly around a number of predetermined streets. The predominate source of complaint is the volume at which the stereo systems in the vehicles are operated during lapping.*

Overview of the bill

3. The bill contains provisions designed to suppress two forms of illegal motoring activity.

4. The first category of activities at which the bill is directed are those which involve speed trials, races between vehicles and "burn outs" on roads or public places, where those activities also involve the commission a range of current road use-related offences under the *Criminal Code* or the *Transport Operations (Road Use Management) Act 1995*. This first category is defined in the bill as "prescribed offences" (see cl.13, Dictionary).

5. The bill attempts to combat these activities by providing, as an additional deterrent process, the capacity for offending vehicles to be impounded and even forfeited.

6. The second category of illegal motoring activity targetted by the bill is a practice known as "lapping". This involves vehicles being driven repeatedly around predetermined streets with the vehicle's stereo systems operating at high volume levels. The bill attempts to attack this practice by extending current noise control powers, contained in the *Police Powers and Responsibilities Act 2000,* to also include excessive noise emitted from vehicles on roads or in public places by radios, CD players or other similar equipment. The bill provides that, unlike other noise control powers in the Act, a complaint from a member of the public will not be necessary in order for police to take action.

Does the legislation have sufficient regard to the rights and liberties of individuals?[19]

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[20]

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[19] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

♦ **Clause 6 (proposed ss.59A to 59X inclusive)**

"Prescribed offences"

7. In relation to the first category of illegal motoring activities (speed trials, races between vehicles and "burn outs", collectively described as "prescribed offences"), cl.6 inserts a new chapter 2, pt 6, div 2 (proposed ss.59A to 59X).

8. Briefly stated, the new provisions empower a police officer who "reasonably suspects" a prescribed offence has been committed, or is being committed, to impound the vehicle concerned for 48 hours without further authority, provided that the officer has first started proceedings against the "person in control" of the vehicle for the suspected prescribed offence. That can be done either by arresting the person in control, or by issuing them on the spot with a "notice to appear".

9. If the person in control has been found guilty of 1 similar offence during the last 3 years a court can be requested to order that the vehicle be impounded for a period not exceeding 3 months, and if the person in control has committed 2 other offences during that period, the court may be asked to make an order that the relevant vehicle be forfeited to the State (proposed s.59H).

10. The vehicle can be returned to an appropriate person whilst proceedings for the "prescribed offence" are pending. The court upon hearing the proceedings may, if it finds the person in charge guilty, make a community service order rather than an impounding or forfeiture order if it is satisfied that that would cause severe financial or physical hardship to the owner or usual driver.

11. If a forfeiture order is made, the capacity of a security holder under the *Motor Vehicles and Security Act 1986* to take possession of the vehicle is extinguished (s.59L(5)(b)), although its entitlement to receive proceeds of a subsequent sale is unaffected (see later). It is a defence to an application for an impounding or forfeiture order that the owner of the vehicle did not consent to, or have knowledge of, the happening of the prescribed offence.

12. Whilst the State must pay the cost of removing and keeping the vehicle for the first 48 hours those costs, if a person is subsequently found guilty of the relevant prescribed offence, are transferred to the guilty person.

13. Forfeited vehicles, and those which are ultimately not collected when the impoundment ends, can be sold by the State (proposed s.59W). Out of the sale proceeds, registered security holders are to be reimbursed and, unless the sale is pursuant to a forfeiture order, the balance is paid to the owner. In the case of forfeiture orders, the balance is paid to the consolidated fund. Proposed s.59X provides scope for third parties who did not appear at the original hearing to have their interests recognised despite the making of a forfeiture order.

14. The new provisions relating to prescribed offences are comprehensive and fairly complex. They include, as the Minister states in his Second Reading Speech, a number of provisions designed to safeguard the interests of persons affected by impounding and forfeiture orders.

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[20] Section 4(3)(I) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation.

15. The impounding provisions will impact upon owners, persons in charge and others associated with the motor vehicles, in that impoundment deprives them of their use. Forfeiture orders obviously also affect owners of vehicles as they thereby lose the vehicle and have no right to share in the proceeds of its sale. Registered security holders are also affected to the extent that the making of forfeiture orders extinguishes any right they may have to take possession of the vehicles.

16. The Minister in his Second Reading Speech justifies these provisions as follows:

> *This dangerous behaviour is placing at risk the safety of road users throughout Queensland. Indeed, the potential for tragedy can never be underestimated when it comes to illegal drag racing.*
>
> *It presents real risks to legitimate and lawful road users, to the general public, not to mention the motorists and their passengers.*

17. Self-evidently, the effect which the bill has upon the rights of owners, drivers, security holders and others associated with relevant motor vehicles, must be balanced against the detriment to the community of the anti-social motoring activities at which the bill's provisions are aimed.

"Lapping"

18. As mentioned earlier, the bill also targets a noise-related motoring activity known as "lapping", which involves vehicles being driven repeatedly around predetermined streets with the vehicles' stereo systems being operated at high volume.

19. The changes to the current law are much more modest here than in relation to "prescribed offences" (see above), as the bill simply extends existing noise control powers relating to motor vehicles on private land to those on roads and in public places, whilst also removing the requirement that a complaint be made before police can take action.

20. Again, this broadening of noise control powers will adversely affect persons in control and other occupants of the relevant motor vehicles.

21. The Minister in his Second Reading Speech refers to this aspect of the bill as follows:

> *The bill I have introduced is not intended at preventing people enjoying music within their vehicles. Rather, it is aimed at behaviour that intentionally disrupts the lives of people who have a right to enjoy the peace and quiet of their surroundings.*

22. Again, the rights of vehicle users must be balanced against those of members of the general public living in areas adjacent to roads on which "lapping" occurs.

23. The committee notes that this bill introduces a comprehensive statutory scheme authorising the impounding and, in some cases, the forfeiture of motor vehicles used in relation to certain illegal motoring activities described as "prescribed offences".

24. The committee further notes that in relation to a practice known as "lapping", the bill extends current noise abatement powers contained in the *Police Powers and Responsibilities Act* so as to apply to this activity, with a consequent additional impact upon the rights of drivers and occupants of the vehicles concerned.

25. The committee refers to Parliament the question of whether the various provisions mentioned above have sufficient regard to the rights of persons associated with the relevant motor vehicles on the one hand, and the general public on the other.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[21]

- **Clause 6 (proposed s.59S)**

26. Clause 6 inserts proposed s.59S ("Protection from liability'). Section 59S(3) provides that once a police officer has signed a towing authority under proposed s.59D (after having impounded a vehicle under the bill's provisions), the State is not liable for any damage, loss or depreciation to the vehicle while it is being moved by the tow truck operator and whilst it is impounded in the tow truck operator's holding yard. This immunity appears to be unconditional.

27. The rationale for this provision would appear to be that the vehicle is at all relevant times in the possession of the tow truck operator, who should therefore assume sole responsibility for its protection. Tow truck operators will, of course, receive fees for their services.

28. In the opinion of the committee, if Parliament were to accept the general thrust of the statutory regime introduced by this bill, the protection from liability afforded by s.59S(3) would not be unreasonable.

29. The committee notes that proposed s.59S(3) declares the State to be immune from liability in respect of any damage, loss or depreciation to a vehicle whilst it is in the possession of the tow truck operator authorised by the police officer who initiated the impounding process.

30. Given the nature of the statutory regime instituted by this bill, the committee does not object to this immunity.

- **Clause 6 (proposed s.59W(3)**

31. Proposed s.59W describes the manner in which proceeds of a sale by the commissioner of the police service of an impounded vehicle, or of one ordered to be forfeited, are to be distributed. The section indicates which persons are entitled to receive the proceeds, and in which order of priority. Section 59W(3) then provides as follows:

> *(3) Compensation is not recoverable against the State in relation to a payment made under this section.*

32. Provisions of this nature are normally employed to make it clear that exercise of an express statutory power, which may produce results adverse to particular individuals, does not of itself give rise to any entitlement to compensation on the part of such persons. In the present case, the relevant statutory process is the sale of a motor vehicle subsequent to impoundment or forfeiture under the bill's provisions. In the context of s.59W, the committee is

[21] Section 4(3)(h) of the provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

concerned that subsection (3) might conceivably be interpreted as providing that the State is to be immune from any liability for maladministration (for example, for an incorrect distribution of the proceeds of a particular sale, due to negligence or even fraud on the part of the departmental officer handling the matter).

33. The committee would be concerned if this were the intent of the bill.

34. The committee notes that s.59W(3) provides that compensation is not recoverable against the State in relation to payments made under that section.

35. The committee seeks confirmation from the Minister that this provision is not intended to deprive persons of any right they might normally have to sue the State (on the basis of negligence or misconduct, for example) over an incorrect distribution of the proceeds of a particular sale.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[22]

- **Clause 6 (proposed s.59M)**

36. Clause 59M (inserted by cl.6) provides as follows:

> *In a proceeding for an impounding order or a forfeiture order in relation to an impounded vehicle, it is a defence for an owner of the vehicle to prove that the prescribed offence happened without the knowledge and consent of the owner.*
>
> *(The section incorporates an example not reproduced here).*

37. As mentioned earlier, the provisions of this bill may impact severely upon the rights of owners of vehicles which are involved in the commission of "prescribed offence". In many cases a vehicle will not be owned by the person who was in control of it at the time of the offence. Section 59M recognises this by providing owners with an opportunity to establish grounds upon which impounding or forfeiture of a vehicle should not occur. Section 59M requires that owners not have had knowledge of the happening of the "prescribed offence", and not have consented to it.

38. However, an owner relying upon s.59M has the onus of establishing these matters to the satisfaction of the court. The bill appears to embody an assumption that, unless s.59M is successfully invoked, an impounding or forfeiture order may be made without regard to whether the person in control of the vehicle was also the owner. In the opinion of the committee, the bill effectively incorporates a reversal of onus of proof.

39. It is the committee's understanding that reversals of onus of proof, of varying degrees of severity, are often employed in legislation regulating traffic and motor vehicles. For example, an infringing vehicle detected by speed cameras is taken to have been driven by the registered owner unless that person claims otherwise. In the present case the penalty suffered by an owner who is unable to establish the s.59M defence could be very significant.

[22] Section 4(3)(d) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

40. The committee notes that proposed s.59M, in conjunction with other provisions of the bill, effectively reverses the onus of proof in relation to the issue of whether the use of the vehicle to commit a "prescribed offence" happened without the owner's knowledge or consent.

41. The committee does not as a general rule approve of provisions which reverse the onus of proof, whilst recognizing that such provisions are often employed in traffic-related legislation.

42. The committee refers to Parliament the question of whether the reversal of onus of proof effected by the bill (including proposed s.59M) has sufficient regard to the rights of owners of relevant motor vehicles.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[23]

- **Clause 6 (proposed s.59H)**

43. Most provisions of the bill dealing with "prescribed offences" refer to the "person in control" of the motor vehicle. This term is already defined in the *Police Powers and Responsibilities Act* (see Dictionary).

44. However, proposed s.59H refers to the "driver".

45. The committee notes a discrepancy between terminology employed in proposed s.59H and that used elsewhere in the bill.

46. The committee seeks information from the Minister as to the reasons for this discrepancy.

[23] Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

5. TOBACCO LEGISLATION AMENDMENT BILL 2002

Background

1. The Honourable W M Edmond MP, Minister for Health and Minister Assisting the Premier on Women's Policy, introduced this bill into the Legislative Assembly on 14 May 2002. It was subsequently passed as an urgent bill on 16 May 2002 following suspension of Standing Orders.

2. Upon receiving the Governor's assent, the bill becomes an Act. The committee only has jurisdiction to comment on bills, and once assent has been given the committee has no jurisdiction to comment upon it.

3. Even if the bill has not yet been assented to, there is in practice no scope for it to come back before Parliament once it has passed the third reading stage. Accordingly, it would be futile for the committee to attempt to comment on the bill's contents.

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

5. The committee accordingly makes no comment in respect of this bill.

SECTION B

COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to "extrinsic material" in the interpretation of a provision of an Act in certain circumstances. The definition of "extrinsic material" provided in that section includes:

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted[24]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[25] of a provision may therefore be considered as extrinsic material in its interpretation.

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24 Section 14B(3)(c) Acts *Interpretation Act 1954*.

25 The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 *Acts Interpretation Act 1954*.

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

6. ADOPTION OF CHILDREN BILL 2002

Background

1. The Honourable J C Spence MP, Minister for Families and Minister for Aboriginal and Torres Strait Islander Policy and Minister for Disability Services of Queensland, introduced this bill into the Legislative Assembly on 16 April 2000.The committee notes that this bill was passed, without amendments, on 15 May 2002.

2. The committee commented on this bill in its Alert Digest No 4 of 2002 at pages 1 to 4. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[26]

- **Clause 6 (proposed ss.13AA(4) and 13AC(2)) and cl. 9 (proposed s.13E(2))**

3. Clause 6 of the bill inserts proposed ss.13AA(4) and 13AC(2), and cl.9 inserts proposed s.13A(2). These provisions provide for the removal of a prospective adoptive parent's name from the adoption list or register if that adoptive parent is ineligible as prescribed by regulation. The committee noted that the matters which could render a prospective adoptive parent ineligible were prescribed by regulation rather than being included in the bill itself. The committee recommended that the Minister consider incorporating the more important matters such as residence, domicile and citizenship into the bill.

4. The Minister provided the following response:

> *The provisions of the bill identified above (proposed sections 13AA(4), 13AC(2) and 13E(2) of the bill) replicate, for the new registers and the remaining adoption lists, the provision in current section 13A of the Adoption of Children Act 1964. This section requires the removal of a person's name from the adoption list should the person prove to be ineligible 'as prescribed'. The eligibility criteria are clearly set out in the Regulation.*
>
> *The purpose of the Adoption of Children Amendment Bill 2002 is to remedy particularly urgent problems relating to the process established in the Act for the selection of prospective adoptive parents for children from Queensland and for children from overseas. The problems specifically relate to the increasing number of applicants on the General Children's Adoption List and the Foreign Children's Adoption List and the requirements in the Act to deal with applications in chronological order.*
>
> *In the context of the ongoing review of the Adoption of Children Act 1964, it was not the intention with these initial amendments to address other or broader problems with the*

[26] Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

legislation as a whole. Whilst the recommendation of the committee on this issue are pertinent, it was not the intention with these amendments to make changes to the Act or the existing structure of the legislation other than those required to remedy urgent matters which significantly impact on adoption practice and the achievement of the objective of the Act.

Consequential amendments will be made to the Adoption of Children Regulation 1999 to reflect the establishment of the expression of interest register and the assessment register and the removal of the General Children's Adoption List and the Foreign Children's Adoption List. No substantive changes will be made to the eligibility criteria or the matters required to be considered in assessing the suitability of prospective adoptive parents.

It is the intention of the Government to implement new adoption legislation within two years after a comprehensive review of the Act and Regulation. The committee's recommendation on the appropriateness of including eligibility criteria in primary legislation will be adopted in the drafting of future adoption legislation.

5. The committee notes the Minister's response. The committee further notes that the issue raised by it will be addressed in the pending review of the principal legislation.

7. ANIMAL AND PLANT HEALTH LEGISLATION AMENDMENT BILL 2002

Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Rural Communities, introduced this bill into the Legislative Assembly on 9 April 2002. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No 4 of 2002 at pages 5 to 10. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[27]

- **Clause 16**

3. Clause 16 of the bill amends s.47 of the *Exotic Diseases and Animals Act 1981*. The committee noted that cl.16 provides that a regulation may impose substantial penalties (up to 80 penalty units) for offences against a regulation. The committee does not generally endorse the delegation of legislative power to impose penalties exceeding 20 penalty units, and recommended that the Minister amend the bill to substantially reduce the maximum penalty which may be imposed by regulation.

4. The Minister provided the following response:

> *The Committee also noted that the general penalties for an offence against a regulation under the Exotic Diseases in Animals Act 1981 was being increased to 80 penalty units, contrary to the general policy of the Committee that the delegation of legislative power to impose penalties should not exceed 20 penalty units. In line with that policy the Committee recommends that I take the opportunity to amend the bill to substantially reduce the maximum penalties that may be imposed by regulation.*
>
> *Whilst I fully support this general policy of the Committee, I consider that there are extenuating circumstances for this policy not being applied to the maximum level of penalties that may be set in Regulations under the Exotic Diseases in Animals Act 1981.*
>
> *Unlike the majority of Queensland legislation the Exotic Diseases in Animals Act 1981 is dormant legislation that is only triggered to underpin an emergency response to an exotic animal disease incursion. Such an incursion will pose a very significant risk to the Queensland economy. By way of example, it is well recognised that the consequences of exotic disease outbreaks such as foot and mouth disease (FMD) or bovine spongiform encephalopathy (BSE) on trade and the economy of Australia would be devastating. The immediate loss in export revenue resulting from a FMD outbreak in Australia is estimated by the Australian Bureau of Agricultural Resources Economics to approximate $5.8 million in*

[27] Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

the first year of the outbreak. A loss of 3% in Gross Domestic Product and an increase of 1% in employment are also forecast. The FMD outbreak in Brittain and the recent BSE outbreaks in Europe and Japan have the potential to seriously affect the economic development of Queensland in particular due to the scale of our livestock industries and proximity to the most likely means of entry from Asia via the Torres Strait.

Currently section 47 of the Exotic Diseases in Animals Act 1981 is silent on the maximum penalty that may be imposed by a regulation. The only offence penalty currently prescribed by regulation is prescribed in section 4 (3) of the Exotic Diseases in Animals Regulation 1998, which imposes a maximum penalty of up to 80 penalty units or 6 months imprisonment for an offence of failing to comply with an order of an inspector requiring the person to wear protective outer clothing and footwear when entering, leaving or moving within infected premises, a restricted area, a standstill zone or a control area. Failure to comply with such an order to take appropriate precautions to prevent spread of an exotic disease infection occurring in the State is a very serious offence. Failure to take appropriate precautions when directed to do is recognised as posing a high risk of spreading an exotic disease. This would result in significant adverse consequences for containment and eradication of the disease as well as the potentially serious impacts on trade, market access and the economy of the State that are likely have a severe flow-on effect on all sections the community.

As well as setting appropriate levels for the penalties already in the Regulation, there is a strong need to be able to create new offences quickly. This need exists for several reasons:

- *To be able to act quickly to introduce penalties that may be found necessary to prevent the spread of an existing identified exotic disease outbreak;*

- *To respond to new exotic disease related requirements imposed by Queensland's overseas trading partners.*

In both these cases urgent reaction is vital to prevent damage to the Queensland economy. It is recognised that the capacity to quickly create new offences is only possible through the making of Regulations. In both cases, having due regard to the gravity of the situation then existing, the likely offences that will be needed will require a high level of penalty to be an effective deterrent.

In addition, the maximum penalties have been formulated to be consistent with the existing penalty provisions in comparable legislation from other States and Territories. This consistency is necessary to maintain public confidence that Queensland is serious about preventing the spread of exotic disease in this State.

Whilst the maximum penalties are relatively high, the Magistrate has discretion as to the amount of the penalty that fits the circumstances of the case.

5. The committee notes the Minister's response.

8. CONSUMER CREDIT (QUEENSLAND) AMENDMENT BILL 2002

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 6 March 2002. The committee notes that this bill was passed, without amendments, on 18 April 2002.

2. The committee commented on this bill in its Alert Digest No 3 of 2002 at pages 1 to 3. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation have sufficient regard to the institution of Parliament?[28]

- **The bill generally**

3. This bill amends the *Consumer Credit Code*, which is set out in an appendix to the *Consumer Credit (Queensland) Act 1994*. The committee noted that the bill forms part of national scheme legislation and that many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament. The committee referred to Parliament the question of whether the bill has sufficient regard to the institution of Parliament.

4. The Minister commented as follows:

> *The scheme for the uniform legislation has been developed under an intergovernmental agreement called the Australian Uniform Credit Laws Agreement 1993 ("the Agreement"). It is acknowledged in the Agreement that it is in the interests of the public and administering authorities that there should, as far as possible, be uniformity in consumer credit laws and their administration in the States and Territories of Australia. This uniformity is achieved through a co-operative national scheme that requires two-third majority support from the Ministerial Council of any amending legislation to the Consumer Credit Code ("the Code").*
>
> *Parliament's role is to scrutinise and debate the provisions of this Bill. The Agreement allows for the making of alterations of a drafting nature which may arise out of Parliamentary debate without the need for further Ministerial Council approval. However, in order to comply with the Agreement, more substantial changes arising from parliamentary debate would be required to be approved by the Ministerial Council. This could be achieved by amending the Bill and seeking further approval from the Ministerial Council or drafting an amendment bill. This national scheme does not intend to exclude Parliament from executing its constitutional responsibility to make laws for the peace, order and good Government of the State.*

5. The committee notes the Minister's response.

[28] Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[29]

- **Clause 6 (proposed s.146T)**

6. The principal amendment to the *Code* made by this bill is the insertion of a new Part 9A – Comparison Rates. Clause 6 of the bill (proposed s.146T) provides that a regulation may exempt persons and matters from the operation of Part 9A. The committee expressed the view that this clause constitutes a "Henry VIII clause". The committee does not generally endorse the use of such provisions and sought information from the Minister as to whether she is satisfied that the use of this "Henry VIII clause" is necessary to achieve the bill's objectives.

7. The Minister provided the following information:

> *The Committee considers that the proposed section 146T of the Bill is a Henry VIII clause and has sought information as to whether the use of this Henry VIII clause is necessary to achieve the Bill's objectives.*
>
> *The proposed section 146T provides that by regulation any class of person or matters may be exempt from the operation of Part 9A of the Bill. The clause effectively allows exemptions to be given to a person or group from the requirement to publish comparison rates in their advertising and the publishing of comparison rate schedules.*
>
> *The delegation of power from Parliament is considered proper only in circumstances where this will achieve the objectives of the Bill. Proposed section 146T is appropriate as it meets the objectives of the Bill in the following ways:*
>
> - *The Code includes specific exemption provisions, which are in the same form as the proposed section 146T. Section 7(10) of the Code provides that a class of credit may be exempt from the application of the Code by regulation.*
> - *The regulation making power under the Code is governed by section 10(2) of the* Consumer Credit (Queensland) Act 1994 *which requires exemptions made under the Code to be made only on the recommendation and approval of the Ministerial Council.*
> - *The regulation making process is also governed by the Agreement, which establishes a lengthy process of consultation and review of proposed changes to the Code including consultation and review through the Uniform Consumer Credit Code Management Committee ("UCCCMC"). The UCCCMC is a committee set up to specifically consider all exemption applications under the Code and where necessary seek expert, community and industry views on such exemptions. All State and Territory Governments have rights of representation on the UCCCMC. The UCCCMC makes recommendations to the Ministerial Council Consumer Affairs ("MCCA") who ultimately recommend exemptions being granted or otherwise.*
> - *Once MCCA has recommended that an exemption be granted, it is forwarded to Queensland to pass through the Executive Council process.*
> - *Exemptions granted by regulation are not an unusual feature of modern legislation. This process allows the Parliament to be free of minor and incidental matters that would unnecessarily hold up the progress of more significant legislative initiatives.*

[29] Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

- *Such processes of providing exemptions to the application of the Code are proper in light of the nature of credit and industry practices. Credit has a wide impact and is used in a wide variety of ways. Accordingly, there are occasions where some forms of credit are inadvertently caught and there was never any intention or desire for this to occur. A timely process of exempting persons or bodies in these areas is the most effective way of dealing with these matters.*

8. The committee notes the Minister's response.

♦ **Clause 6 (proposed s.146R)**

9. Proposed s.146R(2) of the bill provides that certain matters are exempt from inclusion in the calculation of the relevant comparison rate unless a regulation under the section otherwise provides. The committee expressed the view that this clause may constitute a "Henry VIII clause", the use of which the committee does not generally endorse. The committee sought information from the Minister as to whether she is satisfied that the use of this "Henry VIII clause" is necessary to achieve the bill's objectives.

10. The Minister provided the following information:

The Committee has also sought information as to whether the proposed section 146R(2) of the Bill is necessary to achieve the Bill's objectives.

Proposed section 146R requires ascertainable fees only to be used in the calculation of comparison rates. Subsection (2) allows other fees or charges that are not ascertainable at the time of calculating the comparison rate to be included in the calculation. These unascertainable amounts may be prescribed by regulation. This was deliberately done so as to allow amendment to catch credit providers who try to avoid the proper use of comparison rates by saying that certain fees and charges are not ascertainable at the time of calculating the comparison rate.

The appropriateness of delegating power to determine what fees and charges will be prescribed have been stated above regarding proposed section 146T.

11. The committee notes the Minister's response.

9. REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2002

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 11 April 2002. The committee notes that this bill was passed, without amendments, on 9 May 2002.

2. The committee commented on this bill in its Alert Digest No 4 of 2002 at pages 14 to 17. The Treasurer's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[30]

- **Clause 10**

3. Clause 10 of the bill inserts into the *Duties Act 2001* a provision that expressly enables an instrument or transaction to be exempted from the imposition of duty in certain circumstances. The committee expressed the view that this clause constitutes a "Henry VIII clause". The committee does not generally endorse the use of such provisions and recommended that the provision be deleted.

4. The Treasurer responded as follows:

> *In relation to clause 10, the Committee recommends that the clause be deleted from the Bill as the committee cannot identify sufficient justification for the inclusion of the provision.*
>
> *Clause 10 adds to s.508 of the Duties Act 2001 to allow for an exemption from duty to be made by regulation for a financial arrangement entered into by a statutory body as defined in the Statutory Bodies Financial Arrangements Act 1982 or another Act.*
>
> *While the committee comments in relation to clause 10 are noted, the clause is not considered to be inappropriate or insufficiently limited as, for an exemption to be made under the clause, the instrument or transaction must have been entered into by a statutory body as defined in the Statutory Bodies Financial Arrangements Act 1982 or another Act and the instrument or transaction must meet the description of a financial arrangement under the Statutory Bodies Financial Arrangements Act 1982. If an instrument or transaction does not meet that description it cannot be exempted by an exercise of the regulation making power under the clause. The adoption of the requirement that the instrument or transactions which may be exempted be within the meaning of statutorily defined terms from other legislation as the criteria for the exercise of the power therefore provides sufficient Parliamentary oversight of the exercise of the power.*
>
> *The clause, which reinstates a provision in the Statutory Bodies Financial Arrangements Act 1982 which was omitted by the Duties Act 2001, is necessary and justified to ensure that instruments and transactions may be exempted from the imposition of duty where that is*

[30] Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

inappropriate. In drafting the provision, sufficient regard has been had to fundamental legal principles as the provision is significantly narrower than the provision is replaces.

5. The committee notes the Treasurer's response.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[31]

- **Clause 39**

6. Clause 31 of the bill replaces current s.38 of the *Fuel Subsidy Act 1997* with a new s.38. The committee noted that new s.158 (inserted by cl.39 of the bill) refers to "criminal" liability and sought confirmation from the Treasurer that this was a reference to liability to be prosecuted under the *Justices Act 1886* for breach of the statutory duties contained in the new s.38.

7. The Treasurer responded:

The Committee has queried if the reference to "criminal liability" in the new s.158 inserted by cl.39 into the Fuel Subsidy Act 1997 is a reference to liability to be prosecuted under the Justices Act 1886 for breach of the statutory duties contained in new s.38 of the Fuel Subsidy Act 1997. I confirm that this is the case.

8. The committee notes the Treasurer's response.

[31] Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

10. STATE HOUSING AND OTHER ACTS AMENDMENT BILL 2002

Background

1. The Honourable R E Schwarten MP, Minister for Public Works and Minister for Housing, introduced this bill into the Legislative Assembly on 16 April 2002. The committee notes that this bill was passed, without amendments, on 14 May 2002.

2. The committee commented on this bill in its Alert Digest No 4 of 2002 at pages 18 to 21. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[32]

- **Clause 8**

3. Clause 6 of the bill inserts new provisions in the *State Housing Act 1954*, which authorise the Queensland Housing Commission to make loans to persons who provide "residential services" under the *Residential Services (Accreditation) Bill 2002*.[33] The committee noted that cl.8 of the bill denies providers of residential accommodation to whom monies are advanced by the Commission the benefit of a consumer protection measure available to all other persons who obtain advances from the Commission. The committee sought information from the Minister as to why a distinction is drawn between the two classes of borrowers.

4. The Minister provided the following information:

> *Clause 8 amends section 32AB of the State Housing Act 1945 such that the section will not apply to loans to Residential Service Industry Operators under the proposed new part 6D of the Bill. Section 32AB of the State Housing Act 1945 relates only to loans for owner occupied housing loans, and section 32AA provides for the "Standard Interest Rate Policy", the method by which the standard interest rates are determined, to be prescribed under a regulation. The Minister for Housing declares the standard interest rates, consistent with the Standard Interest Rate Policy, by publication of a notice in a newspaper circulating generally throughout Queensland. The Standard Interest Rate Policy provides that regard must be had to the standard fixed and variable interest rates charged by four major banks, for residential home loans.*
>
> *The existing interest rate mechanism is only applicable and appropriate for owner-occupied residential home loans. As such section 32AB is not relevant to the proposed new loans to Residential Service Industry Operators.*
>
> *That is, just as the State Housing Act 1945 does not provide the power to make loans to Residential Service Industry Operators, nor does it provide for any interest rate mechanism for such.*

---

[32] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

[33] This bill was passed on 10 May 2002.

The interest payable on loans to Residential Service Industry Operators will be payable on the unpaid balance at the rate stated in the document executed by the Commission and the borrower that states the terms of the loan. The fact that the rate will be stated in the document is an adequate protection measure for this new class of borrowers.

5. The committee thanks the Minister for this information.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[34]

- **Clause 9 (proposed s.49)**

6. Clause 9 of the bill inserts proposed s.49. The committee noted that the effect of this clause is to provide for validation of things done by a particular Minister in relation to s.22B(2) of the *State Housing Act 1954*, and sought information from the Minister about the background to s.49.

7. The Minister provided the following information:

There are two types of State Housing Perpetual Town Leases: residential and commercial. Both types are subject to the State Housing Act 1945, the State Housing (Freeholding of Land) Act 1957 and the Land Act 1994.

The Department of Housing, the Department of Natural Resources and Mines and lessees have always operated on the basis that the Ministerial approval required for dealings with both commercial and residential State Housing Perpetual Town Leases, is that of the Minister administering the State Housing Act – the Minister for Housing.

It is clear that this is the case for residential leases, due to the specific wording of section 24 of the State Housing Act 1945.

However, this has been revealed not to be legally correct for commercial leases, due to the absence of a clear intention in the existing section 22B of the State Housing Act 1945. The end result of the unclear wording is that at present the legally correct decision-maker for dealings in commercial State Housing Perpetual Town Leases is the Minister administering the Land Act 1994 – the Minister for Natural Resources and Mines and not the Minister for Housing.

Accordingly, section 22B is being amended to rectify the unclear intention, and to make it clear that the appropriate decision-making is the Minister for Housing, bringing the commercial lease provisions into line with the existing provisions relating to residential leases.

The Bill proposes to insert a new section 49 in the State Housing Act to validate prior approvals given by the Minister administering the State Housing Act – the Minister for Housing. Lessees, sub-lessees and transferees of the leases have relied on approvals given by the Minister for Housing from 1955 through to the current day. The Department of Housing and the Department of Natural Resources and Mines have also relied on prior approvals by the Minister for Housing.

[34] Section 4(3)(g) of *the Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligation, retrospectively.

The validation is necessary and appropriate because all parties involved in dealings with these leases have always acted in reliance on the Minister administering the State Housing Act 1945 as being the Minister responsible for exercising powers in relation to the leases.

There will be no adverse effects of the validation, as it will affirm prior dealings that many parties have acted in total reliance on. If no validation were to occur, that would have an adverse effect upon the rights of individuals.

8. The committee thanks the Minister for this information.

11. TOURISM, RACING AND FAIR TRADING (MISCELLANEOUS PROVISIONS) BILL 2002

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 6 March 2002. The committee notes that this bill was passed, without amendments, on 18 April 2002.

2. The committee commented on this bill in its Alert Digest No 3 of 2002 at pages 22 to 26. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[35]

- **Schedule, *Motor Vehicle, Securities and Other Acts Amendment Act 2001*, amendment 9**

3. A schedule to the bill contains "minor amendments" made to a number of Acts. Amendment 9 of the amendments to the *Motor Vehicles, Securities and Other Acts Amendment Act 2001* inserts a new s.46A. The committee noted the effect of the section is to declare that these provisions are taken to have commenced on 7 June 2001 and sought information from the Minister about the background to proposed s.46A.

4. The Minister provided the following information:

> *The declaration contained in the new section 46A of the Motor Vehicle Securities and Other Acts Amendment Act 2001 confirms the proper operation of section 2 of the Motor Vehicle Securities and Other Acts Amendment Act 2001.*
>
> *Because of the incorporation of amendments in-committee and the subsequent clerical renumbering of the amending Bill, the references in section 2(1) of the amending Act to part 2A and sections 19(3A), 31, 31A, 32A to 32C, 34, and 38(2) should be read as references to part 3 and sections 19(4), 35, 36, 38 to 40, 42 and 46(2) respectively.*
>
> *The declaration merely confirms the Parliament's clear legislative intent.*

5. The committee thanks the Minister for this information.

[35] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[36]

- **Clause 40**

6. Clause 40 of the bill amends s.109 of the *Fair Trading Act 1989*. The committee noted that cl.40 confers upon the Minister an absolute exemption from liability in relation to disclosures or publications made by the Minister concerning businesses and persons. The committee recognised that the new exemption provisions will require that the disclosure or publication be made in good faith, and that the Minister is satisfied the public interest requires it to be made. The committee referred to Parliament the question of whether this extension of exemption from liability in relation to statements made by the Minister has sufficient regard to the rights of persons adversely mentioned in those statements, as well as the interests of consumers.

7. The Minister commented as follows:

> *The new exemption provisions, both in relation to the Minister and the Commissioner, will require that the disclosure or publication only be made in good faith, and will require the Minister or Commissioner to be satisfied that it is in the public interest.*
>
> *There is currently no specified "good faith" or "pubic interest" restriction on the Commissioner's ability to disclose or publish information with the protection offered by section 109(1)(b). Under the proposed amendments, no protection will be afforded to the Commissioner or to the Minister unless the disclosure or publication is made in good faith and in the public interest. This will ensure that the Commissioner and the Minister pay serious attention to the interests of the public and of the persons to be referred to or otherwise identified by those statements.*
>
> *I have given a commitment to establish procedures within my office to ensure that disclosures and publication of information under section 109 will only be made in appropriate circumstances. Although I cannot bind future Ministers to adopting those or similar procedures, it will be in their best interests to do so. Ministers will be open to personal liability for disclosures or publications made outside Parliament if they do not ensure that the disclosure or publication is made in good faith and is, in their honest belief, in the public interest.*

8. The committee notes the Minister's response.

[36] Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[37]

- **Clauses 103 and 106**

9. Clause 103 of the bill amends s.547 of the *Property Agents and Motor Dealers Act 2000*. The committee noted that by cls.103 and 106, the bill confers on inspectors additional powers of entry that extend beyond situations where the occupier consents or where a warrant has been obtained, and that once entry has been effected the bill confers on these persons significant powers to obtain information. The committee drew these extensive powers of entry, and other significant powers, to the attention of Parliament.

10. The Minister commented:

> *Without such powers, and under the current provisions, if an inspector calls on a licensee at a licensee's business premises and discovers a possible breach of the Property Agents and Motor Dealers Act 2000 the licensee is entitled to order the inspector to leave the premises. The inspector must then leave. Evidence of the offence will then be left to the mercies of the offending licensee. The current provision would require the inspector to obtain a search warrant every time before entering a licensee's premises. Yet a warrant cannot be obtained unless there are grounds for issuing the warrant. This has the potential to make unworkable a significant body of the Office of Fair Trading's compliance and enforcement program regarding the Property Agents and Motor Dealers Act 2000.*
>
> *Enabling inspectors to require marketeers to produce documents simply provides inspectors the same power they already have in relation to licensees. Marketeers may not be licensees. Unless inspectors are provided with this power, marketeers will continue to escape the scrutiny necessary to ensure the protection of real estate consumers.*

11. The committee notes the Minister's response.

Does the legislation have sufficient regard to the rights and liberties of individuals?[38]

- **Clauses 81 to 83 inclusive**

12. Clauses 81 to 83 of the bill insert into the *Property Agents and Motor Dealers Act 2000* several provisions relating to the appointment of pastoral houses for sales of residential property. The committee noted that cls.81 to 83 create offences which, if committed by a pastoral house, are punishable by very substantial maximum penalties and drew these substantial penalties to the attention of Parliament.

13. The Minister provided the following response:

> *Clause 81 introduces a new section 174A, which is identical to new section 134A (in relation to real estate agents) and new 211A (in relation to auctioneers). These provisions require the agent to bring to the client's notice very important information regarding the effect of*

[37] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

[38] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

different types of listing. The penalties for a breach of this provision are identical to the penalties currently applying to breaches of other provisions under the Act.

Clause 82 does not introduce new penalties for Pastoral Houses. The same penalties already apply for a breach of the current section 175.

Clause 83 does not introduce new penalties for Pastoral Houses. The same penalties already apply for a breach of the current section 176.

14. The committee notes the Minister's response.

12. TRANSPORT (COMPULSORY BAC TESTING) AMENDMENT BILL 2002

Background

1. Mr V G Johnson MP, Shadow Minister for State Development and Small Business, Shadow Minister for Transport and Main Roads and Shadow Minister for Aboriginal and Islander Policy and Member for Gregory, introduced this bill into the Legislative Assembly on 18 April 2002 as a private member's bill. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No 4 of 2002 at pages 22 to 25. The member's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[39]

- **Clause 5 (proposed ss.80A and 80B)**

3. Clause 5 of the bill (proposed ss.80A and 80B) introduces into the *Transport Operations (Road Use Management) Act 1995* a number of provisions designed to ensure that where a person involved in a road accident is admitted to a hospital for treatment, a blood sample is taken whether or not the person consents or is capable of consenting. The committee referred to Parliament the question of whether these provisions have sufficient regard to the rights and liberties of the abovementioned persons, as well as those of the relevant doctors and nurses.

4. The Member provided the following response:

> *The Committee has referred to Parliament the question of whether the impact of the Bill upon the rights and liberties of the person whose blood is taken, and upon relevant doctors and nurses, is justifiable.*
>
> *As the Committee has noted, I detailed in my second reading speech that this matter has been examined in detail by the Parliamentary Travelsafe Committee report on Compulsory BAC Testing tabled in December 1997, which unanimously recommended legislation with provisions similar to this Bill.*
>
> *As I have also indicated in my second reading speech, similar provisions have been enacted in most other States of the Commonwealth and this Bill is generally similar to the equivalent legislation in New South Wales.*
>
> *As the Committee is aware, specific protection has been provided to the medical staff performing testing under this Bill by amendment to Section 167.*
>
> *Unlike the random sampling provisions of the existing legislation which enables samples to be taken without reason to believe than any offence may have been committed, the samples*

[39] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

required under this legislation are being taken only from persons who may have been the controller of a motor vehicle or a pedestrian who has required hospital treatment following a motor vehicle accident.

The Travelsafe report previously referred to, substantiates that a significant number of persons under the influence are avoiding the consequences of their actions because they are unable to give consent to a test required under Section 80. There is also concern that some persons are avoiding the law by feigning unconsciousness.

This defect in the existing legislation is particularly disturbing to the relatives and acquaintances of someone killed or maimed by persons known to have consumed alcohol prior to an accident, but who avoid the legal consequences.

This legislation will also serve as a further deterrent to drink driving by removing a possible means of avoiding detection and increasing the perceived risk of detection.

I believe that the existing Random Breath Testing arrangements were a more significant issue for individual rights and liberties but the significant community support for such widespread and random sampling clearly indicates that the rights and liberties of innocent road users should be given precedence.

5. The committee notes the Member's response.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[40]

- **Clause 5 (proposed ss.80G and 80H)**

6. Clause 5 of the bill (proposed ss.80G and 80H) enables the contents of evidentiary certificate provisions to be taken as evidence. The committee expressed concern that cl.5 goes beyond non-contentious matters. The committee noted, however, that the provisions are consistent with a general policy underlying the provisions of the *Transport Operations (Road Use Management) Act 199*5. The committee referred to Parliament the question of whether the provisions of ss.80G and 80H have sufficient regard to the rights of persons against whom evidence of blood, breath or urine test results may be led.

7. The Member responded:

The Committee has also noted that sections 80G and 80H enable significant matters to be put in evidence by means of certificate. The Committee has expressed concern that these provisions include matters that may be contentious in nature and has referred to Parliament the question of whether there is sufficient regard to the rights of persons against whom evidence of blood, breath or urine samples may be led.

Firstly this Bill only deals with certification in relation to blood tests. Breath and urine testing certification is already dealt with by the existing legislation and the provisions of this Bill provide similar certification arrangements to those that have operated for quite some time in the existing and previous legislation.

[40] Section 4(3)(d) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

As I have already pointed out these provisions are also consistent with arrangements in other jurisdictions that have operated without significant difficulties in the past.

The discretion exists for a court to require an analyst to attend and this can be seen as recognising the need in some circumstances to introduce direct evidence in circumstances in which there may be some reasonable doubt about the accuracy of a certification process. Specific provision in this respect is made in Section 80H.

I believe that where a conclusive certification can be overturned by contrary evidence, it is only conclusive to the extent that no evidence has led to challenge it. Once it is challenged it is really only prima facie evidence because it is open to a court to accept or to reject the certificate evidence.

For the information of the Committee a draft copy of this Bill was provided to a wide range of stakeholders seeking comment. These stakeholders included the Queensland Council for Civil Liberties and the Queensland Law Society but, despite follow up phone calls to both organisations, no comment has been forthcoming.

In these circumstances I believe that this Bill does have sufficient regard to the rights of defendants and that the provisions in this Bill are warranted.

8. The committee notes the Member's response.

AMENDMENTS TO BILLS[41]

ANIMAL AND PLANT HEALTH LEGISLATION AMENDMENT BILL 2002

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 4 of 2002 at pages 5-10. On 9 May 2002, the Honourable Henry Palaszczuk MP, Minister for Primary Industries and Rural Communities, provided the committee secretariat with a copy of an amendment, which he proposed to move to the above bill during the committee stage of debate. The committee notes that as at the date of publication of this Alert Digest No 5 of 2002 the bill has not been passed

2. The amendment proposed by the Minister raises no issues within the committee's terms of reference.

CRIMINAL LAW AMENDMENT BILL 2002

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 3 of 2002 at pages 4 to 8. During the committee stage of debate, Parliament agreed to certain amendments proposed by the Minister sponsoring the bill, the Honourable Rod Welford MP, Attorney-General and Minister for Justice. The bill was subsequently passed, with the amendments proposed by the Attorney incorporated in it, on 16 May 2002.

2. The amendments proposed by the Attorney raised no issues within the committee's terms of reference.

NATURAL RESOURCES AND MINES LEGISLATION AMENDMENT BILL 2002

1. In this Alert Digest the committee reports that it considers this bill, as originally introduced, raises no issues within the committee's terms of reference (see Table of Contents, page iii).

2. However, on 3 June 2002 the Minister sponsoring the bill, the Honourable Stephen Robertson MP, forwarded to the committee a copy of amendments to the bill which he will be proposing during the committee stage of debate, together with Explanatory Notes relating to those amendments.

3. The committee considers these proposed amendments raise issues within its terms of reference.

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41 On Wednesday 7 November 2001, Parliament resolved as follows:

> *the House confers upon the Scrutiny of Legislation Committee the function and discretion to examine and report to the House, if it so wishes, on the application of the Fundamental Legislative Principles to amendments* (to bills)*, whether or not the bill to which the amendments relate has received Royal Assent.*

On 18 February 2002 the committee resolved to commence reporting on amendments to bills, on the following basis:

- *all proposed amendments of which prior notice has been given to the committee will be scrutinised and included in the report on the relevant bill in the Alert Digest, if time permits*
- *the committee will not normally attempt to scrutinise or report on amendments moved on the floor of the House, without reasonable prior notice, during debate on a bill*
- *the committee will ultimately scrutinise and report on all amendments, even where that cannot be done until after the bill has been passed by Parliament (or assented to), except where the amendment was defeated or the bill to which it relates was passed before the committee could report on the bill itself.*

4. The amendments insert several additional provisions into the *Mineral Resources Act 1989*. They validate a mining lease under which a major underground coal mine has been conducted for some years (proposed s.418A), and deal with compensation of persons with interests in the relevant land (proposed s.418B).

5. The Explanatory Notes state that doubts have recently arisen about the validity of the relevant mining lease because it does not incorporate a depth limitation.

6. The practice of making retrospectively validating legislation is not one which the committee endorses, because such law could adversely affect rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. The committee does, however, recognise that there are occasions on which curative retrospective legislation, without significant effects on rights and liberties of individuals, is justified to correct unintended legislative consequences.

7. The Explanatory Notes state that all parties have at all times acted on the assumption that the mining lease was valid. It is also worth noting that the situation is not one in which the mining lease is clearly invalid: the situation is rather one in which there is a significant possibility of that being the case. If the lease were in fact not presently invalid, then the bill would not alter the current legal position.

8. A pivotal issue from the committee's perspective is whether the validation will adversely affect any person.

9. In this regard, the committee notes that s.418A(5) expressly protects any compensation agreements or orders previously made by the holder of the mining lease in relation to the inclusion of any land in the mining lease. The committee further notes that in relation to the validations made by this bill, proposed s.418B(2) confers upon the owner of the "surface" freehold involved (lot 65) an entitlement to compensation similar to that which the Act confers upon affected owners generally.

10. However, s.418(3) provides that compensation is not payable to the owner of the "subterranean" freehold lot underneath lot 65 (lot 66).

11. Although the Notes do not expressly say so, the committee assumes there are no other owners or persons associated with the relevant land whose positions will be adversely affected by this bill.

12. In relation to the denial of compensation to the owner of lot 66, the Explanatory Notes state:

> *....the proposal is consistent with the policy intent of the Mineral Resources Act that only surface freehold tenures are compensable.*

13. The Notes also state, in relation to this matter:

> *There are two reasons for this. The first is that the Mineral Resources Act was never intended to provide for the grant of a surface area of a subterranean lot. The second reason is that it is arguable that the land owner has a right under section 179 of the Property Law Act 1974 to have his land supported. Section 179 was never intended to apply to volumetric subdivisions of land that involve subterranean freehold tenures that may be impacted on by mining.*

The proposed amendment will clarify these matters.

14. The committee notes that the Minister's proposed amendments to this bill may have retrospective effect. The committee further notes that whilst the amendments protect previous compensation agreements and orders, and enable one affected owner to seek compensation, one other affected owner is precluded from obtaining compensation.

15. The committee refers to Parliament the question of whether the retrospective provisions of this bill have sufficient regard to the rights of this latter owner.

PUBLIC RECORDS BILL 2001

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 1 of 2002 at pages 23-29. During the committee stage of debate, Parliament agreed to certain amendments proposed by the Minister sponsoring the bill, the Honourable Paul Lucas MP, Minister for Innovation and Information Economy. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 17 April 2002.

2. The amendment to cl.12 of the bill arose from the committee's recommendation in Alert Digest No 1 of 2002. The amendment provides that a person is not guilty of the offence of "neglecting" a public record if the person has a reasonable excuse.

3. The amendment to cl.53 clarifies an issue raised by the committee with the Minister concerning the immunity conferred by cl.53(2)(b). The amendment qualifies the immunity given to the author of a public record or "another person" who supply the record, to cases where they have done so "under a requirement of this Act". This amendment overcomes the committee's previous reservations about cl.53(2)(b).

4. The remaining amendments proposed by the Minister raised no issues within the committee's terms of reference.

This concludes the Scrutiny of Legislation Committee's 5th report to Parliament in 2002.

The committee wishes to thank all departmental officers and ministerial staff for their assistance in providing information to the committee office on bills dealt with in this digest.

Warren Pitt MP
Chair

18 June 2002

APPENDICES

Appendix A	—	Ministerial Correspondence
Appendix B	—	Terms of Reference
Appendix C	—	Meaning of "Fundamental Legislative Principles"
Appendix D	—	Details of Bills considered by the committee.

APPENDIX B – TERMS OF REFERENCE

The Scrutiny of Legislation Committee is established by s.80 of the *Parliament of Queensland Act 2001*. It has been in existence since 15 September 1995, when it was originally established as a statutory committee by s.4 of the *Parliamentary Committees Act 1995* (repealed).

Terms of Reference

22.(1) The Scrutiny of Legislation Committee's area of responsibility is to consider—

(a) the application of fundamental legislative principles[42] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[43].

(2) The committee's area of responsibility includes monitoring generally the operation of—

(a) the following provisions of the *Legislative Standards Act 1992*–

- section 4 (Meaning of "fundamental legislative principles")
- part 4 (Explanatory notes); and

(b) the following provisions of the *Statutory Instruments Act 1992*–

- section 9 (Meaning of "subordinate legislation")
- part 5 (Guidelines for regulatory impact statements)
- part 6 (Procedures after making of subordinate legislation)
- part 7 (Staged automatic expiry of subordinate legislation)
- part 8 (Forms)
- part 10 (Transitional)

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42 "Fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, s.4(1)). The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

* The relevant section is extracted overleaf.

43 A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, s.50.

APPENDIX C - MEANING OF "FUNDAMENTAL LEGISLATIVE PRINCIPLES"

4.(1) For the purposes of this Act, "**fundamental legislative principles**" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.[44]

(2) The principles include requiring that legislation has sufficient regard to –

1. rights and liberties of individuals; and
2. the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation –

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with the principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(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; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation –

(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(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.

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[44] Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

APPENDIX D – DETAILS OF BILLS CONSIDERED BY THE COMMITTEE

Details of all bills considered by the committee since its inception in 1995 are contained in the Bills Register kept by the Committee's Secretariat.

Information about particular bills (including references to the Alert Digests in which they were reported on) can be obtained from the Secretariat upon request.