



## **SCRUTINY OF LEGISLATION COMMITTEE**

# **ALERT DIGEST**



Tabled 11 May 2004

Issue No 2 of 2004

# SCRUTINY OF LEGISLATION COMMITTEE

## MEMBERSHIP

### 51<sup>ST</sup> PARLIAMENT, 1<sup>ST</sup> SESSION

|                                  |  |
|----------------------------------|--|
| Chair:                           | Hon Ken Hayward MP, Member for Kallangur           |
| Deputy Chair:                    | Mr Peter Wellington MP, Member for Nicklin         |
|                                  | Mr Vaughan Johnson MP, Member for Gregory          |
|                                  | Mr Peter Lawlor MP, Member for Southport           |
|                                  | Mr Tim Mulherin MP, Member for Mackay              |
|                                  | Mrs Jann Stuckey MP, Member for Currumbin          |
|                                  | Mrs Carryn Sullivan MP, Member for Pumicestone     |
| Legal Advisers to the Committee: | Professor Gerard Carney                            |
|                                  | Mr Robert Sibley                                   |
|                                  | Ms Margaret Stephenson                             |
|                                  | Vacant   |
| Committee Staff:                 | Mr Christopher Garvey, Research Director           |
|                                  | Ms Renée Easten, Acting Principal Research Officer |
|                                  | Ms Carolyn Heffernan, Executive Assistant          |



Scrutiny of Legislation Committee  
Level 6, Parliamentary Annexe  
Alice Street  
Brisbane Qld 4000  
Phone: 07 3406 7671  
Fax: 07 3406 7500  
Email: [scrutiny@parliament.qld.gov.au](mailto:scrutiny@parliament.qld.gov.au)

## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>TERMS OF REFERENCE .....</b>  | <b>v</b>  |
| <b>FUNDAMENTAL LEGISLATIVE PRINCIPLES .....</b>  | <b>v</b>  |
| <b>PART I - BILLS .....</b>  | <b>1</b>  |
| <b>SECTION A – BILLS REPORTED ON .....</b>   | <b>1</b>  |
| <b>1. Aurukun Associates Agreement Repeal Bill 2004 .....</b>  | <b>1</b>  |
| Background.....  | 1         |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>  | <i>1</i>  |
| ◆ clauses 3 to 7 inclusive.....  | 1         |
| <b>2. Geothermal Exploration Bill 2004 .....</b>   | <b>3</b>  |
| Background.....  | 3         |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>  | <i>3</i>  |
| <i>Does the legislation provide for the compulsory acquisition of property only with fair compensation? .....</i>  | <i>3</i>  |
| ◆ clause 11.....   | 3         |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>  | <i>5</i>  |
| ◆ clauses 13 and 14 .....  | 5         |
| <i>Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?.....</i>  | <i>6</i>  |
| ◆ clause 14(1)(b) .....  | 6         |
| <i>Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? .....</i>   | <i>7</i>  |
| ◆ clauses 37 and 39 .....  | 7         |
| <i>Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? .....</i> | <i>8</i>  |
| ◆ clause 109.....  | 8         |
| <b>3. Land Acquisition Amendment Bill 2004 .....</b>   | <b>9</b>  |
| Background.....  | 9         |
| <b>4. Legal Profession Bill 2004.....</b>  | <b>10</b> |
| Background.....  | 10        |
| <i>Overview of the bill .....</i>  | <i>10</i> |
| <i>Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons? .....</i>   | <i>11</i> |
| <i>Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?.....</i>  | <i>11</i> |
| ◆ clauses 24, 50, 74, 86, 87, 117, 124, 145, 156, 182, 199, 200, 205, 316, 363, and 643.....   | 11        |

|  |           |
|--|-----------|
| <i>Does the legislation confer immunity from proceeding or prosecution without adequate justification? .....</i>   | <i>12</i> |
| ♦ clauses 148(4) and 164(4) .....  | 12        |
| <i>Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? .....</i> | <i>13</i> |
| ♦ clauses 182(5) and 183(4) .....  | 13        |
| <i>Does the legislation provide appropriate protection against self-incrimination? .....</i>   | <i>14</i> |
| ♦ clause 342(4) .....  | 14        |
| <i>Is the legislation unambiguous and drafted in a sufficiently clear and precise way? .....</i>   | <i>15</i> |
| ♦ clause 10 .....  | 15        |
| <b>5. Nature Conservation Amendment Bill 2004 .....</b>  | <b>16</b> |
| Background .....   | 16        |
| <b>6. Parliament of Queensland Amendment Bill 2004 .....</b>   | <b>17</b> |
| Background .....   | 17        |
| Overview of the bill .....   | 17        |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals? .....</i>   | <i>18</i> |
| <i>Does the legislation have sufficient regard to the institution of Parliament? .....</i>   | <i>18</i> |
| ♦ clause 3 .....   | 18        |
| <i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>   | <i>19</i> |
| ♦ clause 4 .....   | 19        |
| <b>7. Private Property Protection Bill 2004 .....</b>  | <b>20</b> |
| Background .....   | 20        |
| <b>8. Residential Services and Other Legislation Amendment Bill 2004 .....</b>   | <b>21</b> |
| Background .....   | 21        |
| <i>Is the legislation unambiguous and drafted in a sufficiently clear and precise way? .....</i>   | <i>21</i> |
| ♦ clauses 4 and 7 .....  | 21        |
| <b>9. Terrorism (Community Safety) Amendment Bill 2004 .....</b>   | <b>23</b> |
| Background .....   | 23        |
| Positive aspects of the bill .....   | 23        |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals? .....</i>   | <i>23</i> |
| ♦ clauses 5, 6 and 7 (Surveillance Warrant applications by CMC) .....  | 23        |
| ♦ clauses 27-37 inclusive .....  | 26        |
| <b>10. Transport and Other Legislation Amendment Bill 2004 .....</b>   | <b>29</b> |
| Background .....   | 29        |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals? .....</i>   | <i>29</i> |
| ♦ clause 55 (proposed s.158) .....   | 29        |
| <b>SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE .....</b>  | <b>31</b> |
| <b>11. Duties Amendment Bill 2004 .....</b>  | <b>31</b> |

|  |           |
|--|-----------|
| Background.....  | 31        |
| <i>Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? .....</i> | <i>31</i> |
| ◆ clauses 4, 5, 7 and 13 .....   | 31        |
| <i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>   | <i>32</i> |
| ◆ clause 2.....  | 32        |
| <b>12. Natural Resources and Other Legislation Amendment Bill 2004.....</b>  | <b>33</b> |
| Background.....  | 33        |
| <i>Does the legislation provide for the compulsory acquisition of property only with fair compensation? .....</i>  | <i>33</i> |
| ◆ clause 10.....   | 33        |
| <b>13. Sugar Industry Reform Bill 2004.....</b>  | <b>35</b> |
| Background.....  | 35        |
| <i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>  | <i>35</i> |
| ◆ clauses 29 (proposed ss.386, 387, 390 and 391), 30 (proposed ss.393-395), 32 (proposed ss.407-408), 33 (proposed ss.413-414), 34 (proposed ss.416 and 417) and 35 (proposed ss.419-420).....         | 35        |
| ◆ clause 15 (proposed ss.107R, 107S, 107U, 107V and 107W) .....  | 35        |
| ◆ clause 15 (proposed s.107T) .....  | 35        |
| <i>Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?.....</i>   | <i>36</i> |
| ◆ clause 15 (proposed s.107X).....   | 36        |
| <b>14. Vegetation Management and other Legislation Amendment Bill 2004.....</b>  | <b>37</b> |
| Background.....  | 37        |
| <i>Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? .....</i> | <i>37</i> |
| ◆ clause 15 (proposed s.22L) .....   | 37        |
| <b>SECTION C – AMENDMENTS TO BILLS .....</b>   | <b>39</b> |
| <i>(NO AMENDMENTS TO BILLS ARE REPORTED ON IN THIS ALERT DIGEST) .....</i>   | <i>39</i> |
| <b>APPENDIX</b>  |           |
| <br>   |           |
| <b>PART II – SUBORDINATE LEGISLATION .....</b>   | <b>40</b> |
| <b>SECTION A – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCERNS.....</b>  | <b>40</b> |
| <b>SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES (including list of correspondence).....</b>  | <b>41</b> |
| <b>APPENDIX</b>  |           |

**NOTE:**

*Details of all bills considered by the committee since its inception in 1995 can be found in the Committee's Bills Register. Information about particular bills (including references to the Alert Digests in which they were reported on) can be obtained from the Committee Secretariat upon request.*

*Alternatively, the Bills Register may be accessed via the committee's web site at:*

**[HTTP://WWW.PARLIAMENT.QLD.GOV.AU/COMMITTEES/SLC/SLCBILLSREGISTER.HTM](http://www.parliament.qld.gov.au/committees/slc/slcbillsregister.htm)**

## TERMS OF REFERENCE

The Scrutiny of Legislation Committee was established by statute on 15 September 1995. It now operates under the provisions of the *Parliament of Queensland Act 2001*.

Its terms of reference, which are set out in s.103 of the *Parliament of Queensland Act*, are as follows:

- (1) *The Scrutiny of Legislation Committee's area of responsibility is to consider—*
- (a) *the application of fundamental legislative principles<sup>1</sup> to particular Bills and particular subordinate legislation; and*
  - (b) *the lawfulness of particular subordinate legislation;*
- by examining all Bills and subordinate legislation.*
- (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).*

## FUNDAMENTAL LEGISLATIVE PRINCIPLES

The "fundamental legislative principles" against which the committee assesses legislation are set out in section 4 of the *Legislative Standards Act 1992*.

Section 4 is reproduced below:

- 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.<sup>2</sup>*

<sup>1</sup> "Fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, section 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.

<sup>2</sup> 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.

- (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.*



# **PART I**

## **BILLS**

**PART I - BILLS****SECTION A – BILLS REPORTED ON****1. AURUKUN ASSOCIATES AGREEMENT REPEAL BILL 2004****Background**

1. The Honourable S Robertson MP, Minister for Natural Resources, Mines and Energy, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Minister in his Second Reading Speech, is:

*to repeal the Aurukun Associates Agreement Act 1975.*

**Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>3</sup>****◆ clauses 3 to 7 inclusive**

3. The *Aurukun Associates Agreement Act 1975* was enacted to authorise the making of an agreement between the State of Queensland and three mining companies including Aluminium Pechiney Holdings Limited (“Pechiney”), in relation to the development of bauxite deposits at Aurukun in Cape York.
4. Pursuant to the agreement, a Special Bauxite Mining Lease (now Mining Lease No. 7032) was granted to the companies. Since 1985, Pechiney has held 100% of the interest in the mining lease.
5. In breach of a requirement of the agreement, the companies did not construct an aluminium refinery within the leased area or elsewhere in Queensland. Several extensions of time were granted by the State, but the refinery was still not built.
6. That situation continued until October 2003, when the Premier demanded Pechiney surrender the lease. It declined to do so and the State commenced legal proceedings in the Queensland Supreme Court, which are ongoing.
7. The purpose of this bill is to:
  - repeal the *Aurukun Associates Agreement Act 1975* (see cl.5);
  - cancel the mining lease (see cl.3); and
  - declare that the agreement entered into under the 1975 Act has, and has had since 1988, no force and effect.<sup>4</sup>

---

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

<sup>4</sup> The committee notes in passing that this bill bears at least some similarities to the *Irvinebank State Treatment Works Repeal Bill 2003*, upon which the committee reported in Alert Digest No 9 of 2003 at pages 10 to 11.

8. The effect of these provisions will be to erase any claim Pechiney may have, and enable the relevant bauxite deposits to be offered to other miners for development.
  9. Clause 6 of the bill provides that the State will pay Pechiney an amount of \$572,160 within 20 business days after repeal of the 1975 Act, plus costs in relation to the current Supreme Court proceedings. The amount of \$572,160 represents rental payments made by the company to the State under the mining lease between 1989 and 2003, plus interest.
  10. The bill has an obvious and direct effect upon Pechiney, and the issue for the committee is whether the various provisions of the bill produce a result which is fair in the circumstances.
  11. The position is rather complex. On the one hand, Pechiney did not build a refinery as required by the Agreement, despite several extensions. On the other hand, it continued to pay the mining lease rentals and it does not appear the State took any definitive action to terminate the agreement or the lease until recently.
  12. Clause 7 of the bill provides that, apart from the payments mentioned in cl.6, no other amounts are payable by the State to Pechiney in relation to any aspect of this matter, including the enactment of this bill and the cancellation of the mining lease.
  13. The committee notes from the Minister's speech that he considers Pechiney's failure to start work on a refinery by the end of 1988 deprived the Agreement of any force and effect, and that the company has since had a statutory obligation to surrender the lease.
  14. Given the complex circumstances and history of this matter, the committee does not feel in a position to reach any firm view as to the extent of Pechiney's current legal rights.
15. The committee notes that this bill repeals the *Aurukun Associates Agreement Act 1975*, declares that the Agreement made under that Act has had no force and effect since 31 December 1988, and cancels the mining lease associated with the Agreement. Whilst the State will be obliged to pay Pechiney \$572,160 plus costs of a current Supreme Court action, no other compensation, reimbursement or other payment is payable in relation to the enactment of the bill, the cancellation of the lease or any other relevant matter.
  16. The Explanatory Notes and the Minister's Second Reading Speech both deal with the background to the bill at length.
  17. The committee refers to Parliament the question of whether the provisions of cls.3-7 of the bill have sufficient regard to the rights of Pechiney.
-

## 2. GEOTHERMAL EXPLORATION BILL 2004

### Background

1. The Honourable S Robertson MP, Minister for Natural Resources, Mines and Energy, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Minister in his Second Reading Speech, is:

*To establish a legal regime for geothermal exploration, which will put the Smart State in the box seat of an exciting new industry.*

*It will give industry the certainty it needs to invest in exploration, as well as providing a form of tenure and regulatory structure that will allow geothermal exploration to start as soon as possible.*

### **Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>5</sup>**

### **Does the legislation provide for the compulsory acquisition of property only with fair compensation?<sup>6</sup>**

#### ◆ **clause 11**

3. Clause 11(1) of the bill states:

*All geothermal energy on or below the surface of any land in the State is, and is taken always to have been, the property of the State.*

4. The regulatory regime established by the bill is based upon this fundamental premise. Under that regime, the State determines who can explore for and exploit this resource, and receives payments of “annual rent” from those persons (cl.43).
5. Clause 12 of the bill provides that each authority, lease, licence, permit or other instrument of tenure of land (a “grant”) is taken to contain a reservation to the State of all geothermal energy on or below the land and the exclusive right to authorise exploration, authorise persons to carry out activities related to exploration or extraction of geothermal energy, and regulate those processes. Clause 12(2) provides that the clause applies “whether the grant was made before or after the commencement of (the clause)”. Clause 12 ensures that all land in Queensland, no matter what its current title and encumbering interests, will be subject to the provisions of the bill.
6. The term “geothermal energy” is defined in the dictionary to the bill as “heat energy derived from natural geological processes”.

<sup>5</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

<sup>6</sup> 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.

7. The Explanatory Notes describe the geological background to geothermal energy as follows:

*The temperature of the Earth's crust increases with depth but this heat gradient is not uniform and can result in regional and localised "hot spots" with rock temperatures in excess of 200°C. If water already exists in, or can be injected into these rocks, this heated water can potentially then be extracted from the ground and passed through heat exchangers where this heat can be extracted and used in the production of electricity or for other industrial purposes.*

*Queensland contains significant resources of such rocks, particularly in the State's southwest.*

8. At common law, there is a presumption that a landowner also owns everything on or below the surface of that land, including all minerals on or beneath the surface.<sup>7</sup> This was always subject to an exception in relation to "Royal metals" (that is precious metals, particularly gold and silver).<sup>8</sup>
9. However, this common law principle has largely been abolished in Australia by statute, and the Crown in right of the State is now generally declared the owner of all minerals. Grants of land also routinely include express reservations to the Crown of all minerals.
10. In relation to cl.11, the Explanatory Notes state:

*The assumption of the right to geothermal energy in this way is arguably a breach of fundamental legislative principles as set out in the Legislative Standards Act 1992, on the basis that it would adversely affect the rights of a freehold landowner to the geothermal energy in the freehold land. In Queensland however, the holder of freehold land does not hold an allodial title but a tenurial title based on the Torrens system, which is subject to a number of reservations to the State. The Parliament has already reserved minerals and petroleum in this manner and is entitled to reserve geothermal energy also. The better view is that the holder of a freehold property has never had the right to any geothermal energy within their land.*

11. The committee notes that under cl.11, the State is not declared to be the owner of minerals, soil or other physical part of the land. Rather, it is declared the owner of a certain type of energy, namely, energy resulting from contact between water and hot subterranean rocks.
12. The committee considers it is probably more appropriate in conceptual terms to characterise cl.11 as a provision which, rather than involving the acquisition of mineral or other physical asset of a landowner, restricts the general common law right of an owner of freehold land to use his or her land in whatever manner he or she thinks fit.<sup>9</sup> As the committee has noted on a number of previous occasions,<sup>10</sup> this common law right of landowners has for many decades been subject to an increasing range of statutory restrictions.<sup>11</sup>

---

<sup>7</sup> This is encapsulated in the maxim *cujus est solum, ejus est usque ad coelum et usque ad inferos*.

<sup>8</sup> *Case of Mines (1567) 75ER472*.

<sup>9</sup> This bill goes further, by providing that the State can authorise persons other than the landowner to enter the land and do the things which the bill forbids the owner from doing.

<sup>10</sup> See, most recently, the committee's report on the *Vegetation Management and Other Legislation Amendment Bill 2004*: Alert Digest No. 1 of 2004 at pages 18-19.

<sup>11</sup> Moreover, given the information about geothermal energy provided in the Explanatory Notes, it may be that the land affected by this bill will in most cases be Crown leasehold land, not freehold land.

13. Under the bill's provisions, landholders (whether freehold owners or lessees) may of course be subject to various intrusions and detriments related to the exploration for, and exploitation of, geothermal energy on their land (see below).
14. The Explanatory Notes (at pages 1 and 2) and the Minister's speech both advance a number of justifications for the provisions of cl.11, and for the regulatory regime established under the bill.
15. Clause 100 of the bill confers upon landholders and others the capacity to claim compensation in relation to intrusions and detriments suffered by them. However, there is no automatic entitlement to compensation, as cl.101 provides payment can only be ordered by the tribunal if it considers it just.

16. The committee notes that cl.11 of the bill (which declares the State to be the owner of all geothermal energy on or below the surface of any land in the State), in essence restricts the capacity of owners of freehold land to use their property in the manner they see fit, and subjects landholders (whether owners or lessees) to a range of exploration and operational activities by permit holders and others operating under the provisions of the bill. Clause 100 of the bill confers upon landholders and others a right to claim compensation for any "compensatable effects".
17. The committee refers to Parliament the question whether the provisions of cl.11, and related provisions of the bill, have sufficient regard to the rights of landholders.

### **Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>12</sup>**

#### **◆ clauses 13 and 14**

18. Clauses 13 and 14 of the bill prohibit persons from carrying out "geothermal exploration" and extraction of geothermal energy unless eligible and authorised under the provisions of the bill. Breaches of these prohibitions constitute offences, punishable by substantial maximum penalties of 1,500 penalty units (\$112,500).

19. The committee notes that cls.13 and 14 create offences in relation to unauthorised geothermal exploration and extraction of geothermal energy, punishable by substantial maximum penalties of 1,500 penalty units (\$112,500).
20. The committee draws the magnitude of these penalties to the attention of Parliament.

<sup>12</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

**Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?<sup>13</sup>**

◆ **clause 14(1)(b)**

21. Clause 14(1) provides that a person must not extract, or carry out an activity related to the extraction of, geothermal energy unless that activity is authorised under the bill or is “an activity prescribed under a regulation”. As mentioned earlier, a maximum penalty of 1,500 penalty units is provided for breach of this provision.
22. Clause 14(2) provides that activities may be prescribed under 14(1)(b) only if they are:
  - related to the use of hot water for domestic or associated purposes; or
  - for remote power generation of no more than 250kW.
23. Clause 14(1)(b) appears to be a “Henry VIII clause” within the meaning of that term adopted by the committee.<sup>14</sup> As is well known, the committee does not favour the use of such provisions. Moreover, the provision does not appear to fall within any of the four categories of cases in which the committee concedes there may be some call for the use of a “Henry VII clause”.<sup>15</sup>
24. However, the committee notes that the range of matters which may be prescribed is very significantly limited by cl.14(2).
25. In relation to this matter, the Explanatory Notes state:

*(cl.14(2)) is required to enable existing low-use of bore water as a source of domestic hot water to continue. Intrusive regulation of such low level use is not the intent of this bill.*

26. The committee notes that cl.14(1)(b) of the bill appears to constitute a “Henry VIII clause”. However, the committee notes that the range of matters in relation to which regulations may be made under this provision is very significantly limited by cl.14(2).
27. The committee makes no further comment in relation to this provision.

<sup>13</sup> 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.

<sup>14</sup> See the committee’s January 1997 report on *The Use of Henry VIII Clauses in Queensland Legislation*.

<sup>15</sup> These are urgent Executive action, innovative legislative schemes, transitional arrangements, and national scheme legislation.

**Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?<sup>16</sup>**

◆ **clauses 37 and 39**

28. Clause 37 provides that a person who has been granted a geothermal exploration permit under cl.32, and an “authorised person” for the permit, may enter the area of the permit (which may include privately owned land) to exercise the general exploration right under cl.35(1).
29. Clause 39 provides that these persons may take, interfere with and use underground water for geothermal exploration if the water is necessarily taken during the carrying out of geothermal exploration in the area.
30. These provisions clearly authorise actions which are or may be quite intrusive in nature. However, various other provisions of the bill impose restrictions upon these rights to enter and exploit underground water. Clause 87 imposes restrictions on the entry power in relation to “restricted land”. This term is defined in cl.87(2) to include a range of categories of land, in particular land within 100m laterally of permanent buildings used for accommodation, business or community purposes, and land within 50m laterally of a range of agricultural or other features, as well as heritage-listed and significant Aboriginal and Torres Strait islander areas. Clause 46 requires the permit holder to restore any damage to an improvement on the land in question, to replace it, or to pay agreed compensation.
31. Further, cl.91 imposes a general requirement to give at least 5 business days notice of entry, and cls.100 and 101 provide an entitlement to claim compensation for landholders and other relevant persons. This right arises if activities under a geothermal exploration permit result in deprivation of possession of the land surface, diminution of its value or of the use made of it, or severance of any part of the land from other parts of the land, as well as any cost arising from the carrying out of activities under the permit.<sup>17</sup>
32. The Explanatory Notes deal with this issue as follows:

*The Bill will create certain rights of access to private land. Access of this nature is, however, already provided to mineral and petroleum explorers under other legislation. Numerous checks and balances are provided in the Bill to minimise and control land use conflict issues arising from this access however. These provisions include a duty of care, compensation and restitution provisions, notification requirements, restrictions on activities that can be undertaken, access only by consent in the vicinity of dwellings or stock watering points and penalties for contravening these requirements.*

*The provision of access is essential for the exploration to be able to proceed. Given the number of checks and balances provided above, the minimal number of tenure likely to be involved, the relatively small “footprint” of geothermal exploration and the sparsely populated nature of the area of prime interest, this should not, however, be a significant issue.*

<sup>16</sup> 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.

<sup>17</sup> Clause 101 provides that compensation may only be ordered by the Land and Resources Tribunal if it is “satisfied that it is just to make the order in the circumstances of the particular case”.



33. The committee notes that the bill confers power on permit holders and associated persons to enter private land. However, the bill contains a number of restrictions upon the exercise of this power.
34. The committee refers to Parliament the question whether these provisions of the bill have sufficient regard to the rights of landholders.

**Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?<sup>18</sup>**

◆ **clause 109**

35. Under the bill, appeal rights are dependent upon whether persons are required to be given an “information notice”. They can then appeal to the Land and Resources Tribunal against the relevant decisions (see cl.109).
36. A range of decisions under the bill are therefore appellable. These include applications by a permit holder under cl.57 to amend a permit condition, to defer compliance with certain provisions of the bill, to defer the time provided for achievement of a specific objective, to surrender or transfer the permit (cl.58) and decisions by the Minister or chief executive to amend, cancel or suspend a permit or permit condition (see cl.81(2)(a)). Decisions under cls.126-128 inclusive are also appellable.
37. However, various other decisions, including most importantly the decision to grant a permit under cl.32, are not appellable, either by a landholder or by an unsuccessful tenderer, although “affected persons” have a right to make submissions under cl.25. Other decisions in relation to which no appeal appears to be available include the various directions which may be given under cls.102-108 inclusive.
38. The Explanatory Notes address this issue as follows:

*All administrative decisions proposed under the Bill that would affect existing rights, will be subject to appeal rights on the merits. This appeal right will not extend to proposed decisions regarding the grant of new rights. The applicant in the latter instance will have a right to state their case and be heard, but will not have appeal rights. An unfavourable outcome in these instances would result in no change to the then status quo and as such, would not infringe fundamental legislative principles.*

39. The committee notes that the bill provides no appeal rights in relation to certain administrative decisions taken under its provisions.
40. The committee refers to Parliament the question whether these provisions of the bill have sufficient regard to the rights of the landholders and other persons to whom appeal rights are denied.

<sup>18</sup> Section 4(3)(a) 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 makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

**3. LAND ACQUISITION AMENDMENT BILL 2004****Background**

1. Mr J W Seeney MP, Deputy Leader of the Opposition and Member for Callide, introduced this bill into the Legislative Assembly on 21 April 2004 as a private member's bill.
2. The object of the bill, as indicated by the Member in his Second Reading Speech, is to:

*enshrine in law a charter of property rights that will be the basis for greater security and fair dealing between successive Queensland Governments and private property owners.*
3. This bill is identical to the *Land Acquisition Amendment Bill 2003*, which was introduced on 10 September 2003 by the member during the life of the previous (50<sup>th</sup>) Parliament. That bill had not been debated by the time Parliament was dissolved in January 2004, and accordingly lapsed.
4. The Scrutiny of Legislation Committee of the 50<sup>th</sup> Parliament reported on the earlier bill (see Alert Digest No. 10 of 2003 at pages 6 and 7), to which readers are referred.
5. The committee adopts and repeats the comments contained in its predecessor committee's report on the earlier bill.

## 4. LEGAL PROFESSION BILL 2004

### Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 29 April 2004.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*(to provide) for reforms to the regulation of the legal profession in the interests of the administration of justice and the protection of consumers of legal services. (and)...also (to facilitate) legal practice on a national basis.*

### Overview of the bill

3. This bill is an extremely large document of 427 pages, containing 643 clauses and 5 schedules.
4. As the Attorney indicates in his Second Reading Speech, the bill incorporates (with some modifications) the provisions of the *Legal Professional Act 2003*, which was enacted in November 2003 but which has not yet been proclaimed. It also includes additional provisions, including provisions relating to multi-disciplinary partnerships, fidelity cover, external intervention, practice of foreign law by foreign lawyers and provisions relating to the Queensland Law Society Incorporated. The current bill is described by the Attorney as the second stage of the Government's reforms of the Queensland legal profession (he described the 2003 bill as the first stage).
5. The previous Scrutiny of Legislation Committee reported on the bill for the 2003 Act in Alert Digest No. 12 of 2003 at pages 13 to 16. The Attorney's response to matters raised by the previous committee appears in the current committee's Alert Digest No. 1 of 2004 at pages 26 to 29. Readers are referred to both of those reports.
6. Although the clause numbers have changed somewhat, the matters raised by the predecessor committee in relation to the 2003 bill arise again in relation to this bill.

7. The committee adopts and repeats its predecessor committee's comments in relation to the issues common to the 2003 bill and this bill, but for the sake of convenience will not repeat them here.

8. In relation to the current bill generally, and specifically in relation to the new matter which it contains, the committee is of the same view as its predecessor expressed in relation to the 2003 bill, that is, that whilst it is a lengthy, complex and significant piece of legislation, it raises comparatively few issues for the committee.
9. The additional issues raised by the current bill, and one further matter related to the 2003 bill content, are dealt with below.

**Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?<sup>19</sup>**

**Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?<sup>20</sup>**

◆ **clauses 24, 50, 74, 86, 87, 117, 124, 145, 156, 182, 199, 200, 205, 316, 363, and 643**

10. An obvious feature of this bill is the very extensive reliance which it places on the making of regulations. Various provisions which authorise the making of regulations are listed above, although the list is far from exhaustive. Indeed, the number of provisions of the bill which authorise the making of regulations is so large as to preclude any attempt to deal with them individually.
11. The committee’s general view is that subordinate legislation-making powers in bills should be kept to the minimum which is appropriate in the circumstances. The inclusion of a power to make regulations will in fact be appropriate in the case of most bills, and in some cases it will be justifiable for that power to be quite extensive (planning legislation is a case in point).
12. Whilst regulation of the legal profession is a subject about which some level of regulation-making power will obviously be required, the Explanatory Notes (at various pages) cite a number of factors as justifying the very extensive use of regulations in the bill. They include:
  - the novel nature of many of the concepts introduced by the bill, including incorporated legal practices and multi-disciplinary legal practices
  - the consequent need for flexibility and the capacity to legislate rapidly as the need arises
  - the fact that many provisions of this bill form part of a national legislative scheme (model laws), an area in which broad regulation-making powers are traditionally required
  - related to this, the need to ensure maximum uniformity with the national model laws (which, for the reason mentioned above, contain many regulation-making powers).
13. The committee notes that cl.643 provides a transitional regulation-making power, of a type which appears in many bills under which one legislative scheme is replaced by another.
14. The committee further notes that a number of the regulation-making provisions in the bill are, or may be, “Henry VIII clauses” within the meaning of that term adopted by the committee. Such provisions include, most notably, cls.86, 87, 199, 200, and 316. These provisions all expressly enable provisions of the bill to be displaced by regulation.

<sup>19</sup> 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.

<sup>20</sup> 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.

15. Despite the committee's general disapproval of "Henry VIII clauses", it recognises that they may be excusable in four types of situations, namely:
- to facilitate immediate Executive action;
  - to facilitate the effective application of innovative legislation;
  - to facilitate transitional arrangements; and
  - to facilitate the application of national schemes of legislation.<sup>21</sup>
16. As mentioned above, the justifications put forward in the Explanatory Notes for the wide range of regulation-making powers in this bill (including the various "Henry VIII clauses") include all of these matters.

17. The committee notes that the bill contains a very large number of provisions authorising the making of regulations, including some "Henry VIII clauses".
18. The committee seeks confirmation from the Attorney that he is satisfied the extent of these delegations of legislative power is appropriate in the circumstances, and has been kept to the minimum reasonably achievable.

**Does the legislation confer immunity from proceeding or prosecution without adequate justification?<sup>22</sup>**

◆ **clauses 148(4) and 164(4)**

19. Clause 148(4) of the bill provides that no liability, including liability for defamation, is incurred by the Law Society, a council member or a person acting at their direction in relation to anything done or omitted to be done in good faith for the purpose of arranging for fidelity fund insurance.
20. Clause 164(6) applies to situations where the Law Society, having considered there may have been a default by a law practice, publishes a notice seeking information about the default or inviting claims in relation to it, or provides information to persons making inquiries in response to the notice. Clause 164(6) provides that in such cases, neither the publication nor the provision of information subjects a "protected person" to any liability including liability and defamation, provided the relevant actions have been carried out "in good faith". A "protected person" includes the Law Society, a council member, the proprietor, editor or publisher of a newspaper, an internet service provider or content host or a person acting at their direction.

<sup>21</sup> See the committee's January 1997 report *The Use of "Henry VIII Clauses" in Queensland Legislation* at page 56.

<sup>22</sup> 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.

21. In relation to these conferrals of immunity, the Explanatory Notes state:

*(cls.148 and 164) are based on the national model laws and are of limited effect where necessary for the administration of (the bill).*

22. It should be noted that, in order for the immunity to become available, it is only necessary that the person act “in good faith”. There is no additional requirement of an absence of negligence.

23. The committee notes that cls.148 and 164 confer immunity upon stipulated persons in stated circumstances, provided that they act “in good faith”.

24. The committee does not consider these grants of immunity to be unreasonable.

**Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?**<sup>23</sup>

◆ **clauses 182(5) and 183(4)**

25. Clause 182(4) provides that, despite amounts paid from the fidelity fund being generally “capped” at an amount set by regulation, the Law Society may nevertheless authorise payment of a larger amount “if satisfied that it would be reasonable to do after taking into account the position of the fidelity fund and the circumstances of the particular case”.

26. Clause 182(5) provides that no proceedings can be brought by way of appeal or otherwise to require the payment of a larger amount or consideration of such payment.

27. In relation to this matter, the Explanatory Notes state:

*The clause can be justified having regard to the finite resources of the fund. Caps on claims are needed to maximize the availability of the fund for claimants where a single large claim or groups of claims could potentially exhaust the fund. The clause is considered appropriate because, if the cap is not exceeded, the law society is already paying the maximum claim generally allowed under the legislation. To provide a right of appeal for payments not made in excess of the cap would not be workable.*

28. Clause 183(1) provides that if the Law Society believes the fidelity fund is likely to be insufficient to meet its ascertained and contingent liabilities it may do various things including postponing all payments or making only partial payments.

29. Clause 183(4) provides that such a decision of the Law Society “is final and not subject to appeal or review”.

<sup>23</sup> Section 4(3)(a) 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 makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

30. In relation to this provision, the Explanatory Notes state:

*The clause can be justified having regard to the finite resources of the Fund and the foreseeable possibility of the insufficiency of the Fund due to extraordinary claims.*

31. The committee notes that cls.182 and 183 of the bill provide that specified decisions of the Law Society shall not be subject to review. The Explanatory Notes advance arguments in favour of these denials of review rights.
32. The committee refers to Parliament the question whether these denials of review rights are acceptable in the circumstances.

### Does the legislation provide appropriate protection against self-incrimination?<sup>24</sup>

#### ◆ clause 342(4)

33. Clause 342(1) provides that the Supreme Court may, on application by the receiver for a law practice or on its own initiative, order an associate or former associate of the practice or another person to appear before the court for examination in relation to the “regulated property” of the law practice. On examination, the person is required to answer all questions that the court allows to be put (cl.342(2)). Clause 342(3) provides that an individual is not excused from answering a question on the ground that the answer might tend to incriminate the person.
34. The committee has reported on provisions of this type on a number of previous occasions.<sup>25</sup> The committee’s general view is that denial of the protection afforded by the rule against self-incrimination is only potentially justifiable:
- if the questions posed concern matters which are peculiarly within the knowledge of the persons to whom they are directed, and it would be difficult or impossible to establish by any alternative evidentiary means; and
  - the bill prohibits the use of any information obtained in prosecutions against the person; and
  - in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).
35. The committee concedes that information in relation to the “regulated property” of the law practice<sup>26</sup> may well involve matters peculiarly within the knowledge of the person to whom the questions are directed.
36. Moreover, the committee notes that cl.342(4) of the bill provides protection against use of the answer in evidence, and also provides a “derivative evidence” immunity in relation to

<sup>24</sup> 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.

<sup>25</sup> See, for example, Alert Digest No. 1 of 2000 at pages 7-8 (*Guardianship and Administration Bill 1999*).

<sup>26</sup> “Regulated property” is defined in cl.315 of the bill as meaning trust money received, receivable or under the control of the practice, other property received or receivable in providing legal services, interest dividends or other income derived from those matters, documents or records relating to them.

evidence derived as a direct or indirect result of the answering of the questions. These immunities relate generally to proceedings for “offences”, other than offences against a “relevant law”<sup>27</sup> or proceedings for perjury.

37. The Explanatory Notes state, in relation to cl.342(3) and (4):

*It is considered adequate that the court controls this process and the person is subsequently protected.*

38. The committee notes that cl.342(3) removes the protection of the rule against self-incrimination in relation to Supreme Court examinations of associates of a legal practice or other persons, in relation to “regulated property” of the law practice. The committee further notes that the bill confers a general immunity from use of the answer or “derivative evidence” in relation to proceedings for offences (subject to certain exceptions).
39. The committee refers to Parliament the question whether, in the circumstances, the exclusion by cl.342(3) of the rule against self-incrimination is justifiable.

### **Is the legislation unambiguous and drafted in a sufficiently clear and precise way?<sup>28</sup>**

#### **◆ clause 10**

40. Various requirements of the bill do not apply in relation to “government legal officers” who engage in legal practice in that role. In particular, such persons are not required to hold a practising certificate (cl.47(2)).
41. The term “government legal officer” is defined in cl.10(1). Paragraph (a) of cl.10(1) includes in the definition persons employed in or appointed to:

*A department of this jurisdiction, the commission (the Legal Services Commission) or an agency prescribed under a regulation for this paragraph (underlining added).*

42. The drafting of this provision clearly recognizes that there will be a range of Queensland public sector agencies, other than departments of Government, whose staff should appropriately be afforded the status of “government legal officers”.
43. It occurs to the committee that, whilst retaining a residual power to extend the definition by regulation, it should be possible to specify a number of the more obvious agencies in the bill itself.

44. The committee seeks information from the Attorney as to whether consideration was given to drafting cl.10(1) in the manner mentioned.

<sup>27</sup> Essentially the bill or previously or subsequently applicable provisions of the *Legal Practitioners Act 1995*, the *Queensland Law Society Act 1952* or the *Trust Accounts Act 1973*.

<sup>28</sup> 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. NATURE CONSERVATION AMENDMENT BILL 2004****Background**

1. The Honourable R J Mickel MP, Minister for Environment, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*to make the hierarchy of categories of protected wildlife in the Nature Conservation Act 1992 (NCA) more consistent with those used by the International Union for the Conservation of Nature (IUCN).*

3. The committee considers that this bill raises no issues within the committee's terms of reference.

## 6. PARLIAMENT OF QUEENSLAND AMENDMENT BILL 2004

### Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*To reinstate the previously applicable exemption in respect of land transactions from the statutory prohibition on Members' transacting business with the State under section 71 of the Parliament of Queensland Act 2001.*

### Overview of the bill

3. The background to this bill is dealt with at length in the Explanatory Notes at pages 1 to 2, to which readers are referred. In brief, the situation is that:
  - the legislation applicable until 6 June 2002 (the *Constitution Act 1867*) prohibited Members of Parliament from transacting business with an entity of the State. Breach of the provisions resulted in any relevant contract being invalidated, and the Member's seat becoming liable to vacation. However, the legislation provided exemptions for:
    - arrangements involving provision by the State to the Member of goods and services
    - arrangements involving the acquisition by the Member from the State of an interest in land
    - arrangements involving the acquisition by the State from the Member of an interest in land.
  - When the relevant legislation was consolidated in the *Parliament of Queensland Act 2001* (which took effect from 6 June 2002), the first of these three exemptions was re-enacted but the second and third were inadvertently omitted.<sup>29</sup>
4. The current bill effectively reinstates the omitted range of exemptions, retrospective to the date of their omission.

<sup>29</sup> It is clear from the report of the Legal Constitutional and Administrative Review Committee on *Consolidation of the Queensland Constitution: Final Report* (Report No. 13, tabled April 1999) that it had been intended to re-enact the omitted provisions (see report, Part III at page 22).

**Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>30</sup>****Does the legislation have sufficient regard to the institution of Parliament?<sup>31</sup>****◆ clause 3**

5. Clause 3 of the bill omits current s.70(2)(a)(ii) of the *Parliament of Queensland Act 2001* and replaces it with a new paragraph. The new provision provides exemptions for Members of Parliament, not only in relation to business transactions involving provision by an entity of the State to the Member of goods or services (as presently applies), but also in relation to transactions involving acquisition by a Member from an entity of the State of an interest in land, and vice versa.
  6. As mentioned earlier the effect of the amendment is to reinstate the wider range of exemptions existing prior to 6 June 2002, the omission of which from the 2002 consolidating legislation appears to have been inadvertent. The reinstatement is retrospective to the date of the omission, which effectively means that they are deemed never to have been omitted.
  7. The provisions of the bill deal with one aspect of a somewhat broader issue, namely, the extent to which Members of Parliament should be able to transact business with the State. As the Premier indicates in his Second Reading speech, that general issue (effectively an examination of s.70 of the *Parliament of Queensland Act 2001*) was referred by the previous Parliament to the then Members Ethics and Parliamentary Privileges Committee on 27 November 2003. The current Members Ethics and Parliamentary Privileges Committee recently resolved to continue that examination.
  8. In the circumstances, the Scrutiny of Legislation Committee has decided not to embark upon an examination of the ultimate merits of the provisions embodied in this bill. It considers that is a matter best left to the Members Ethics and Parliamentary Privileges Committee as part of its current inquiry.
- |  |
|--|
| <ol style="list-style-type: none"> <li>9. The committee notes that cl.3 of the bill broadens the range of exemptions available to Members of Parliament in respect of transacting business with entities of the State, by including land transactions in those exemptions. This effectively restores the situation which applied prior to 6 June 2002.</li> <li>10. The committee notes that the matters dealt with this bill, and the whole issue of the capacity of Members of Parliament to transact business with the State, is currently the subject to an inquiry by the Members Ethics and Parliamentary Privileges Committee.</li> <li>11. In the circumstances, the committee makes no comment on the appropriateness of the additional exemptions conferred by this bill.</li> </ol> |
|--|

<sup>30</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

<sup>31</sup> Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>32</sup>**

◆ **clause 4**

12. Clause 4 effectively provides that the amendments made by the bill will be deemed to have applied at all times since the consolidating legislation came into force on 6 June 2002. In other words, the wider range of exemptions for Members of Parliament will be deemed to have continued uninterrupted.

13. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has “sufficient regard”, the committee typically has regard to the following factors:

- whether the retrospective application is adverse to persons other than the government; and
- whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.

14. In relation to the retrospective application of the bill, the Explanatory Notes state:

*This retrospective operation is not considered to be objectionable, for the following reasons:*

- *the omission of the exemption from the Parliament of Queensland Act 2001 was inadvertent, and was therefore also not publicised;*
- *the amendment is intended to be curative in nature, so as to restore the previously applicable exemption; and*
- *the practical difficulty of seeking to undo any land transactions between Members of the Assembly and the State that may have taken place since 6 June 2002.*

15. The effect of the bill is to enlarge the range of exemptions available to Members of Parliament in terms of transacting business with the State, and it is therefore beneficial to those individuals.

16. The committee notes that cl.4 of the bill provides that the amendments which it makes will be deemed to have applied from 6 June 2002. The bill is therefore retrospective in nature.

17. However, the bill appears to be clearly beneficial to individual Members of Parliament who may have entered into a relevant transaction during the interim period.

18. In the circumstances, the committee has no concerns in relation to the retrospective aspects of this bill.

<sup>32</sup> 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.

**7. PRIVATE PROPERTY PROTECTION BILL 2004****Background**

1. Mr J W Seeney MP, Deputy Leader of the Opposition and Member for Callide, introduced this bill into the Legislative Assembly on 20 April 2004 as a private member's bill.
2. The object of the bill, as indicated by the Member in his Second Reading Speech, is to:

*enshrine in law a charter of property rights that will be the basis for greater security and fair dealing between successive Queensland Governments and private property owners.*
3. This bill is identical to the *Private Property Protection Bill 2003*, which was introduced on 10 September 2003 by the member during the life of the previous (50<sup>th</sup>) Parliament. That bill had not been debated by the time Parliament was dissolved in January 2004, and accordingly lapsed.
4. The Scrutiny of Legislation Committee of the 50<sup>th</sup> Parliament reported on the earlier bill (see Alert Digest No. 10 of 2003 at pages 19 to 26), to which readers are referred.
5. The committee adopts and repeats the comments contained in its predecessor committee's report on the earlier bill.

## 8. RESIDENTIAL SERVICES AND OTHER LEGISLATION AMENDMENT BILL 2004

### Background

1. The Honourable M M Keech MP, Minister for Tourism, Fair Trading and Wine Industry Development, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Explanatory Notes, is to:
  - *exempt residential service-style independent student accommodation services from the Residential Services (Accreditation) Act 2002; and*
  - *ensure residents and operators of residential service-style independent student accommodation services are subject to the Residential Services (Accommodation) Act 2002.*

### Is the legislation unambiguous and drafted in a sufficiently clear and precise way?<sup>33</sup>

#### ◆ clauses 4 and 7

3. Clauses 4 and 7 of the bill respectively define two key terms, namely, “independent student accommodation service” and “residential service”, as services:

*conducted mainly to provide accommodation to persons who are enrolled in courses (underlining added) that, under the Social Security Act 1991 (Cwlth), section 569B, are approved courses of education or study for section 569A(b) of that Act.*

4. This is an example of “cross-referencing” or “signposting”. This is a practice under which terms which are to be assigned a particular meaning in an Act are not defined in the Act itself, but are defined by reference to a definition contained in another Act.
5. In the present case, the bill inserts into the *Residential Services (Accommodation) Act 2002* (Qld) and the *Residential Services (Accreditation) Act 2002* (Qld) definitions which make reference to courses approved in terms of s.569B of the *Social Security Act 1991* (Cwth). That provision in turn refers to a definition contained in another Commonwealth legislative provision, namely, s.5D of the *Student Assistance Act 1973* (Cwth). Furthermore, the relevant courses are not specified in s.5D itself but in ministerial determinations made under that section, to which readers must again refer. The committee notes that the s.5D determinations are “disallowable instruments” under s.46A of the *Acts Interpretation Act 1901* (Cwth) (that is, they are subordinate legislation).
6. The committee concedes that it is often impracticable to fully define, within the main body of a bill, all of the various terms requiring definition, and accordingly accepts that “signposting” can sometimes be justified.<sup>34</sup> Moreover, the committee has in recent years

<sup>33</sup> 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.

<sup>34</sup> See for example, the committee’s report on the *Police Powers and Responsibilities Bill 2000*: Alert Digest No. 3 of 2000 at page 13.

been less critical of the practice given that legislation (including cross-referenced provisions) is now more readily accessible, particularly via the internet. However, the committee remains of the general view that the practice is theoretically undesirable, and should be avoided where possible. The difficulties which the practice can cause readers of legislation is clearly illustrated by the current example, under which a three-stage reference process is required.

7. The Explanatory Notes, and a letter from the Minister to the committee's Chair dated 28 April 2004, cite three grounds justifying the use of the relatively convoluted drafting process embodied in cls.4 and 7. They are:

- a. the practical effect of the current Commonwealth definition is to refer to courses approved by relevant State accrediting bodies;*

- b. it is considered that the Commonwealth definition provides a necessary element for defining the relevant kind of accommodation service in the most appropriate way. The relevant approved courses are set out in the Determination. The Determination is brief, concise and uses a clear table of all types of tertiary and secondary courses and institutions that it applies to - all in the one location. By contrast, the use of Queensland education legislation would involve identifying and continual review and maintenance in relation to a number of separate pieces of legislation, therefore increasing the legislative burden; and*

- c. a change of the Commonwealth definition affecting the scope of the Accreditation Act is likely to be preceded by consultation with Queensland, allowing time for making any necessary amendments to the Accreditation Act if considered necessary.*

8. The committee notes that this is the only example of "cross-referencing" contained in the bill.

9. The committee notes that cls.4 and 7 of the bill contain an example of "cross-referencing" or "signposting", which moreover involves three stages of "cross-referencing" before the effective definition is reached. The committee has frequently expressed the view that "cross-referencing" or "sign posting" of definitions is theoretically undesirable as it makes legislation less accessible to the reader, and should be avoided where possible.

10. The committee notes that the Explanatory Notes advance various arguments in favour of the use of the process in this case.

11. The committee makes no further comment in relation to this matter.

## 9. TERRORISM (COMMUNITY SAFETY) AMENDMENT BILL 2004<sup>35</sup>

### Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*to strengthen the powers of Queensland law enforcement authorities to prevent and respond to terrorist acts by amending the:*

- *Crime and Misconduct Act 2001*
- *Criminal Code 1899*
- *District Court of Queensland Act 1967*
- *Freedom of Information Act 1992*
- *Police Powers and Responsibilities Act 2000*
- *Police Service Administration Act 1990*
- *Weapons Act 1990*
- *Witness Protection Act 2000*

### Positive aspects of the bill

3. The bill seeks to enhance Queensland's capacity to respond to terrorist acts as part of a national co-operative response while striking an appropriate balance in protecting the fundamental rights of its citizens.

### Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>36</sup>

#### ***INCREASES IN THE POWERS OF THE CRIME AND MISCONDUCT COMMISSION (CMC)***

##### ◆ **clauses 5, 6 and 7 (Surveillance Warrant applications by CMC)**

#### Jurisdiction to investigate terrorism

4. The CMC has jurisdiction to investigate official misconduct and major crime. "Official misconduct" relates generally to conduct by persons who hold appointments in a unit of public administration, that is either a criminal offence or a disciplinary breach providing reasonable grounds for the termination of the person's services. "Major crime" is criminal

<sup>35</sup> The committee thanks Mr Robert Sibley, Senior Lecturer in Law, Queensland University of Technology, for his valued advice in relation to the scrutiny of this bill.

<sup>36</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.



activity involving an indictable offence carrying 14 years imprisonment or criminal paedophilia or organised crime.

5. The bill (see cl.12) will add “terrorism” to the definition of major crime to be investigated by the CMC. “Terrorism” is defined to be criminal activity that involves a terrorist act. Clause 4 of the bill defines “terrorist act” in a way similar to that in the Commonwealth *Criminal Code Act 1995*.<sup>37</sup>

#### Illegality of “general” covert surveillance warrants

6. At present the CMC can apply to a Supreme Court Judge to obtain a surveillance warrant in relation to either a misconduct investigation or the investigation of major crime. The judge may only issue the warrant if satisfied that there are reasonable grounds for believing that the *relevant person* is involved in the misconduct or major crime and is likely to be at the place identified in the application. Thus the judge is not empowered to issue a general warrant, ie, one that does not specifically identify a person.
7. At common law general warrants are regarded as abhorrent and are routinely struck down by the courts. In *Heery v CJC*<sup>38</sup> Thomas JA observed,<sup>39</sup> in relation to the issue of a listening device warrant:

The grant of approval for the use of invasive devices of this kind is a power that needs to be exercised with considerable caution. Judges, as designated persons with the authority to approve the performance of acts which would otherwise be unlawful, exercise considerable care in ensuring that appropriate limitations are attached to such approvals. The limitations that are commonly imposed are not confined merely to time, place and nature of devices, *but are designed to prevent general fishing expeditions, or the invasion of a person’s premises and privacy in the hope that something discreditable might turn up against him or her. The aversion of the common law to general warrants is well known. (italics added)*

8. The foundation for the courts’ concerns about listening device warrants is discussed in the High Court judgments in *Rockett v Geroge*,<sup>40</sup> *Coco v R*,<sup>41</sup> *Grollo v Palmer*<sup>42</sup> and *Ousley v R*<sup>43</sup> which are summarised and adopted in the unanimous judgement of the Victorian Full Court in *R v Nicholas* in 2000.<sup>44</sup> At the heart of those concerns is the interference with fundamental rights to privacy and private property. The use of covert surveillance devices involves clandestine installation and highly intrusive activity that would otherwise be illegal or tortious. In *Nicholas* the court struck down a listening surveillance warrant issued under the *Customs Act* that related to “one or more persons who obtain or seek to obtain possession of a named bag” known to contain illicit drugs. The court observed that that was no more acceptable than the general warrant struck down in the old case of *Money v Leach* which had authorised a search for “the authors, printers and publishers of a certain seditious and treasonable libel, and to apprehend and seize them together with their papers”.

<sup>37</sup> Explanatory Notes p 4.

<sup>38</sup> [2000] QCA 511

<sup>39</sup> at paragraph 17

<sup>40</sup> (1990) 170 CLR104 at 110

<sup>41</sup> (1994) 179 CLR 427 at 435-438 and 446

<sup>42</sup> (1995) 184 CLR 348 at 358-360 and 367

<sup>43</sup> (1997) 192 CLR 69 at 95, 105, 111

<sup>44</sup> [2000] VSCA 49

Proposed inclusion of “general” surveillance warrants

9. Clauses 5, 6 and 7 of the bill will have the effect of allowing a Supreme Court Judge to issue a “general” surveillance warrant if satisfied there are reasonable grounds for believing evidence of major crime or misconduct is likely to be obtained using a surveillance device at the relevant place.
10. In so doing the legislation authorises a practice which, as mentioned earlier, is impermissible at common law. Moreover, the legislation will apply not just in relation to terrorism but also to misconduct and major crime.
11. The proposed changes will have an obvious impact in terms of the rights and liberties of citizens.
12. The committee notes that the Parliamentary Crime and Misconduct Committee (PCMC), after conducting an extensive review process said in its *Three Yearly Review of the Crime and Misconduct Commission*:<sup>45</sup>

*The Committee is not satisfied, having regard to the nature of the surveillance devices and their potential for interference with the privacy of individuals, that surveillance warrants for places should be available for all major crime investigations. The present provisions of the CMA and the PPRA, which ground an application in the existence of a relevant person, provide some safeguard regarding the possible extent of individuals whose privacy may be subjected to interference by the use of surveillance devices. These should remain applicable in the circumstances of ordinary criminal offences.*

13. The PCMC’s Recommendation 21 was as follows:

*The Committee recommends that the Crime and Misconduct Act 2001 and the Police Powers and Responsibilities Act 2000 be amended to allow a surveillance warrant to be issued in respect of specified premises on the basis that there are reasonable grounds for the believing that:*

- *A major crime which constitutes a ‘terrorist act’ has been, is being, or is likely to be, committed; and*
- *The use of a surveillance device at the premises is necessary for the purpose of an investigation into that major crime or suspected major crime or enabling evidence to be obtained of the major crime or suspected major crime.*

14. The committee accepts the force of the Premier’s arguments in his Second Reading Speech that increased powers are warranted for the protection of Queenslanders from the threat of terrorist acts, and that there must be a balancing of this against the fundamental rights and civil liberties of its citizens. The committee accordingly does not object to the enlargement of CMC powers by cls.5, 6 and 7, insofar as they relate to terrorism.
15. As mentioned earlier, the enlarged CMC powers also apply to major crime which does not involve terrorism, and to misconduct. The question therefore arises of the appropriateness of extending the enlarged powers to these additional areas. This is particularly so in the case of official misconduct, which need not even involve the commission of a criminal offence. In relation to this matter, the Explanatory Notes (at page 2) state:

<sup>45</sup> Parliamentary Crime and Misconduct Committee Report No 64, March 2004 *Three Yearly Review of the Crime and Misconduct Commission*, at page 52.

*The proposals are grouped into: (1) terrorism specific; (2) non-terrorism specific; and (3) other proposals. Some proposals are terrorism specific and others are not; but all will assist in terrorism investigations. Proposals that are non-terrorism specific are so because it is considered preferable that those powers be extended to all offences within the jurisdiction of the Queensland Police Service (QPS) and the Crime and Misconduct Commission (CMC) rather than just terrorism incidents. This is in recognition of the fact that investigators may not yet have established that the criminal activity in question is terrorism related.*

16. The committee notes that cls.9, 10 and 11 of the bill propose to allow the CMC to apply to a Supreme Court Judge for an “Additional Powers Warrant” in cases of terrorism. This existing power presently only extends to misconduct investigations. These warrants authorise CMC officers to enter financial institutions during business hours to inspect financial records relating to persons being investigated for misconduct. The warrants may also authorise the seizure of passports, travel documents, instruments of title to property and financial documents etc, and require individuals to give sworn affidavits about their property and financial transactions.
17. The committee accepts that this is a proper extension of power, but notes it does not also extend to major crime investigations.

18. The committee notes that cls.5, 6 and 7 of the bill introduce various provisions enabling the Crime and Misconduct Commission to obtain surveillance warrants without specifying a person to whom it will relate. These provisions apply to terrorism, but also to major crime not involving terrorism, and to official misconduct.
19. Insofar as the additional powers relate to terrorism, the committee does not object to their inclusion.
20. Insofar as they relate to matters other than terrorism, the committee refers to Parliament the question whether they have sufficient regard to the rights of persons against whom they may be used, as well as to the interests of the community as a whole.

### ***INCREASES IN POWERS OF POLICE UNDER THE POLICE POWERS AND RESPONSIBILITIES ACT 2000***

#### **◆ clauses 27-37 inclusive**

##### Powers and jurisdiction to investigate terrorism

21. Clause 32 of the bill inserts into the *Police Powers and Responsibilities Act 2000* (“the *PPR Act*”) a new s.147A which defines “terrorism” and “terrorist act” in the same terms as proposed under the amendments to the *Crime and Misconduct Act 2001*. As the Premier observes in his Second Reading Speech, it is difficult to conceive of a terrorist act that is not an offence under Queensland Law. It is therefore able to be investigated by members of the Queensland Police Service.

##### Covert Search Warrant applications by members of the police service

22. At present inspectors of the Queensland Police Service may apply to a Supreme Court Judge for a covert search warrant, and if the judge is satisfied that there are reasonable grounds for

believing that there is at the place *evidence of organised crime* the warrant may issue. *Organised crime* is defined in the *PPR Act* as:

*means an ongoing criminal enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation.*

23. “Serious indictable offence” is also defined in the act as meaning indictable offences involving:
- (a) serious risk to or actual loss of life
  - (b) serious risk of or actual serious injury to a person
  - (c) serious damage to property in circumstances endangering the safety of any person
  - (d) serious fraud
  - (e) serious loss of revenue
  - (f) official corruption
  - (g) serious theft
  - (h) money laundering
  - (i) conduct relating to prostitution or SP bookmaking
  - (j) child abuse and child pornography
  - (k) an offence against the *Drugs Misuse Act 1986* punishable by at least 20 years imprisonment.
24. Clauses 33-37 inclusive of the bill propose to extend the power to issue covert search warrants to obtain evidence of terrorism. It also proposed to authorise such a search where the evidence of either organised crime or terrorism is likely to be taken to the place within the next 72 hours.

25. The committee regards the amendments made by cls.33-37 as reasonable and necessary. However, these amendments may be contrasted with those relating to the issue of covert surveillance warrants (see below).

#### Covert Surveillance Warrant applications by members of the police service

26. At present an inspector of the Queensland Police Service can apply to a Supreme Court Judge for a covert surveillance warrant which relevantly includes both listening and visual surveillance devices. The judge may issue the warrant only if satisfied that there are reasonable grounds for believing that *an identified person* is involved in a serious indictable offence and is likely to be at the place.
27. Thus, as with the present position dealt with above in relation to the *Crime and Misconduct Act 2001*, the *Police Powers and Responsibilities Act 2000* does not presently allow the issue of a general covert surveillance warrant.
28. Clauses 27-31 inclusive of the bill propose amending the *PPR Act* so that a Supreme Court Judge may issue a warrant if satisfied that there are reasonable grounds for believing that evidence of the commission of a serious indictable offence is likely to be obtained using a surveillance device at the relevant place.

29. The committee refers again to the appellate court decisions discussed above and the conclusions and recommendations of the Parliamentary Crime and Misconduct Committee extracted above from its *Three Yearly Review of the Crime and Misconduct Commission*. The committee again notes the obvious impact of the proposed amendments in terms of the rights and liberties of citizens.
30. Again, the committee accepts the force of the Premier's arguments in his Second Reading Speech that increased powers are warranted for the protection of Queenslanders from the threat of terrorist acts. As before, the committee does not object to this enlargement of police powers, insofar as terrorism is concerned.
31. As was the case with the CMC expansions of power, however, these are not in their terms limited to terrorism, but extend to all serious indictable offences. In that respect, they raise the same question of appropriateness as did the provisions mentioned earlier.

32. The committee notes that cls.27-31 inclusive of the bill introduce various provisions enabling an inspector of the Queensland Police Service to obtain covert surveillance warrants without specifying a person to whom it will relate. These provisions apply to terrorism, but also to any other serious indictable offence.
  33. Insofar as the additional powers relate to terrorism, the committee does not object to their inclusion.
  34. Insofar as they relate to matters other than terrorism, the committee refers to Parliament the question whether they have sufficient regard to the rights of persons against whom they may be used, as well as to the interests of the community as a whole.
-

**10. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2004****Background**

1. The Honourable P T Lucas MP, Minister for Transport and Main Roads, introduced this bill into the Legislative Assembly on 20 April 2004.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*to amend Acts administered by the Department of Transport and the Department of Main Roads, as well as the Land Act 1994 and the Land Title Act 1994 that are administered by the Department of Natural Resources, Mines and Energy.*

**Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>46</sup>****◆ clause 55 (proposed s.158)**

3. Clause 18 of the bill inserts into the *Transport Operations (Passenger Transport) Act 1994* a new chapter 6, part 2, division 2AA (proposed ss.62AAA to 62AAI inclusive). The new division provides a statutory framework for integrated ticketing arrangements, pursuant to Translink service contracts, in South East Queensland (the relevant “SEQ area” is defined in a new provision inserted into the dictionary to the Act).
4. Consequent upon the introduction of this new regime cl.55 of the bill inserts a number of provisions designed to facilitate the transition, in the SEQ area, from service contracts to new Translink service contracts. Proposed s.160 provides that a specified list of existing service contracts, set out in new schedule 2A to the Act, will terminate at 6pm on 25 June 2004 if the contract holder does not enter into a Translink service contract by that date.
5. Proposed s.158 provides that if, before commencement of that section, the chief executive has invited one of the relevant existing service contract holders to offer for a Translink service contract, that invitation to offer replaces any existing statutory right the holder may have had to offer for a new service contract, and the holder’s existing right is extinguished.
6. However, proposed s.161 provides the relevant service contract holders with a right to claim compensation from the State, in the event that their service contract is terminated in the manner mentioned above and they do not enter into a Translink service contract.
7. The Explanatory Notes deal with this matter as follows:

*An amendment at clause 55 to facilitate the introduction of integrated ticketing in south east Queensland involves the termination of several public passenger transport service contracts. This clause will affect the operator’s rights and this could be considered to breach fundamental legislative principles. This potential breach is considered to be justified by the widespread benefits to the public of transforming the public transport network into one*

---

<sup>46</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

*system that allows passengers to travel easily by bus, train and ferry. Further, affected operators may seek compensation following the termination of a relevant service contract.*

8. The committee notes that, as part of a transitional arrangement to Translink service contracts, certain current service contracts in the relevant area of the State will terminate if the holder has not entered into a Translink service contract by 25 June 2004.
9. The termination of these specific service contracts in the specified circumstances will obviously have an adverse impact upon the contract holders.
10. The committee refers to Parliament the question whether, in the circumstances, the termination of the relevant service contract holders' right to offer for a new contract has sufficient regard to the rights of those persons.

**PART I - BILLS****SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE****11. DUTIES AMENDMENT BILL 2004****Background**

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 18 March 2004. The committee notes that this bill was passed, without amendment, on 27 April 2004.
2. The committee commented on this bill in its Alert Digest No 1 of 2004 at pages 7 to 9. 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 legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?**<sup>47</sup>

◆ **clauses 4, 5, 7 and 13**

3. The committee noted that cls.4, 5, 7 and 13 of this bill introduce provisions which confer significant discretionary powers upon the Commissioner of State Revenue. The committee referred to Parliament the question whether these discretions are both appropriate and sufficiently defined.
4. The Treasurer provided the following comment:

*The discretions contained in clauses 4 and 5 (to allow the first home transfer duty concession to a minor) and in clause 7 (to allow the first home borrower mortgage duty exemption to a minor) ensure that new limitations imposed by the Bill on claiming the concession or exemption do not operate harshly in genuine cases.*

*As the Bill imposes an 18 year age requirement on taxpayers claiming a first home transfer duty concession or a first home borrower mortgage duty exemption, the discretions are designed to ensure that a minor may claim either concession where there is no avoidance scheme in relation to the first home transaction or first home mortgage.*

*Experience with the First Home Owner Grant Scheme administered under the First Home Owner Grant Act 2000 has shown that there can be genuine cases where a minor could acquire a first home.*

*The discretions strike an appropriate balance between preserving the integrity of the duty concessions while ensuring that the duty concessions may still be claimed in genuine*

<sup>47</sup> Section 4(3)(a) 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 makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.



*circumstances. Without the discretion it would be difficult to deal with the wide range of circumstances that may be encountered where a minor is involved.*

*The Committee correctly notes that the discretions are exercisable only in relation to one matter, namely, whether an avoidance scheme exists. They permit the Commissioner of State Revenue to consider all relevant facts and circumstances in determining whether or not such a scheme exists, having regard to the objectives of imposing an 18 year age requirement to preserve the integrity of the duty concessions and the revenue base. The inclusion of the discretions is beneficial for minor taxpayers who would otherwise not be entitled to claim either duty concession, despite the absence of an avoidance scheme.*

5. The committee notes the Treasurer's response.

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>48</sup>**

◆ **clause 2**

6. The committee noted that this bill, if not enacted during the 20-22 April 2004 Parliamentary sittings, would take effect retrospectively.
7. The Treasurer commented as follows:

*It is intended that the Bill will be passed during the 20-22 April 2004 sittings to avoid the possibility that the Bill will have retrospective application.*

*In the event that the Bill is not passed during the 20-22 April 2004 sittings, it is acknowledged that the Bill will take effect retrospectively. However, the new concession and exemption are beneficial to taxpayers and have been widely reported in the media. Details of the new arrangements have also been published on the Office of State Revenue website and provided to financial institutions.*

8. The committee notes the Treasurer's response. The committee further notes that the bill was in fact passed on 27 April 2004, and assented to on 29 April 2004.

<sup>48</sup> 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.

## 12. NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 2004

### Background

1. The Honourable S Robertson MP, Minister for Natural Resources, Mines and Energy, introduced this bill into the Legislative Assembly on 18 March 2004. The committee notes this bill was passed, with amendments, on 29 April 2004.
2. The committee commented on this bill in its Alert Digest No 1 of 2004 at pages 10 and 11. 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 provide for the compulsory acquisition of property only with fair compensation?<sup>49</sup>

#### ◆ clause 10

3. The committee noted that cl.10 of the bill inserts into s.38 of the *Land Act 1994* a provision denying persons a right to claim compensation where a deed of grant in trust is cancelled under s.38(1) of that Act.
4. The committee sought information from the Minister as to:
  - the likely extent to which individuals might suffer financial loss as a result of such a cancellation;
  - why, in the circumstances, it is considered appropriate to absolutely prohibit any grant of compensation.
5. The Minister provided the following information:

*Deeds of grant in trust and reserves for various community purposes are collectively defined as trust land. The trustees of trust land, including a deed of grant in trust, hold the land so that it may be used exclusively for the community purpose for which it was granted. Therefore the trustees, as individuals, do not benefit from the grant. As your committee has noted, section 38(1) sets out the limited circumstances in which a deed of grant in trust may be cancelled. It is also mentioned that section 43 provides an additional safeguard for Aboriginal and Torres Strait Islander people in that a deed of grant in trust for Aboriginal or Torres Strait Islander purposes can only be cancelled by an Act of Parliament.*

*The proposed amendments to section 38 are intended to bring the section into line with the existing provisions in section 34 for revocation of a reserve. Section 34(5) provides that no person has a right to claim compensation as a result of the revocation of a reserve. The amendment to section 38 mirrors this provision for deeds of grant in trust. Section 38(3)*

---

<sup>49</sup> 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.

*currently provides, in part, that if a deed of grant in trust is cancelled all appointments of trustees and trustee leases and trustee permits over the deed of grant in trust are cancelled. However, the proposed inclusion of subsections 3A and 3B of section 38 allows the removal of improvements by their owner or the reversion of the improvements to the State if not removed within the specified time. Again this is in line with existing provisions for revocation of a reserve. Supporting amendments to sections 246 and 247 include deeds of grant in trust in the classes of land that relate to payment for improvements received by the State from incoming lessees or buyers and the State's obligation to pay any such amount to the previous holder of the land or owner of the improvements.*

*The interests of a mortgagee of a deed of grant in trust are protected by sections 68 to 72 which allow a mortgagee to enter into possession of and sell the deed of grant in trust if the trustee defaults under the mortgage. The trustee of a deed of grant in trust, issued prior to commencement of the Land Act 1994, may only mortgage the trust land if the Minister has approved the mortgage. Deeds of grant in trust issued after the commencement, with a couple of rare exceptions, are not permitted to be mortgaged.*

*Other provisions of the Land Act 1994 (sections 73 to 78) provide for the winding-up of the affairs of a trust if a reserve is revoked, a deed of grant in trust is cancelled or a deed of grant in trust is sold by a mortgagee in possession.*

*Action to cancel a deed of grant in trust would be taken only after full consideration of all the issues and alternatives. If cancellation action was taken, trustees as individuals would not be disadvantaged as they hold the land solely for the benefit of the community. It is not appropriate to provide compensation to individuals in these circumstances because the land is held on behalf of the community as a whole.*

|  |
|--|
| 6. The committee thanks the Minister for this information. |
|--|

---

## 13. SUGAR INDUSTRY REFORM BILL 2004

### Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Fisheries, introduced this bill into the Legislative Assembly on 18 March 2004. The committee notes that bill was passed, without amendment, on 28 April 2004.
2. The committee commented on this bill in its Alert Digest No 1 of 2004 at pages 13 to 17. 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?<sup>50</sup>

- ◆ **clauses 29 (proposed ss.386, 387, 390 and 391), 30 (proposed ss.393-395), 32 (proposed ss.407-408), 33 (proposed ss.413-414), 34 (proposed ss.416 and 417) and 35 (proposed ss.419-420)**
3. The committee noted that cls.29-35 of the bill insert a range of transitional provisions which do, or may, disadvantage persons with current statutory rights. The Explanatory Notes address most of these provisions in some detail.
  4. The committee referred to Parliament the question of whether, in the circumstances, the effects of the transitional provisions of this bill upon the accrued rights of various persons are acceptable.
- ◆ **clause 15 (proposed ss.107R, 107S, 107U, 107V and 107W)**
5. The committee noted that cl.15 inserts several provisions which impose very substantial penalties in relation to offences connected with exemptions from the "vesting" laws in relation to sugar. The committee drew the magnitude of these penalties to the attention of Parliament.
- ◆ **clause 15 (proposed s.107T)**
6. The committee noted that proposed s.107T (inserted by cl.15) exempts documents held by the Sugar Authority in relation to applications for granting of exemptions from the sugar vesting scheme, and certain associated documents, from the freedom of information laws.
  7. The committee referred to Parliament the question whether this exemption from freedom of information laws is appropriate in the circumstances.

<sup>50</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

**Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?<sup>51</sup>****◆ clause 15 (proposed s.107X)**

8. The committee noted that proposed s.107X imposes obligations on the executive officers of corporations which effectively reverse the onus of proof.
9. The committee referred to Parliament the question whether this reversal of the onus of proof was justifiable and therefore had sufficient regard to the rights and liberties of individuals.

**Minister's response**

10. In relation to the various matters mentioned above, the Minister responded as follows:

*I note that the Committee has drawn a number of issues relating to the Sugar Industry Reform Bill 2004 to the attention of Parliament and has observed that those matters are discussed in some detail in the Explanatory Notes. These issues formed part of the Parliamentary debate on 27 and 28 April 2004 where the Bill passed through all stages.*

*If you require any further information regarding this matter, please do not hesitate to contact my office.*

- |  |
|--|
| 11. The committee notes the Minister's response. |
|--|

---

<sup>51</sup> 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.

## 14. VEGETATION MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2004

### Background

1. The Honourable S Robertson MP, Minister for Natural Resources, Mines and Energy, introduced this bill into the Legislative Assembly on 18 March 2004. The committee notes that this bill was passed, with amendments, on 22 April 2004.
2. The committee commented on this bill in its Alert Digest No 1 of 2004 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 make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?**<sup>52</sup>

◆ **clause 15 (proposed s.22L)**

3. The committee noted that certain decisions in relation to broadscale applications are, pursuant to proposed s.22L (inserted by cl.15), not subject to appeal. The committee referred to Parliament the question whether this denial of appeal rights is appropriate in the circumstances.
4. The Minister responded to the committee's concerns as follows:

*New section 22L provides that a person cannot appeal under any Act against the ballot process or result, refusal of an application on the grounds that the allocation for the region is exhausted, the length of the currency period or a decision of the tribunal.*

*The justification for this provision was addressed in the explanatory notes to the Bill. The VMOLA provides, among other things, a framework for phasing out broadscale clearing of remnant vegetation by the end of 2006 under a transitional cap. The assessment of broadscale applications will occur in order of priority as determined by a ballot process. Once the allocation for a region is exhausted, all remaining applications must be refused. The exhaustion of an allocation is a matter of fact and therefore is not a matter that could be appealed.*

*All clearing under the phase out must be completed by the end of 2006, in order to meet national greenhouse gas reduction targets. While applicants who are successful in the ballot and receive an allocation cannot appeal the currency period attached to the approval, they may appeal any other matter, such as a refusal or another condition imposed in the approval.*

*In these circumstances, the restriction on appeal rights is considered to be justified.*

---

<sup>52</sup> Section 4(3)(a) 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 makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

5. The committee notes the Minister's response.

**PART I - BILLS****SECTION C – AMENDMENTS TO BILLS<sup>53</sup>**

***(NO AMENDMENTS TO BILLS ARE REPORTED ON IN THIS ALERT DIGEST)***

---

<sup>53</sup> 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.*



**PART I - BILLS**

**APPENDIX**

**MINISTERIAL CORRESPONDENCE**

*(in the electronic version of the Alert Digest, this  
correspondence is contained in a separate document)*

# **PART II**

## **SUBORDINATE LEGISLATION**

**PART II – SUBORDINATE LEGISLATION****SECTION A – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCERNS\***

| <b>Sub-Leg No.</b> | <b>Name</b>   | <b>Date concerns first notified</b><br><i>(dates are approximate)</i> |
|--------------------|---|---|
| 263                | Body Corporate and Community Management Legislation Amendment Regulation (No.1) 2003 SL No. 263 of 2003 | 20/4/04   |
| Exempt             | Public Trustee (Fees and Charges Notice) (No.1) 2003  | 20/4/04   |
| ---                | Notification of Speed Limit – Coomera River   | 20/4/04   |
| ---                | Notification of Speed Limit – Nerang River  | 20/4/04   |
| ---                | Notification of Speed Limit – Abel Point Marina   | 20/4/04   |

---

\* Where the committee has concerns about a particular piece of subordinate legislation, or wishes to comment on a matter within its jurisdiction raised by that subordinate legislation, it conveys its concerns or views directly to the relevant Minister in writing. The committee sometimes also tables a report to Parliament on its scrutiny of a particular piece of subordinate legislation.

**PART II – SUBORDINATE LEGISLATION****SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT  
WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES\*\***  
*(INCLUDING LIST OF CORRESPONDENCE)*

| <b>Sub-Leg No.</b> | <b>Name</b> | <b>Date<br/>concerns<br/>first<br/>notified</b><br><i>(dates are<br/>approximate)</i> |
|--------------------|-------------|---|
|                    |             |   |
|                    |             |   |
|                    |             |   |
|                    |             |   |

(Copies of the correspondence mentioned above are contained in the Appendix which follows this Index)

---

\*\* This Index lists all subordinate legislation about which the committee, having written to the relevant Minister conveying its concerns or commenting on a matter within its jurisdiction, has now concluded its inquiries. The nature of the committee's concerns or views, and of the Minister's responses, are apparent from the copy correspondence contained in the Appendix which follows this index.



This concludes the Scrutiny of Legislation Committee's 2<sup>nd</sup> report to Parliament in 2004.

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

Ken Hayward MP  
Chair

11 May 2004

## APPENDIX

### CORRESPONDENCE

*(in the electronic version of the Alert Digest, this  
correspondence is contained in a separate document)*

(No correspondence is contained in this  
Alert Digest)