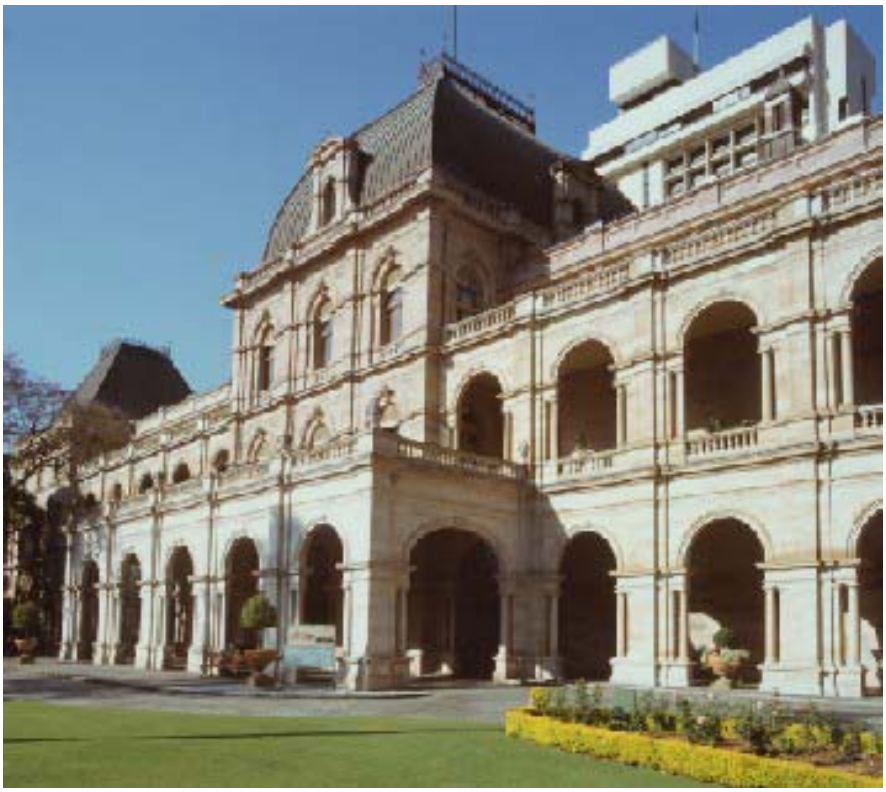
SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST



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SCRUTINY OF LEGISLATION COMMITTEE MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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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

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[1] 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.*[2]

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1 "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.

2 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. FREEDOM OF INFORMATION AMENDMENT BILL 2004

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 17 August 2004.

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

> (to provide) *an exemption from the application of the Freedom of Information Act 1992 (the "FOI Act") to incentives for projects under an investment incentive scheme.*

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

- **clause 3**

3. Clause 3 of the bill inserts into the *Freedom of Information Act 1992* an additional s.47A ("matter relating to investment incentive scheme"). The new section will form part of Division 2 of Part 3 of the Act ("exempt matter")(ss.36 to 50).

4. As indicated by the Premier in his Second Reading Speech, the new section is being enacted to overcome the effect of a recent decision of the Information Commissioner to the effect that certain information about an "investment incentive scheme" was not entitled to the benefit of the exemption from disclosure currently provided by s.45 of the Act for "matters relating to trade secrets, business affairs and research". The Premier indicates that the Government, whilst not accepting the correctness of the decision and whilst intending to apply to the Supreme Court for a judicial review of it, had decided to insert unambiguous legislative provisions in relation to the matter of such schemes.

5. In short, new s.47A will provide that documents need not be disclosed if disclosure could reasonably be expected to reveal information about incentives given by the Government under an investment incentive scheme. The term "incentive" is defined in the section as including amounts on account of refunds of taxes, fees or charges, other amounts, whether lump sums or instalments, and other forms of benefit.

6. If the Information Commissioner's decision is correct, the bill will provide an additional area of exemption from the general obligation to disclose which is imposed under the *Freedom of Information Act*. The bill therefore enacts a provision which may have the effect of altering the current statutory disclosure regime.

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

7. The committee has previously outlined its approach to bills which amend the freedom of information scheme (see the committee's report on the *Freedom of Information Amendment Bill 2001*: Alert Digest No. 7 of 2001 at pages 23 to 25).

8. As the earlier committee there stated, it considered it has the capacity to comment on freedom of information issues because of the broad interpretation which it gives to its charter in respect of "rights and liberties of individuals". Nevertheless, as the committee also stated:

- Entitlements to access government-held information are an entirely statutory concept (introduced via the *FOI Act*), and are not based on any established common law right

- The right to access information via the *FOI Act* has, moreover, always been far from unqualified, as that Act contains a very extensive range of exemptions and restrictions

- Whilst the committee considers s.4(2) of the *Legislative Standards Act 1992* provides it with scope to comment on freedom of information issues in appropriate cases, the "right" which the committee may thereby recognise cannot be regarded as unconditional (for example, whilst a person might have a right to access personal information about themselves, no one would seriously argue such a right would generally extend to accessing personal information about other persons).

9. The 2001 bill enhanced the power of agencies to refuse access to documents sought *via* broadly-framed applications and also authorised the imposition of fees for processing applications other than those about the personal affairs of the applicant. In its report on that bill, the earlier committee concluded that, whilst these amendments would no doubt place many applicants in a position less favourable than that which they presently enjoyed under the Act, those changes were essentially policy-related. The committee therefore simply flagged the issue for Parliament's attention.

10. The committee considers any changes made by the current bill are comparable, in that they also amend the structure of the information access scheme in a way which will place some applicants in a less favourable position. The committee again considers that, whatever the merits or otherwise of this change in terms of overall government accountability, the issue essentially remains one of policy.

11. The committee notes that this bill inserts provisions which may have the effect of providing an additional exemption from the document production requirement imposed on government under the *Freedom of Information Act*.

12. In the circumstances, and given the general approach of the committee to freedom of information-related issues (see above), the committee has concluded that the issues raised by this bill are essentially policy-related.

13. The committee refers to Parliament the question whether any changes the bill may make to the current statutory freedom of information regime are appropriate in the circumstances.

2. INTEGRATED PLANNING AND OTHER LEGISLATION AMENDMENT BILL 2004

Background

1. The Honourable D Boyle MP, Minister for Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 17 August 2004.

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

> *to facilitate effective regional planning in South-East Queensland. The Bill also includes amendments to other provisions of the Integrated Planning Act 1997 (IPA) designed to clarify or improved its operation.*

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

3. LIQUID FUEL SUPPLY AMENDMENT BILL 2004

Background

1. Mr L J Springborg MP, Leader of the Opposition, introduced this bill into the Legislative Assembly on 19 August 2004, as a private member's bill.

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

- *amend the Liquid Fuel Supply Act 1984, specifically to require all petrol sold in Queensland to contain a minimum 10 percent ethanol blend by volume;*
- *stimulate the orderly development of, and investment in, a fuel ethanol industry in Queensland based on sugarcane and grain produced in Queensland;*
- *stimulate regional and rural development through the creation of an alternative and stable market for sugarcane and grain produced in Queensland and the creation of new jobs in the fuel ethanol industry;*
- *improve the quality of unleaded petrol and reduce greenhouse gas emissions from motor vehicles in Queensland by blending a minimum quantity of the oxygenate, ethanol, with unleaded petrol used in Queensland; and*
- *reduce Queensland's reliance on foreign oil imports and Queensland motorists' exposure to the vagaries of the global oil market.*

Overview of the bill

3. This bill is identical to the *Liquid Fuel Supply Amendment Bill 2002*, which was introduced by the then Leader of the Opposition, Mr M J Horan MP, as a private member's bill on 4 September 2002. The Scrutiny of Legislation Committee reported on that bill in Alert Digest No. 8 of 2002 at pages 16 to 17.

4. In relation to this bill, the current committee adopts and repeats the comments made by the previous committee in relation to the earlier bill. Those comments are set out below in paragraphs 6 to 15.

5. The committee has included some additional comments in relation to the issue of constitutional validity.

Does the legislation have sufficient regard to the rights and liberties of individuals?[4]

♦ **clause 5**

6. Clause 5 of the bill inserts into the *Liquid Fuel Supply Act 1984* new ss.35A to 35AE inclusive, which replace current s.35A.

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

7. Current s.35A in essence provides that the Governor-in-Council may by an Order in Council require the owners of oil refineries in Queensland to obtain Queensland-manufactured ethanol, and to blend it into their petrol before selling the petrol in this State. Various aspects of the purchase and blending processes are to be prescribed by the same or another Order in Council.

8. The principal difference between the current and proposed new provisions is that the new provisions, rather than leaving to the discretion of the government the making of a requirement to purchase and blend ethanol into petrol sold in Queensland, entrench a requirement to blend at least 10 per cent ethanol into such petrol, and to purchase sufficient ethanol for that purpose.

9. The restrictions proposed by the bill are not based upon public safety or public health considerations. Rather, the Member in his Second Reading Speech states:

> *This legislation will ensure Queensland becomes the ethanol production capital of Australia by giving financiers, investors and farmers the confidence to invest in ethanol production.*
>
> *Ethanol is a renewable fuel that can be produced from crops like sugar cane, sorghum and corn. It is being widely used around the world in places like Europe, the USA and Brazil to blend with conventional petrol.*
>
> *Ethanol has many benefits. It will reduce greenhouse gas and toxic emissions, it will improve the air quality in our cities, and it will stimulate the development of an exciting new industry in rural and regional areas throughout Queensland. Quite simply, a viable ethanol industry in Queensland will create jobs.*

10. As can be seen, the justifications advanced by the Member are both environmental and economic.

11. The proposed sections, if enacted, would impact upon the right of refinery operators to conduct their businesses in the manner they consider most appropriate. However, it is fair to say that commerce is already subject to a large number of statutory restrictions and requirements.

12. In the final analysis, the appropriateness of imposing a statutory requirement of the type proposed is essentially a policy issue, upon which Parliament must decide.

13. The committee notes that cl.5 of the bill introduces a statutory requirement that operators of oil refineries blend into their petrol sold in Queensland a 10 per cent ethanol content, and that they purchase from Queensland ethanol suppliers sufficient ethanol for that purpose.

14. This provision clearly impacts upon the right of the refinery operators to conduct their business in the manner they see fit. The Member argues in favour of the statutory restriction on environmental and economic grounds.

15. The committee refers to Parliament the question of whether, in all the circumstances, the proposed restriction has sufficient regard for the rights and liberties of individuals, including the relevant refinery operators.

Does the legislation have sufficient regard to the institution of Parliament (constitutional validity)?[5]

- **clause 5**

16. During debate on the 2002 bill (see Hansard of 30 October 2002 at pages 4277 to 4298, and 7 November 2002 at pages 4587 to 4610), reference was made by a number of speakers to perceived issues about the constitutional validity of the bill, based on a possible conflict with s.92 of the *Commonwealth Constitution*. Section 92 of course provides that trade and commerce between the States shall be absolutely free.

17. The Member in his Second Reading speech states:

> *Despite the Premier's excuses about legal technicalities, sugar industry experts and even the RACQ have said there are no legal barriers to introducing a State ethanol mandate.*

18. The committee notes that during debate on an identical 2002 bill the issue of the constitutional validity of the bill, by reason of inconsistency with s.92 of the *Commonwealth Constitution,* was raised.

19. The committee seeks information from the Member as to whether he has obtained legal advice in relation to this issue.

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

4. MARINE PARKS BILL 2004

Background

1. The Honourable R J Mickel MP, Minister for Environment, introduced this bill into the Legislative Assembly on 17 August 2004.

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

> *provide for the protection and maintenance of the marine environment while allowing for its ecologically sustainable use.*

Does the legislation have sufficient regard to the institution of Parliament?[6]

- **clauses 30 and 35**

3. The bill provides (see cl.29) for the approval by the Governor-in-Council of management plans for marine parks. Management plans play an important role in relation to such parks. The initial stage in the generation of management plans ultimately approved under cl.29 is their preparation, in draft form, by the Minister (see cl.30). A similar process applies in relation to amendments of management plans, which are approved under cl.34 after preparation by the Minister of a draft amendment (see cl.35).

4. In relation to these draft management plans and draft amendments of management plans, cls.30 and 35 both provide as follows:

> *(2) The draft* (plan or amendment) *may apply, adopt or incorporate (with or without modification) the provisions of another document, whether of the same or a different kind.*
>
> *(3) A provision of another document applied, adopted or incorporated is the provision as in force from time to time, unless the draft* (plan or amendment) *expressly provides otherwise.*

5. It is not clear from either the Minister's Second Reading Speech or the Explanatory Notes precisely what these other documents will be, although the Explanatory Notes state (in relation to cl.30):

> *This will facilitate coordinated management and the implementation of non-statutory plans where such plans assist in the conservation of the environment or the use and non-use values of a marine park.*

6. The effect of cls.30 and 35 is that external documents may be incorporated into Queensland law, with the incorporation automatically including any amendments which may subsequently be made to those documents.

7. The incorporation by reference of external documents, either in fixed form or in whatever form they may take from time, is a feature of a significant number of bills examined by the

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

committee. This process is also expressly authorised, in relation to subordinate legislation, by s.23 of the *Statutory Instruments Act 1992*.

8. In both contexts the committee considers the fixed form option is acceptable, provided the document concerned is readily accessible to readers of the legislation. The incorporation of external documents in ambulatory form (that is, in whatever form they may take from time to time) raises an additional issue for the committee, namely, that this practice has the tendency to undermine the institution of Parliament by effectively delegating the making of Queensland law to outside bodies.

9. The committee therefore naturally prefers that the incorporation of external documents is kept to the minimum reasonably achievable in the circumstances, particularly where the incorporation is in ambulatory form. Having said that, the committee recognises that there are many cases (particularly in relation to subordinate legislation, where the s.23 process is frequently utilised) where this incorporation will be convenient for the drafters of legislation.

10. Apart from the issue of the appropriateness of conferring the force of law on external documents, there is also (as mentioned above) a practical issue regarding the accessibility of the incorporated documents, and of any amendments to them.

11. The committee notes that cls.30 and 35 both enable the incorporation, in management plans or amendments thereto, of the provisions of external documents, in either fixed or ambulatory form. Management plans are important documents in the administration of the marine park system.

12. The committee considers such powers of incorporation raise issues both in terms of accessibility and regard for the institution of Parliament. In light of these concerns (detailed above) the committee seeks information from the Minister as to:

- What type of documents are likely to be adopted or incorporated? Will these documents be readily accessible to the public?
- Will any future amendments to these documents be similarly accessible?
- For what practical or other reasons is it considered appropriate to provide such a power of incorporation?

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[7]

♦ **clause 43**

13. Clause 43 prohibits a person from wilfully entering or using a marine park for a "prohibited purpose". While the general maximum penalty is 295 penalty units ($22,125), cl.43(1) provides a particularly heavy maximum penalty of 3,000 penalty units ($225,000) where the

[7] 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.

wilful entry or use is for a prohibited purpose involving the taking of natural or cultural resources.

14. Clause 43(4) provides that a prohibited purpose is a "purpose prescribed under a regulation or zoning plan as a prohibited purpose for the purposes of (the clause)".

15. Given the heavy maximum penalties which may be imposed for breach of the cl.43 obligations, an issue arises as to why the relevant purposes are not set out in the bill itself, rather than being left to regulation or to inclusion in zoning plans.

16. The committee notes that an essential element of the cl.43 offences, some of which carry very substantial maximum penalties, is that of "prohibited purpose", which is to be prescribed by a regulation or zoning plan.

17. Given the substantial maximum penalties involved, the committee seeks information from the Minister as to why the relevant purposes are not set out in the bill itself.

♦ **clauses 24(2)(b) and 150(3)**

18. Clause 150(1) and 150(2) set out regulation-making powers in relation to the bill. Clause 150(3) provides that a regulation may prescribe a penalty of not more than 165 penalty units for contravention of a regulation.

19. It is a long-standing policy of the committee not to endorse powers to create, in regulations, penalties of more than 20 penalty units for breach of the regulation. The figure stated cl.150(3) is, of course, more than 8 times this level.

20. Clause 24(2)(b) provides that a maximum penalty of the same level may be prescribed in a zoning plan.

21. In relation to these matters, the Explanatory Notes state:

> *The level of penalties allowed in the Bill is identical to the level provided under the Nature Conservation Act 1992. This is necessary to allow consistency of penalties for offences on national park islands and adjoining marine park beaches, and for protection of wildlife such as seabirds on islands and adjacent beaches and waters.*
>
> *In addition, current penalties for offences in regulations and zoning plans under the Great Barrier Reef Marine Park Act 1975 can apply a maximum of 50 (Commonwealth) penalty units, which equates to roughly 75 penalty units under the State's penalty unit conversion formula. State-Commonwealth Offshore Constitutional Settlement agreements that require the Queensland marine parks legislation to be brought into line with the Great Barrier Reef Marine Park Act 1975 make it necessary for the framing of the Bill, regulations and zoning plans to be able to provide consistent State and Commonwealth penalty levels. It is impossible, for example, for every penalty contained in a Commonwealth zoning plan to be omitted from the matching State zoning plan and instead inserted in the Bill.*

22. The committee notes that cls.24(2)(b) and 150(3) enable maximum penalties of up to 165 penalty units to be set in zoning plans and regulations respectively. It is the long-standing policy of the committee to favour maximum penalties, in such cases, of only 20 penalty units.

23. This issue is addressed in the Explanatory Notes.

24. The committee refers to Parliament the question whether the level of maximum penalties prescribed under cls.24(2)(b) and 150(3) is acceptable.

Does the legislation have sufficient regard to the rights and liberties of individuals?[8]

- **clauses 43, 44, 48, 49, 50 and 114**

25. Various provisions of the bill carry heavy maximum penalties. Amongst them are the following:

- Clause 43 (wilfully entering or using a marine park for a prohibited purpose involving the taking of natural or cultural resources) - 3,000 penalty units ($225,000)
- Clause 44 (entering or using a park for a purpose involving the taking of natural or cultural resources, without holding a relevant authority) - 3,000 penalty units ($225,000)
- Clause 48 (failure to comply with a temporary restricted area declaration) - 3,000 penalty units ($225,000) or 2 years imprisonment)
- Clause 49 (failure to comply with the conditions of an authority, in relation to the taking of natural or cultural resources) - 3,000 penalty units ($225,000)
- Clause 50 (wilfully doing an act or making an omission that directly causes or is likely to cause serious environmental harm to a marine park) - 3,000 penalty units ($225,000) or 2 years imprisonment
- Clause 114 (contravening an enforcement order or an interim enforcement order) - 3,000 penalty units ($225,000) or 2 years imprisonment.

26. Moreover, cl.130 of the bill provides that any offence carrying a maximum penalty of imprisonment of 2 years is an indictable offence. Indictable offences are more serious offences usually tried before a judge and jury. Clauses 48, 50 and 114 create offences of this nature.

27. Clause 133(1) provides a general limitation period of 1 year for commencement of proceedings for summary offences under the Act (or 1 year after the offence comes to the complainant's knowledge, subject to a 2 year overall time limit dated from commission of the offence). However, the committee notes that subclause (2) empowers a Magistrate's Court to extend these time limits if it considers it just and equitable in the circumstances.

28. The Explanatory Notes argue that the maximum penalties imposed under the current legislation are manifestly inadequate, especially where an offence relates to significant damage to the environment or the use or non-use values of a highly protected area of a marine park.

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

29. The Explanatory Notes also state that the proposed maximum penalties are:

> *generally consistent with other natural resource management legislation including the Commonwealth Great Barrier Reef Marine Park Act 1975 and will enhance conservation outcomes sought under the bill.*

30. The committee notes that cls.43, 44, 48, 49, 50 and 114 impose maximum penalties of up to 3,000 penalty units ($225,000) and in some cases also provide for a maximum of 2 years imprisonment.

31. The committee further notes that the more serious offences under the bill are deemed to be indictable offences, and in relation to the other offences the general time limit for bringing proceedings can be extended by a court.

32. The committee draws to the attention of Parliament the level of these maximum penalties, and the other relatively stringent aspects of the bill's offence provisions.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[9]

- **clauses 59, 66, 70, 72, 94 to 109 inclusive**

33. Clause 59 of the bill confers upon inspectors a general power to enter a "place" (defined in the dictionary as including a vessel, vehicle or aircraft) in a series of circumstances routinely provided for in bills which incorporate a regulatory regime. The power of entry under cl.59 extends somewhat beyond situations where the occupier of a place consents or where entry is authorised by a warrant, as it includes public places when open to the public and to authority holders' places of business when carrying on business or otherwise open for entry.

34. Clause 66 confers a set of general powers exercisable after entry has been effected under cl.59. Other provisions (for example, cls.67, 68, 74 to 84 inclusive) confer post-entry powers which are not dissimilar to those included in many bills previously examined by the committee.

35. However, the bill includes a number of additional powers which appear to be tailored to the marine park context. These include:

- Power to require a person found committing, or who has just committed, an offence to stop and not move on until permitted (cl.70).
- Power to direct a person to immediately leave a marine park if found committing, or attempting to commit, or having just committed, an offence (cl.71).
- Power to board or enter a vessel, vehicle or aircraft (cl.72). The exercise of this power is not restricted to exercise in national parks.

[9] 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.

36. The bill also provides for several other compliance processes, including compliance notices (cl.93), declaration of temporary restricted areas (cl.95 to 98), directions for protecting the environment and users (cl.99) and removal of abandoned, stranded, sunk or wrecked property (cls.100 to 104).

37. In relation to the power to enter and search a vessel, vehicle or aircraft, the Explanatory Notes state (at page 7):

> *These powers and requirements are standard enforcement powers under most legislation dealing with vessel, vehicles and aircraft and are considered essential. In the absence of such provisions, the ability to search vessels, vehicles or aircraft in marine parks for the presence of illegally taken marine products would be seriously undermined.*

38. The committee notes that the bill confers powers of entry which extend beyond situations where the occupier consents or where a warrant has been obtained. The bill also includes a range of post-entry powers, together with a number of specific enforcement and entry powers tailored to the marine park context.

39. The committee refers to Parliament the question whether the extent of the various powers referred to above is appropriate in the circumstances.

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

- **clauses 135 and 136**

40. Clause 135 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes its executive officers).

41. Clause 136 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

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

43. Clauses 135 and 136 both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

44. In relation to this issue, the Explanatory Notes state:

> (These provisions) *are considered essential to ensure that there is effective accountability at the top management and decision-making level. Such obligations are now reflected in most natural resource management legislation as well as national and international standards for*

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

environmental management (eg AS/NZS ISO14000:Environmental Management Systems (Standards Australia, 1996)

45. The committee notes that cls.135 and 136 of the bill effectively reverse the onus of proof.

46. The committee refers to Parliament the question of whether, in the circumstances, this reversal of onus is justified.

♦ **clauses 137 and 138**

47. The bill contains two additional reversals of onus seemingly tailored to the subject matter of the bill.

48. Clause 137 requires the holder of an authority issued under the bill to ensure that everyone acting under the authority complies with the bill. It goes on to provide that if another person acting under the authority commits an offence, the holder of the authority also commits an offence. A defence analogous to that contained in cls.135 and 136 is provided.

49. Clause 138 provides that each "responsible person" for a vessel, vehicle or aircraft commits an offence if someone else uses that vessel, vehicle or aircraft in committing an offence against the bill and the responsible person knew or had reasonable grounds to suspect that it would be used in committing the offence and did not take reasonable steps to prevent such use. A "responsible person" is defined as an owner of the vessel, a person in control of it or a person who under an agreement is authorised to decide activities for the vessel, vehicle or aircraft.

50. The committee notes that cls.137 and 138 provide two additional reversals of onus seemingly tailored to the subject matter dealt with by the bill.

51. The committee refers to Parliament the question whether, in the circumstances, these additional reversals of onus are justified.

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?[11]

♦ **clause 140**

52. Clause 140 of the bill adds to the accountability of processes associated with the creation and management of marine parks, in that it extends the range of persons able to apply for review of decisions made under the bill via the *Judicial Review Act 1991*.

53. It does so by granting "standing" to bring such proceedings to a wider range of individuals than would normally be the case. It specifically provides that such standing is granted to individuals or corporations resident or established in Australia and which:

[11] 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.

> *at any time in the 2 years immediately before the decision, failure or conduct, ... (have) engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment.*

54. This effectively means that environmental groups will be able to bring judicial review proceedings, whether or not individuals within those groups have any direct interest in the decisions concerned.

55. The committee notes that cl.140 of the bill extends public accountability by broadening the range of persons able to bring judicial review proceedings to include individuals and corporations associated with the environmental movement.

56. The committee commends the Minister on this measure.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[12]

- **clause 164**

57. Clause 164 of the bill expressly validates zoning plans and permissions issued under such zoning plans, in relation to the reclamation of tidal land in marine parks.

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

59. Although the range of factual circumstances to which the provision relates is not completely clear to the committee, it seems unlikely that the interests of any individual will be adversely affected by such validations. The Explanatory Notes state, in relation to this matter:

> *The proposed amendments will remove any uncertainty over the validity of reclamations completed before the commencement of the Bill and the status of land which has been removed from marine park as the result of reclamation works.*

60. The committee notes that cl.164 of the bill validates certain zoning plans and permissions issued under them, in relation to the reclamation of tidal land in marine parks.

61. It appears unlikely that such validations would adversely affect the interest of any individuals.

62. On this basis the committee has no concerns in relation this retrospective provision.

[12] 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.

5. NATURAL RESOURCES 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 17 August 2004.

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

> (to make) *routine, uncontroversial amendments to several pieces of legislation that fall within* (the Minister's) *portfolio responsibilities to improve the administration of those Acts.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[13]

♦ **clause 4**

3. Clause 4 of the bill amends s.37(2) of the *Land Protection (Pest and Stock Route Management) Act 2002*, which provides for the making by the chief executive of "emergency pest declarations" in relation to animals or plants.

4. Section 37(2) currently provides that the chief executive shall make such declarations by means of a Gazette notice. A Gazette notice is defined in the *Act Interpretation Act 1954* as a notice published in the Queensland Government Gazette. Section 37(4) provides that such notice is subordinate legislation. It is therefore required to be tabled in, and is subject to disallowance by, Parliament.

5. Clause 4 deletes from s.37(2) the word "Gazette". The chief executive will therefore in future be able to make pest declarations by means of a notice not necessarily published in the Gazette. Clause 4 will not affect the requirement that the notice be tabled in Parliament and be subject to parliamentary disallowance.

6. The Explanatory Notes (at page 5) explain the amendment on the basis that the current reference to a "Gazette notice" in subsection (2) is inconsistent with the classification of the notice as subordinate legislation (see subsection (4)).

7. It does not appear to the committee that there is currently any conflict between the two subsections. The effect of the amendment will, as mentioned, be that the notice will no longer be required to be published in the Gazette. It is not clear to the committee what, if any, publication processes are envisaged.

8. The committee notes that cl.4 of the bill deletes the requirement that a pest declaration under the *Land Protection (Pest and Stock Route Management) Act 2002* be made by means of a notice published in the Government Gazette.

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

9. The committee seeks information from the Minister as to how (if at all) it is proposed that the public will be informed of the making of the declaration.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[14]

- **clause 31**

10. Part 3 of the bill (cls.22 to 33) amends the *Surveyors Act 2003*, which commenced on 1 August 2004. Various clauses, all related to disciplinary matters and eligibility for registration, amend the Act to include reference not only to the *Surveyors Act 2003* but to the Act which it repealed, namely, the *Surveyors Act 1977*.

11. Clause 31 inserts s.194A, which deems any reference in those amended sections to include a reference to the repealed Act. This deeming provision will apply from the date of commencement of the 2003 Act (1 August 2004) until this bill is passed and takes effect.

12. The purpose of s.194A is obviously to enable various administrative actions under the newly commenced 2003 Act to be conducted, from the time of the Act's commencement until this bill takes effect, as though the relevant sections of the new Act include a reference not only to it but to the previous repealed legislation. The relevant amendments will of course ensure that any actions taken after the bill comes into force will be able to be conducted on that basis.

13. The bill was introduced on 17 August 2004 and could be passed as early as the next sitting week (31 August to 2 September 2004).

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

15. The relevant provisions of the new Act, in relation to which administrative actions will be retrospectively validated, appear to deal with matters of some significance.

16. In a theoretical sense, the content of the proposed section has been on the public record (though not perhaps in a manner readily observed by the public) since the bill was introduced into Parliament on 17 August. The committee is unaware of whether, if at all, the intention to change the legislation in the relevant manner has been publicised in any other way (such as by media release).

[14] 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.

17. The committee notes that proposed s.194A (inserted by cl.31) will validate actions taken under a number of sections of the *Surveyors Act 2003* between its commencement date (1 August 2004) and the commencement of this bill. As such, the bill will have retrospective effect.

18. The committee seeks information from the Minister as to the extent to which any individuals are likely to be adversely affected by these validations.

6. PARTNERSHIP AND OTHER ACTS 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 17 August 2004.

2. The object of the bill, as indicated by the Minister's Second Reading Speech, is:

> (to introduce) *an incorporated limited partnership in Queensland. This entity will be a new form of business structure which Australian and international venture capital investors in Queensland can use to access taxation exemptions and "flow through" taxation treatment for venture capital investment recently provided by the Australian Government.*

The bill generally

3. The bulk of the provisions of this bill facilitate the establishment and operations, under the *Partnership Act* 1891, of a new legal entity to be known as an "incorporated limited partnership". Limited partnerships may presently be established under the *Partnership (Limited Liability) Act 1988*, but the bill will enable such entities to also be given a legal identity separate from that of the partners associated with it.

4. The bill contains lengthy and detailed provisions in relation to this new statutory entity. While these provisions are clearly of some significance, from the committee's standpoint they basically raise issues of policy. The committee therefore does not propose to offer any comment in relation to this bill, other than in respect of the matter mentioned below.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[15]

- **clause 42 (proposed s.111)**

5. Clause 42 of the bill inserts into the *Partnership Act 1891* proposed s.111. This forms part of new chapter 4 of the bill which, as mentioned earlier, introduces provisions facilitating the establishment and operation of incorporated limited partnerships.

6. Section 111 essentially provides that if a general partner in an incorporated limited partnership (as opposed to a limited partner) commits an offence, each other general partner in the partnership will also be deemed to have committed that offence. Section 111(2) provides a defence in that the other partners will not be liable if they can establish that they "took all reasonable precautions and exercised proper diligence to avoid the commission of the offence".

7. Section 111 effectively reverses the onus of proof, since under the law a person cannot generally be found guilty of an offence unless he or she has the necessary intent.

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[15] 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.

8. The committee has previously encountered similar provisions in relation to corporations (in such cases the provision declares "executive officers" of the corporation to be guilty of any offence committed by the corporation, unless they can establish a defence similar to that above), and also in relation to individuals (where acts are performed by a person's "representative" (which includes employees and agents)).

9. The provisions of s.111 can be likened to those in the second category above, as they impose upon an individual an offence liability based on the act of another individual with whom that person is in a co-operative business relationship.

10. The Explanatory Notes do not state reasons why it is thought appropriate that this *prima facie* obligation should be imposed upon a person's co-partners. However, from past experience Ministers usually argue that such provisions promote a higher standard of vigilance on the part of the associated persons, and thereby lessen the likelihood of offences being committed.

11. The committee notes that proposed s.111 (inserted by cl.42) effectively reverses the onus of proof in relation to partners of a person who commits an offence.

12. The committee refers to Parliament the question of whether, in the circumstances, this reversal of onus is justified.

7. PETROLEUM (SUBMERGED LANDS) 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 17 August 2004.

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

   - *provide that cross-references to State laws remain valid, when the Offshore Petroleum Act (Cwlth) is enacted; and*
   - *implement the legislative scheme to confer powers and functions on National Offshore Petroleum Safety Authority (NOPSA) which was established by the Petroleum (Submerged Lands) Amendment Act 2003 (Cwlth).*

Does the legislation have sufficient regard to the institution of Parliament? (national scheme legislation)[16]

♦ **The bill generally**

3. The bill was made pursuant to the Offshore Constitutional Settlement between the States and the Commonwealth. As part of the settlement, the states have an obligation to enact legislation to mirror legislative changes made by the Commonwealth in respect of relevant matters. In the current case the Commonwealth has introduced a new statutory regime governing workplace health and safety matters on offshore petroleum facilities. In order to ensure that the regime applies consistently across all Australian waters, Queensland is enacting this legislation.

4. The legislation will disapply Queensland's occupational health and safety-related legislation within Queensland waters and apply the Commonwealth legislation, thereby enabling the Commonwealth legislation to apply universally. The new Commonwealth provisions are included in Schedule 3 to the bill.

5. It seems clear that the current bill forms part of national scheme legislation.[17]

6. National schemes of legislation have long been a source of concern, both to the committee and to its interstate and Commonwealth counterparts.[18] These schemes take a number of forms and the objection to them is greatest when they involve predetermined legislative provisions.

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

17 The committee uses this term to describe broadly:

- any and all methods of developing legislation which is –
  - uniform or substantially uniform in application;
  - in more than one jurisdiction, several jurisdictions or nationally.

18 The relevant issues are canvassed in detail in *Scrutiny of National Schemes of Legislation – A Position Paper of Representatives of Scrutiny of Legislation Committees Throughout Australia*, October 1996.

7. Minister's sponsoring bills of the latter type will generally object to any amendments being made to them during their passage through Parliament, on the basis that such amendments would be inconsistent with the legislative terms agreed on by the relevant intergovernmental body.

8. In the current case, it appears that although the bill gives effect to an intergovernmental agreement Queensland is, by and large, enacting its own legislation to give effect to that agreement. To that extent, the bill constitutes one of the less problematical forms of national scheme legislation.

9. This bill is made pursuant to an intergovernmental agreement, and forms part of national scheme legislation. Many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament.

10. The current bill is in the committee's view less objectionable than other NSL legislation, in that it appears to have been drafted in Queensland and does not merely adopt other laws.

11. The committee refers to Parliament the question of whether the bill has sufficient regard to the institution of Parliament.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[19]

- **clause 12 (proposed s.14A(3))**

12. As mentioned earlier, a major purpose of this bill is to disapply Queensland laws relating to occupational health and safety, insofar as they concern activities occurring at offshore oil facilities. Proposed s.14A(3) lists a number of Queensland statutes which will be disapplied. However, the section goes on to provide that additional laws may be specified, for the purpose of the definition, by means of regulation.

13. Given the importance of this definition, it would obviously be preferable if all the relevant laws could be exhaustively stipulated in s.14A. However, the definition does contain a lengthy list of statutes (including all the major workplace health and safety-related Acts), and in the circumstances the capacity to nominate additional statutes by regulation perhaps becomes a less significant matter.

14. The committee notes that proposed s.14A (inserted by cl.12) provides power for additional laws to be rendered inapplicable by the making of regulations. However, the proposed section incorporates a lengthy list of workplace health and safety-related statutes.

15. The committee seeks information from the Minister as to why it is not possible to exhaustively list the relevant statutes in the bill itself.

[19] 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.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[20]

- **clause 18 (proposed s.151R)**

16. Proposed s.151R provides that specified authorities and officers are not personally liable for anything done in good faith in the performance of their statutory functions under the bill. This contrasts with the more limited form of immunity generally conferred by Queensland statutes, under which the officer must act not only in good faith, but without negligence.

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

> *This exemption from liability does not currently exist in the Queensland Petroleum (Submerged Lands) Act 1982 but reflects a similar exemption conferred by the Commonwealth Petroleum (Submerged Lands) Act 1967. Inclusion of this provision is consistent with the Offshore Constitutional Settlement between the Commonwealth and the States to provide for consistent offshore regulation. It will also enable the safety authority to carry out their functions without constraint from possible legal action in both Commonwealth and State waters, particularly when incidents occur on offshore facilities that require immediate action.*

18. The committee notes that proposed s.151R (inserted by cl.18) confers statutory immunity upon a range of authorities and officers performing functions under the bill, subject only to their acting in good faith.

19. The committee notes that this provision is enacted to mirror corresponding provisions of the relevant Commonwealth legislation.

20. The committee draws to the attention of Parliament the breadth of this immunity provision.

- **Schedule 3, cl.34**

21. Clause 34 of Schedule 3 similarly provides an exclusion from civil legal liability for health and safety representatives performing their duties. The exemption is framed in quite general terms, and is not subject to any express obligation of good faith or absence of negligence. However, some restrictions may well be implied.

22. The committee notes that cl.34 of Schedule 3 provides a broadly-framed immunity from civil legal liability for health and safety representatives.

23. The committee draws the nature of this immunity to the attention of Parliament.

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

Does the legislation have sufficient regard to the rights and liberties of individuals?[21]

- **Schedule 3 (cls.7 to 14)**

24. Clauses 7 to 14 of the schedule impose a range of broadly-framed obligations upon operators of facilities (cl.7), persons in control of facilities (cl.8), employers (cl.9), manufacturers (cl.10), suppliers (cl.11), persons erecting facilities or installing plant (cl.12) and persons present at facilities (cl.13). Breach of these provisions is an offence punishable by substantial maximum penalties of up to 1,470 penalty units ($110,250).

25. Under these broadly framed provisions, persons can be guilty of an offence for conduct or actions which are not intentional, but are merely negligent in the civil law sense. In that regard these provisions are similar to those contained in Queensland workplace health and safety-related legislation.

26. The committee notes that Schedule 3, cls.7 to 14 impose a range of broadly-framed obligations, which render persons liable to prosecution even if merely negligent. Substantial maximum penalties are provided.

27. The committee draws these provisions to the attention of Parliament.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[22]

- **Schedule 3, cls.44 to 65**

28. The bill confers on OHS inspectors significant powers of entry (cl.45) which extend beyond situations where the occupier consents or the entry is authorised by a warrant. Clause 44 provides a general power for OHS inspectors to conduct inspections at any time to ascertain whether requirements made under listed OHS laws are being complied with, or concerning a contravention of laws or an accident or dangerous occurrence that has happened at a facility. Clause 46 confers a specific additional entry power in relation to facilities, exercisable at any reasonable time, and cl.47 confers similar powers in relation to regulated business premises.

29. Once entry has been effected, cls.56 to 65 confer an extensive range of post-entry powers, not dissimilar to those included a number of bills which the committee has previously examined.

30. In relation to these matters, the Explanatory Notes state:

> *Under clause 45 an inspector may, without consent or a warrant, enter a place of business to which this Bill relates. A power of entry to a place of business when the matter concerns occupational health and safety is consistent with other modern safety legislation. The entry*

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

[22] 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.

by consent option is overwhelmingly used in practice as inspectors entering premises only do so when specifically invited to enter by the owner/occupier. It is logical and sensible that this option remain. The entry onto business premises during working hours without invitation is an essential part of an inspector's work, as an "unannounced" inspection can often detect a breach which would otherwise be hidden.

31. The committee notes that cls.44 to 65 of Schedule 3 confer significant entry and post-entry powers upon OHS inspectors.

32. The committee draws the nature and extent of these powers to the attention of Parliament.

8. PLANT PROTECTION AMENDMENT BILL 2004

Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Fisheries, introduced this bill into the Legislative Assembly on 17 August 2004.

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

> *To amend the Plant Protection Act 1989 to rectify deficiencies identified in the Act during the current citrus canker outbreak, in particular, the proposed Plant Protection Amendment Bill 2004 will:*
>
> - *remove the ability of some owners of diseased properties to seek injunctions to prevent eradication;*
> - *provide greater disease surveillance powers to inspectors;*
> - *allow inspectors to access records (wherever located) to trace the movements of potentially diseased plant matter;*
> - *increase the penalties for breaches of the Act, and including personal liability for company directors;*
> - *clarify the right of the State to carry out necessary treatment or destruction within a pest quarantine area.*

Overview of the bill

3. The Minister in his Second Reading Speech indicates that the bill makes urgent and essential amendments to correct deficiencies in the *Plant Protection Act 1989* that have come to light during the current emergency response to the citrus canker disease outbreak near Emerald. He states that:

> *This bill is essential to protecting Queensland's primary industries and the economy of Queensland and strikes the right balance between individual rights and the public interest.*

4. To overcome deficiencies in the current Act that have become apparent since the recent citrus canker scare, the bill proposes conferring wide-reaching powers on inspectors in quarantine situations, including wide entry, seizure, inquisitorial and directive powers. Of key interest is cl.10 proposing s.11(2A), which provides that, in declaring for s.11(2)(b), the duties and obligations imposed on owners of land, or on any other person in order to achieve the objects of the quarantine, a regulation or notice may include requirements for the treatment or destruction of plants, including healthy plants, soil or appliances. That destruction may be carried out by an inspector. Pages 17 to 19 of the Explanatory Notes elucidate further on these powers.

5. The Explanatory Notes concede that the bill does make a number of departures from the fundamental legislative principles, but that:

> *Any such departures will occur in the context of a tension between the fundamental legislative principles outlined in s.4 of the Legislative Standards Act 1992 and the competing community desire to ensure rapid and decisive response in protecting the community against the impact of potentially devastating plant pest or disease outbreaks.*
>
> *These adverse impacts extend to severe losses in production, loss of market access and resulting loss of jobs. Whilst the nature of some provisions may be considered onerous, the public interest in a precautionary and prudent approach to pest and disease control management far outweighs the public interest of individual ownership rights in respect of infected plants or crops. Where serious and significant threats to industry are the potential impacts of exotic pest and disease, it is the application of the precautionary principle that will ensure the greatest protection and benefit to the whole community.*

6. Provisions of the bill which appear to depart from the fundamental legislative principles are dealt with below.

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?[23]

- **clause 11**

7. Clause 11 inserts new ss.11B to 11F. Section 11B essentially provides that once a notice or regulation has been made declaring a quarantine area, and the relevant pest which is the subject of the pest infestation is declared a "serious pest", designated actions which are authorised or purportedly authorised by the notice or regulation, or by the Act, or are done in compliance with a direct instruction for the purposes of the legislation, can not be legally challenged.

8. Sections 11B(2) and (3) provide that a designated decision ("to perform a designated act") is final and conclusive and cannot be challenged, appealed against, reviewed, quashed, set aside, or called into question in another way, under the *Judicial Review Act 1991* or otherwise (whether by the Supreme Court, another court, a tribunal or another entity), and is not subject to any writ or order of the Supreme Court, another court, a tribunal or another entity on any ground; nor can a person bring a proceeding for an injunction, writ, declaration or other order, to stop or otherwise restrain the performance of a designated act.

9. It should be noted however that a person may still bring an action to recover damages for loss or damage caused by a negligent act or omission in the performance of a designated act, or for an unlawful act (s.11B(4)).

[23] 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.

10. In relation to this removal of the common law right of persons to access the courts, the Explanatory Notes state:

> *The Bill provides that once a Ministerial order or regulation has been made declaring a quarantine area then, for certain prescribed serious diseases, no proceedings for an injunction, or for any order in the nature of a prerogative writ, or an order of any other kind, may be instituted or continued in any court against the Minister, the chief executive, an inspector or any other person that would stop, prevent or restrain the Minister, chief executive, inspector or other person from taking any action in relation to or in consequence of an outbreak or suspected outbreak of an exotic pest or an exotic disease.*
>
> *While the amendment contemplates powers that override rights of ownership, prompt destruction is essential to reduce spread of the infestation and to reopen market access for the industry concerned. Delay in destruction can impose severe hardship on all participants in the relevant industry as well as increasing the risk of spread of the infestation. The section does not stop a person from bringing a proceeding to recover damages for loss caused by a negligent act or omission or an unlawful act.*

11. The committee generally opposes "privative clauses" such as proposed s.11B.

12. That the committee notes that cl.11 inserts a privative clause that will deny persons the right to challenge in the courts designated decisions in respect of pest and quarantine declarations. The committee is generally opposed to provisions of this nature.

13. The committee notes that the Minister's Speech and the Explanatory Notes both advance arguments in favour of this provision.

14. The committee refers to Parliament the question of whether cl.11 has sufficient regard to the rights of persons who may wish to challenge the decisions in question.

♦ **clause 20**

15. Section 21M of the *Plant Protection Act 1989* allows a person aggrieved by the making of a decision of an administrative character to apply to the chief executive for reconsideration of the decision.

16. Clause 20 amends s.21M(5) to specifically state that a decision of the Minister, the chief executive or an inspector, made under a regulation or notice, or authorised under the Act, which decision declares a quarantine area because of a notifiable pest is *not* a decision of an administrative character. Of this the Explanatory Notes state:

> ***Exclusion of the application of section 21M (Application for reconsideration of administrative decisions)***
>
> *It is currently not clear that section 21M does not apply to decisions made under a quarantine regulation or notice. It is unacceptable to delay urgent action in regard to treatment of a notifiable pest or disease, or one of the prescribed serious pests or diseases, while a person aggrieved is given 28 days to apply for a review. Accordingly, for very serious diseases, where the risk to the States economy is considerable, section 21M must, in the greater public interest, be excluded.*

17. The committee refers to Parliament the question of whether cl.20 has sufficient regard to the rights of persons who may wish to challenge the decisions in question.

Does the legislation provide appropriate protection against self-incrimination?[24]

- **clauses 11 and 17**

18. Clause 11 inserts new s.11F(1) to state that it is *not* a reasonable excuse for a person to fail to comply with an inspector's request to inspect or copy a business document on the grounds that complying might incriminate the person.

19. While this provision expressly denies a person protection on the ground of self-incrimination, it is somewhat tempered by s.11F(2) which states that where an individual does comply with a request to inspect business documents, evidence of, or directly or indirectly derived from that document or the information it contains that might tend to incriminate the person is not admissible in evidence against them at a civil or criminal proceeding (except a proceeding where the falsity or misleading nature of the document is relevant).

20. Similarly, cl.17 inserts a new s.20AA. Section 20AA(7) states that it is not a reasonable excuse for a person to fail to comply with an information notice issued under s.20AA because complying with the notice might incriminate the person.

21. The committee's general view is that the denial of protection afforded by the self-incrimination rule is potentially justifiable if:

- The questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and which it would be difficult or impossible for the Crown to establish by any alternative evidentiary means.
- The bill should prohibit use of the information obtained in prosecutions against the person.
- The "use indemnity" should not require the person to fulfil any conditions before being entitled to it (such as formally claiming the right).

22. The Explanatory Notes justify the bill's provisions regarding self-incrimination and "derivative use" of information as follows:

> *The Bill overrides the general rule that a person cannot be required to provide information where that information may tend to incriminate them. This provision is essential in the case of an infestation of a serious plant pest or disease because the only way to ensure that the infestation if fully under control is to be able trace where the infection may have originated and where infected material may have gone. Without adequate trace-forward and trace-back, it cannot be definitively said that the disease is fully under control or is fully eradicated. This poses a very serious risk to the industry concerned because of the threat to*

[24] 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.

further plants and crops and the likely resultant reduction in market access this would result in for the industry.

The clause does contain some safeguard for the individual being required to supply the information because any such information obtained cannot be used to prosecute that individual.

23. The committee refers to Parliament the question of whether the exclusion of the rule against self-incrimination by the bill is justifiable in the circumstances.

Does the legislation have sufficient regard to the rights and liberties of individuals?[25]

- **clauses 8, 9, 10, 11, 12, 13, 14, 15, 17, 18.**

24. The bill contains many provisions the breach of which constitutes an offence punishable by a monetary penalty. One penalty unit for this Act has a value of $75.

25. Most of the penalties have doubled, while one increased from 50 penalty units (p.u.) to 400 p.u. The maximum penalty for breaching a number of the provisions is now set at 400 p.u. ($30,000), while several others have doubled from 1000 p.u. to 2000 p.u. ($150,000).

26. The penalty changes are outlined in the table below:

Provision	Current Maximum Penalty (in p.u.)	Proposed Maximum Penalty (in p.u.)
s.6K – Return of Identity Card	N/A (new)	20 ($1,500)
s.8(4) – Contravention of s.8 Pest Notice or Regulation	1000 ($75,000)	2000 ($150,000)
s.9(4) - Contravention of s.9 Pest Notice or Regulation	1000 ($75,000)	2000 ($150,000)
s.11(10) – Offences in respect of a pest quarantine area	1000 ($75,000)	2000 ($150,000)
s.11C(2) and (3) – Failing to keep business documents for 7 years in breach of s.11C	N/A (new)	400 ($30,000)
s.11D(2) and (3) – Failing to keep business documents for pest quarantine area for 7 years in breach of s.11D	N/A (new)	400 ($30,000)
s.11E(3) and (6) – Failing to produce business documents for inspection or copying, on request by inspector	N/A (new)	400 ($30,000)
s.13(8) – Failure to comply with s.13(5) direction about pest infestations	1000 ($75,000)	2000 ($150,000)

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

Provision	Current Maximum Penalty (in p.u.)	Proposed Maximum Penalty (in p.u.)
s.14(6)– Failure to comply with s.14 direction to destroy healthy crop to prevent pest infestation	200 ($15,000)	400 ($30,000)
s.19(6) – Failure to comply with s.19 direction from inspector without reasonable excuse	200 ($15,000)	400 ($30,000)
s.19A(6) – False representation about a plant or thing likely to cause reasonable belief that an inspector's certificate has been given for that plant or thing	50 ($3,750)	400 ($30,000)
s.20AA(5) – Failure to comply with an information notice without reasonable excuse	N/A (new)	400 ($30,000)
s.20A(9) – Failure to comply with inspector's direction without reasonable excuse where imminent risk of infestation	100 ($7,500)	400 ($30,000)

27. The magnitude of these maximum penalties is justified by the Minister in his Second Reading Speech as follows:

> *One of the lessons learnt from the United Kingdom experience of a Foot and Mouth (FMD) outbreak is that the spread of FMD has in some cases been exacerbated by deliberate contravention of quarantine conditions. The same can prove true of the breaking of quarantine conditions relating to plant infestations. Appropriately set penalties serve as a necessary deterrent to help prevent the introduction and spread of exotic plant pests and diseases.*
>
> *It is proposed to increase the penalties under the Act to reflect the gravity of the implications of non-compliance with control and eradication measures associated with endemic and exotic pest and disease outbreaks. The penalty increases will create a reasonable parity with similar offence penalties in other Australian jurisdictions and other similar penalties in the Queensland Statute Book.*

28. The Explanatory Notes also make reference to the penalties being commensurate with those for equivalent quarantine offences relating to animal diseases such as foot and mouth disease.

29. The committee refers to Parliament the question of whether the level of maximum penalties imposed by the bill, in the context of the threat to primary industry and Queensland's export markets posed by serious plant pests and diseases, has sufficient regard to the rights and liberties of individuals who might be subjected to such penalties.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[26]

- **clause 18**

30. Section 20A of the *Plant Protection Act 1989* gives inspectors appointed under the Act wide powers to act when the chief executive considers, on reasonable grounds, that there is an imminent risk of infestation by a pest on non-quarantined land.

31. Section 20A(3) gives an inspector power to enter the land without warrant or without the consent of the owner of the land, subject to the inspector first attempting to tell the owner and giving the owner the opportunity to allow the inspector immediate entry to the land without use of force.

32. The inspector may, under s.20A(5) direct the owner to take reasonable steps within a stated reasonable period (eg. steps to monitor or treat the pest), or the inspector may take the reasonable steps him or herself, or may authorise another person to do so.

33. Clause 18 inserts a new subsection (10A) into s.20A, which change would allow an inspector to *take any of the following steps as are reasonable in the circumstances –*

(a) inspect anything on the land;

(b) monitor plant movements;

(c) photograph anything;

(d) test anything;

(e) take samples of anything for testing or identification;

(f) lay baits and set lures or traps.

34. Similarly, cl.18 inserts a new subsection (10B) into s.20A, which states that (the proposed) subsection (10A) does not limit the reasonable steps the inspector may direct, take or authorise under s.20A(5) or the powers the inspector may exercise under s.20A(10).

35. The "reasonableness" requirement in s.20A(10A) that steps be "reasonable in the circumstances" tempers what could otherwise be considered to be wide entry, search and seizure powers given to inspectors.

36. The committee refers to Parliament the question of whether the wide powers conferred on inspectors by s.20A(10A) are sufficiently tempered or constrained by the qualification that the exercise of the powers be "reasonable in the circumstances".

[26] 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.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[27]

- **clause 23**

37. Clause 23 proposes a new s.29A that obliges executive officers of a corporation to ensure the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence, that of failing to ensure the corporation's compliance.

38. The proposed section provides grounds upon which liability may be avoided, essentially being that if the executive officer was in a position to influence the conduct of the corporation in relation to the offence, the officer exercised reasonable diligence to ensure compliance and to prevent the offending act or omission, or alternatively that the executive officer was not in a position to influence the conduct of the corporation in relation to the offence.

39. Proposed s.29A, which is in a form routinely employed in many bills examined by the committee, effectively reverses the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she had the necessary intent.

40. In relation to this clause, the Explanatory Notes state:

> *It is arguable that this provision contains a reversal of the onus of proof, however it should be noted that the matters to be proved by the defence are not elements of the offence. Placing the onus to prove the defence on the executive officer is justified because the facts that support the defence will usually be entirely within the defendant's knowledge and would be impossible for the prosecutor to prove in the negative.*

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

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

43. The committee refers to Parliament the question whether proposed s.29A contains a justifiable reversal of the onus of proof and therefore has sufficient regard to the rights and liberties of individuals.

[27] 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.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[28]

- **clauses 20 and 26**

44. Part 8 of the bill inserts proposed ss.36 to 39 which validate, amongst other things, the ministerial notice issued on 2 July 2004 to declare a quarantine for citrus canker at the time when the recent outbreak was first observed.

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

46. The validating provisions would of course impact on persons affected by the 2 July declaration, and by any other such declarations already made.

47. However, the Explanatory Notes (at pages 10 to 11) assert that the 2 July notice was in accordance with the Act as in force at the time, and was therefore valid. The Notes state that the validation provision is being inserted out of an abundance of caution. They also assert that advice from Counsel, and judicial views expressed during recent Supreme Court litigation on the matter, both support this view.

48. The committee notes that proposed ss.36 to 38 (inserted by cl.26) validate, in particular, a ministerial notice of 2 July 2004 which declared a quarantine for citrus canker at the time when the recent outbreak was first observed. These provisions are therefore retrospective in nature.

49. While the validation would clearly impact on persons adversely affected by that declaration, the committee notes that the Explanatory Notes assert that legal and judicial opinion strongly suggests the notice was in fact valid, and that the validation is being enacted only out of an abundance of caution.

50. The committee refers to Parliament the question whether the validation is appropriate in the circumstances.

[28] 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.

9. PRIMARY INDUSTRIES AND FISHERIES LEGISLATION AMENDMENT BILL 2004

Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Fisheries, introduced this bill into the Legislative Assembly on 19 August 2004.

2. The objects of the bill, as indicated by the Explanatory Notes, are to:

> *1. make amendments to and subsequently repeal the Sawmills Licensing Act 1936 (the Sawmills Act) and amend the Fisheries Act 1994 (the Fisheries Act) to meet National Competition Policy requirements;*
>
> *2. amend the Stock Act 1915 (the Stock Act) and Exotic Diseases in Animals Act 1981 (the Exotic Diseases Act) to clarify the appeals process under each Act;*
>
> *3. amend the Food Production (Safety) Act 2000 (the Food Safety Act) and the Grain Industry (Restructuring) Act 1991 (the Grain Act) to clarify the policy intent in some provisions and to make formal/technical amendments;*
>
> *4. make further amendments to the Fisheries Act to:*
>
> > *a. enable disclosure of information to other agencies in certain circumstances; and*
> >
> > *b. to make it clear that the offence of obstructing an inspector includes assault, threaten to obstruct or attempt to obstruct; and*
>
> *5. make a minor amendment to the Police Powers and Responsibilities Act 2000 (the Police Powers Act).*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[29]

- **clauses 2(1) and 31**

3. Clause 2(1) states that proposed Part 7 (which amends the *Sawmills Licensing Act 1936*) is taken to have commenced on 30 September 2004.

4. Clause 31 of Part 7 inserts a new s.21 which is a transitional provision allowing a sawmill licence in force immediately before 30 September 2004 (the standard expiry date for sawmills licences) to continue in force until the end of 31 December 2004 (unless the licence is sooner surrendered or cancelled). This is to ensure sawmills will continue to be validly licensed up to the date of repeal of the *Sawmills Licensing Act 1936* on 1 January 2005 (cl.2 and 36). If the bill is not passed by 30 September 2004, the Part 7 transitional provision will have retrospective effect.

[29] 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.

5. The committee notes that if the bill is not passed by 30 September 2004, the Part 7 transitional provision will have retrospective effect.

6. However, the provision is not adverse to the interests of sawmill operators and enables them to remain validly licensed up to the time the *Sawmills Licensing Act 1936* is repealed.

7. The committee makes no further comment in relation to this provision.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[30]

- **clauses 28 and 29**

8. Clause 28 amends s.65B of the *Police Powers and Responsibilities Act 2000*. Section 65B gives a police officer power to give a written "animal welfare direction" requiring stated action about an animal or its environment. Section 65B(2)(e) allows for an animal welfare direction to be given to a person who was, or is reasonably suspected to have been, the person in charge of an animal before it was seized by a police officer exercising power under s.65(2)(d). Clause 28 purports to extend the occasions when an animal welfare direction can be given about seized animals to include those instances where an animal is seized by a police officer exercising his or her power under ss.60(1), 66(2)(c), 66(2)(d) or 74(1)(h).

9. Section 74(1) of the *Police Powers and Responsibilities Act 2000* gives police officers specified powers under a search warrant. Section 74(1)(h) gives an officer power under a search warrant to "seize a thing found at the relevant place, or on a person found at the relevant place, that the police officer reasonably suspects may be evidence of the commission of an offence or confiscation related evidence to which the warrant relates."

10. Section 74(1)(i) however gives an officer exercising powers under a search warrant "power to muster, hold and inspect any animal the police officer reasonably suspects may provide evidence of the commission of an offence or confiscation related evidence to which the warrant relates".

11. The committee notes that cl.28 relating to animal welfare directions for seized animals purports to apply to animals seized under s.74(1)(h). As s.74(1)(i) makes a more direct reference to animals than s.74(1)(h), the committee seeks clarification whether s.74(1)(i) should be the seizure provision referenced in cl.28.

12. Similarly, cl.29 of the bill amends s.66B(a) of the *Police Powers and Responsibilities Act 2000* to allow animals seized under any of ss.60(1), 66(2)(c), 66(2)(d) or 74(1)(h) to be destroyed. Again, for the reasons outlined above in respect of cl.28, s.74(1)(i) would appear to be a more suitable reference than s.74(1)(h).

13. The committee seeks from the Minister confirmation that the reference to s.74(1)(h) in cls.28 and 29 is the intended reference.

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

10. RURAL ADJUSTMENT AUTHORITY AMENDMENT BILL 2004

Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Fisheries, introduced this bill into the Legislative Assembly on 18 August 2004.

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

> *to implement the recommendations of the review of the Act completed in 2003, the first since its introduction in 1994.*

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[31]

- **clause 12**

3. Clause 12 of the bill amends s.7 of the *Rural Adjustment Authority Act 1994*. That section deals with approval of assistance schemes by the Governor-in-Council. Clause 12 provides that approval of assistance schemes will henceforth be effected by means of a regulation.

4. As the Explanatory Notes state, this will ensure that in future such schemes are drafted by the Office of Parliamentary Counsel, are published by Goprint, and are subject to the automatic expiry, regulatory impact statement and parliamentary tabling and disallowance processes.

5. The changes brought by cl.12 will ensure the quality of future schemes, as well as adequate public access and accountability to the public and to Parliament.

6. The committee notes that cl.12 of the bill provides that assistance schemes under the *Rural Adjustment Authority Act 1994*, which are currently approved by the Governor-in-Council, must in future be incorporated in regulations.

7. The committee commends this amendment, which will ensure public access and accountability to the public and to Parliament.

[31] Section 4(4)(b) 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 sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

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?[32]

♦ **clause 13**

8. Clause 13 amends the Act by inserting Part 3A (proposed ss.13A to 13C) ("review of decisions"). This provides a system of internal review for persons dissatisfied with decisions of the Authority in relation to:

- applications for assistance
- cancellation of assistance
- conditions imposed on assistance
- changes of arrangements for repayments of debt
- declining to deal with applications previously refused assistance; and
- calling up of loans or exercise of the Authority's rights under a security.

9. The Explanatory Notes state that Part 3 is being inserted to formally provide a process which is currently conducted on an administrative basis.

10. The Notes assert that the internal review process is considered to be adequate in the circumstances (see Explanatory Notes, page 12).

11. The committee notes that cl.13 of the bill inserts provisions providing a formal system of appeal by way of internal review, of decisions related to the provision of financial assistance.

12. The Explanatory Notes argue that the system of internal review is an adequate appeal process in the circumstances.

13. The committee views favourably the enactment by cl.13 of a formal review process. The committee considers that the process provided is probably, as the Explanatory Notes assert, adequate in the circumstances.

[32] 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.

11. SOUTHERN MORETON BAY ISLANDS DEVELOPMENT ENTITLEMENTS PROTECTION BILL 2004

Background

1. The Honourable D Boyle MP, Minister for Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 17 August 2004.

2. The object of the bill, as indicated in the Minister's Second Reading Speech, is:

> (to allow) *for the continuation of existing development entitlements to prescribed Southern Moreton Bay Islands landowners whose rights are proposed to be removed by inclusion of their land in the Conservation zone in the Redland Shire Council's new Integrated Planning Act 1997 (IPA) planning.*

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[33]

- **clause 5(c)**

3. A new planning scheme shortly to be adopted by Redland Shire Council will, it appears, remove existing development entitlements in relation to a large number of blocks of land on islands in Southern Moreton Bay. The stated purpose of this bill is to give effect to a government commitment to protect those rights.

4. The bill seeks to achieve that goal by modifying the application of the *Integrated Planning Act 1997*, which provides the general framework for development in Queensland. The modifications will only apply in relation to development approvals for "class 1 buildings" (that is, domestic buildings), and in relation to land owned by individuals (as opposed to companies).

5. Also, the bill will only apply in relation to "prescribed land". The land which is capable of falling within that category is defined in objective terms in clause 5. It must be land on one of the specified "Southern Moreton Bay Islands", it must have been included in one of three specified zones immediately before the Redlands Council's new planning scheme took effect, and it must be located entirely within a specified zone under that scheme. Several thousand blocks of land could potentially satisfy these criteria. However, cl.5(c) provides that the Act will only apply to such of those blocks as are prescribed under a regulation.

6. In other words, identification of the land to which the bill will apply is ultimately made entirely dependent upon the exercise of a subordinate law-making power.

7. Given the importance of this matter in the context of the bill's provisions, the committee's prima facie preference would be that the relevant land be identified in the bill itself (by means of a schedule, as mentioned in the Minister's Second Reading Speech). The

[33] 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.

committee notes that the Minister in her Speech, and the Explanatory Notes, advance a number of arguments as to why, in the circumstances, it is not feasible to specify the land other than by a means of regulations to be made at some future time. The reasons include the following:

- The bill's provisions need to be enacted prior to the making of the new Redlands Shire Council planning scheme.
- Many blocks are subject to drainage constraints, in relation to which the owner will need to demonstrate a capacity to overcome those problems.
- Redlands Council is currently progressing a program of voluntary land purchases or exchanges which, by the time the scheme is finalised, will have removed the need for a number of blocks to be afforded the bill's protection.

8. In the circumstances, the committee agrees that recourse to the regulation-making option is probably necessary in order to to achieve the desired outcomes.

9. The committee notes that whilst cl.5 of the bill identifies all the land capable of being made subject to its provisions, it will in fact only apply to such of that land as is specified in a regulation.

10. The committee notes that the Minister's Second Reading Speech and the Explanatory Notes both advance a number of arguments in favour of this resort to the regulation-making process.

11. In the circumstances of this bill, the committee does not object to the inclusion of the regulation-making power contained in cl.5.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[34]

♦ **clause 6**

12. Clause 4(b) provides that land will only obtain the benefit of the bill's provisions if the relevant development application is made by an "owner". "Owner" is defined in cl.6 as an individual who fulfils certain stipulated conditions. "Individual" is in turn defined in s.36 of the *Acts Interpretation Act 1936* as a natural person.

13. Clause 6(1) provides that the individual must hold a freehold estate either solely, jointly or in common, and either legally or beneficially. Clause 6(2) excludes from the definition of "owner" a person (this term is defined in the *Acts Interpretation Act* as an individual or a corporation) "who is a trustee in relation to the individual".

14. The committee interprets this to mean that where, for example, land is registered in the name of an individual as trustee for a family trust (all of whose beneficiaries are individuals), the

[34] 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.

bill's provisions will only apply if the relevant application is made by, or on behalf of, one of the beneficiaries.

15. The committee seeks confirmation from the Minister that the above interpretation is accurate.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

(NO MINISTERIAL CORRESPONDENCE IS REPORTED ON IN THIS ALERT DIGEST)

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[35]

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

[35] On 13 May 2004, 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.* (This resolution is identical to that passed by the previous Parliament on 7 November 2001.)

In accordance with established practice, the committee reports 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.*

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*

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*
263	Body Corporate and Community Management Legislation Amendment Regulation (No.1) 2003 SL No. 263 of 2003	20/4/04
375	Nature Conservation and Other Legislation Amendment Regulation (No.3) 2003 SL No. 375 of 2003	16/6/04
377	Marine Parks (Moreton Bay) Amendment Zoning Plan (No.1) 2003 SL No. 377 of 2003	16/6/04

* 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)

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*

(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 5th 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

31 August 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)