Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

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Index of bills examined:	Use above web link and click on the 'Index of bills examined' link in the menu bar

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COMMITTEE RESPONSIBILITY

Section 103 of the *Parliament of Queensland Act 2001* confers the committee with a responsibility that has two parts: examination of legislation and monitoring of the operation of certain statutory provisions.

As outlined in the explanatory notes to the *Parliament of Queensland Act* (at 43):

[T]he committee's role is to monitor legislation. The committee may raise issues (such as breaches of fundamental legislative principles) with the responsible Minister, or with a Member sponsoring a Private Member's Bill, prior to pursuing issues, where appropriate, in the Assembly.

1. Examination of legislation

The committee is to consider, by examining all bills and subordinate legislation:

- the application of fundamental legislative principles to particular bills and particular subordinate legislation; and
- the lawfulness of particular subordinate legislation.

Section 4 of the *Legislative Standards Act* states that 'fundamental legislative principles' are 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. They include that legislation have sufficient regard to:

- rights and liberties of individuals; and
- the institution of Parliament.

Section 4 provides examples of 'sufficient regard': see the diagram on the opposite page.

2. Monitoring the operation of statutory provisions

The committee is to monitor generally the operation of specific provisions of the *Legislative Standards Act 1992* and the *Statutory Instruments Act 1992*:

Legislative Standards Act	*Statutory Instruments Act*
• Meaning of 'fundamental legislative principles' (section 4) • Explanatory notes (part 4)	• Meaning of 'subordinate legislation' (section 9) • Guidelines for regulatory impact statements (part 5) • Procedures after making of subordinate legislation (part 6) • Staged automatic expiry of subordinate legislation (part 7) • Forms (part 8) • Transitional (part 10)

Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly* instructs the committee that it is to include in the *Legislation Alert* compliance with requirements in part 4 of the *Legislative Standards Act* regarding explanatory notes.

Fundamental legislative principles require, for example, legislation have sufficient regard to:

<table>
<tr><td rowspan="2">Rights and liberties of individuals</td><td colspan="2">Bills and subordinate legislation
make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review
are consistent with the principles of natural justice
don’t reverse the onus of proof in criminal proceedings without adequate justification
confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer
provide adequate protection against self-incrimination
does not adversely affect rights and liberties, or impose obligations, retrospectively
does not confer immunity from proceeding or prosecution without adequate justification
provide for the compulsory acquisition of property only with fair compensation
have sufficient regard to Aboriginal tradition and Island custom
are unambiguous and drafted in a sufficiently clear and precise way</td></tr>
<tr><td>Institution of Parliament</td><td>Bills
allow the delegation of legislative power only in appropriate cases and to appropriate persons
sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly
authorise the amendment of an Act only by another Act</td><td>Subordinate legislation
is within the power that allows the subordinate legislation to be made
is consistent with the policy objectives of the authorising law
contains only matter appropriate to subordinate legislation
amends statutory instruments only
allows the subdelegation of a power delegated by an Act only –
in appropriate cases to appropriate persons
if authorised by an Act.</td></tr>
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REPORT

Structure

This report follows committee examination of:

- bills (part 1);
- subordinate legislation (part 2); and
- correspondence received from ministers regarding committee examination of legislation (part 3).

Availability of submissions received

Submissions received by the committee and authorised for tabling and publication are available:

- on the committee’s webpage (www.parliament.qld.gov.au/SLC); and
- from the Tabled Papers database (www.parliament.qld.gov.au/view/legislativeAssembly/tabledPapers).

PART 1 – BILLS EXAMINED

1. CRIMINAL CODE (FILMING OR POSSESSING IMAGES OF VIOLENCE AGAINST SCHOOLCHILDREN) AMENDMENT BILL 2010

Date introduced: 10 March 2010

Member: Dr B Flegg MP

Portfolio responsibility: Shadow Minister for Education and Training

Nature of bill: Private member's bill

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 3** creating new offence provisions;
   - **clause 3** (new section 229BH) making rights and liberties, or obligations, dependent on administrative power which may be insufficiently defined or not subject to appropriate review;
   - **clause 3** (new section 229BF) imposing an evidential burden on a defendant;
   - **clause 3** (new section 229BG) providing for compulsory acquisition of property; and
   - **clause 3** (new sections 229BG and 229BH) which may not be drafted in a sufficiently clear and precise way.

BACKGROUND

2. The legislation would amend the Criminal Code to allow for the immediate confiscation of devices used for filming or possessing images of violence against school children.

LEGISLATIVE PURPOSE

3. The bill is intended to (explanatory notes, 1):
   - protect children who are the targets of cyberbullying through the confiscation of devices used by bullies;
   - insert a new chapter of the Criminal Code to specifically deal with making, possessing and distributing schoolchild bullying material; and
   - provide a framework for the forfeiture and seizure of things used to make, distribute or store schoolchild bullying material.
4. The bill would amend the Criminal Code by inserting proposed chapter 22AA.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

5. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act*.

6. **Clause 3** would create new offences under the Criminal Code, with the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

New section	Offence	Proposed maximum penalty
229BB(1)	Involving child in making of schoolchild bullying material	- for an adult - five years imprisonment or 40 penalty units ($4000) - for a child - one year imprisonment or 8 penalty units ($800)
229BC(1)	Making schoolchild bullying material	- for an adult - five years imprisonment or 40 penalty units ($4000) - for a child - one year imprisonment or 8 penalty units ($800)
229BD	Distributing schoolchild bullying material	- for an adult - five years imprisonment or 40 penalty units ($4000) - for a child - one year imprisonment or 8 penalty units ($800)
229BE	Knowingly possessing schoolchild bullying material	- for an adult - two years imprisonment or 16 penalty units ($1600) - for a child - one year imprisonment or 6 penalty units ($600)

Administrative power

7. Section 4(3)(a) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

8. **Clause 3** (new section 229BH) would confer significant administrative power on police officers, school principals and teachers which may not be sufficiently defined or subject to appropriate review.

9. Clause 3 would give police officers, school principals and teachers the power to seize a 'prescribed device' which is defined to mean a mobile phone, computer or other thing, for example, a camera, sound recording device or video recorder, that has just been used, or is being used, to commit a prescribed offence. A 'prescribed offence' is defined to mean an offence against section 229BB, 228BC, 228BD or 228BE.

10. Where police officers are to be conferred with powers of seizure, the powers are to be exercised following relevant training and within a framework of wider experience that police officers have of exercising similar statutory and common law powers. School principals and teachers, however, do not have similar qualifications or experience regarding the exercise of powers of seizure.

11. The committee notes that clause 3 (new section 229BF) would provide safeguards relating to the exercise of the power of seizure. The police officer, school principal or teacher seizing a prescribed device must give a receipt to the person from whom the device was seized if the person asks for one. The receipt must describe the seized device and its condition and must be given to the person the next business day after the device is seized.

12. In relation to review of the powers to be conferred by clause 3, the committee notes that while the bill does not expressly exclude the right to seek review of decisions under the *Judicial Review Act 1991* it does not provide any form of administrative review on the merits.

Onus of proof

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

14. A 'reversal of the onus of proof' occurs where a provision:

- declares the proof of a particular matter to be a defence; or
- refers to acts done without lawful justification or excuse, the proof of which lies on the accused.

15. **Clause 3** (new section 229BF) would reverse the onus of proof in criminal proceedings as it provides defences for a person charged with a prescribed offence and imposes an evidentiary onus upon a defendant to such a charge. The explanatory notes do not provide information regarding the consistency of the provision with fundamental legislative principles.

Compulsory acquisition of property

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

17. **Clause 3** (new section 229BG) would provide for court-ordered forfeiture of schoolchild bullying material and things used to make, distribute or possess the material. Proposed section 229BG would apply if a person is prosecuted for a prescribed offence and provides for the circumstances of forfeiture. It appears there is no right to compensation for the forfeited thing.

18. The explanatory notes do not address the issue.

Clear meaning

19. Section 4(3)(k) of the *Legislative Standards Act* 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 way.

20. **Clauses 3** may not be drafted in a sufficiently precise way to the extent it would insert section 229BG before section 229BH. The committee notes that to the extent proposed section 229BG would relate to the seizure of a prescribed device, its seizure would generally precede its forfeiture.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

21. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

22. Explanatory notes were tabled at the first reading of the bill. They are clear and precise. In respect of the information required by section 23, the committee notes that the explanatory notes:

- provide limited information about why the proposed way of achieving the policy objectives is reasonable and appropriate;
- provide a limited assessment of the consistency of the bill with fundamental legislative principles and the reasons for the acknowledged inconsistency; and
- do not include information about the extent to which consultation was carried out in relation to the bill and do not provide a reason for not including this information.

23. However, the committee notes also that the bill is a private member's bill. Explanatory notes to Government bills are prepared utilising the resources of Government departments. Explanatory notes to private members' bills, by contrast, are prepared with significantly fewer resources.

2. NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 9 March 2010

Responsible minister: Hon S Robertson MP

Portfolio responsibility: Minister for Natural Resources, Mines and Energy and Minister for Trade

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 20, 45 and 50,** creating new offence provisions;
   - **clause 45** which would alter liability for offences under the *Forestry Act*;
   - **clause 193** which is to discourage the lodging of caveats for improper purposes;
   - **clause 239** which would replace the definition of 'watercourse' in the *Water Act*;
   - **clauses 29, 34-5, 45, 72 and 243** which may make rights and liberties, or obligations, dependent on administrative power which may be insufficiently defined or not subject to appropriate review;
   - **clause 110** which may be inconsistent with principles of natural justice;
   - **clauses 18, 67 and 69** (new sections 14, 96AA and 96B to 96D of the *Forestry Act*) which may provide for inappropriate delegation of administrative powers;
   - **clause 45** altering the evidential burden in proceedings;
   - **clauses 45 and 69** conferring immunity from proceeding; and
   - **clauses 24, 45 and 215** providing for compulsory acquisition of property.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 18** (proposed section 15 of the *Forestry Act*) which would authorise the amendment of an Act other than by another Act.
3. The committee invites the minister to provide information as to whether:
   - **clause 45** (new section 61QH of the *Forestry Act*) has sufficient regard to the rights and liberties and of individuals; and
   - **clauses 4, 45, 102 and 231** have sufficient regard to Aboriginal tradition and Island custom.

BACKGROUND

4. The legislation is to resolve uncertainty about the location of tidal and non-tidal ambulatory boundaries, to provide for longer term management of the State's plantation interests by the department, to provide certainty to water users and the environment in the Lower Balonne area and to make several minor amendments.

LEGISLATIVE PURPOSE

5. The objectives of the bill (explanatory notes, 1-3) are to:
   - introduce a feature based methodology to resolve uncertainty in the location of certain ambulatory boundaries adjoining tidal and non-tidal waters (other than lakes) in the *Survey and Mapping Infrastructure Act* and clarify the lateral extent of the State's management powers in non-tidal watercourses in the *Water Act*;
   - differentiate between the boundary of the State's ownership of a watercourse and the non-tidal jurisdiction line for managing a watercourse, by removing State ownership matters from the *Water Act* and inserting them into the *Land Act*;
   - facilitate restructure of the State's interest in Forestry Plantations Queensland (FPQ) and to create a regulatory framework;
   - remove a restriction that a natural resource agreement is not an interest in land;

- extend, from 30 to 100 years, the term that a trust lease or sublease can be granted over an operational Deed of Grant in Trust;
- clarify provisions relating to implementation of the Delbessie Agreement (State Rural Leasehold Land Strategy);
- amend the definition of the Aboriginal or Torres Strait Islander 'native title party for an area' for the purposes of cultural heritage legislation;
- make minor changes to the endorsement of individuals and companies registered as surveyors;
- alter provisions regarding the Surveyors Board;
- align the making of survey guidelines and survey standards;
- provide for electronic provision of survey information;
- amend provisions for the keeping of registers relating to land and the advertisement, publication or notice provisions (excluding gazettal requirements);
- extend the national park exemption under the *Vegetation Management Act* to national parks (Aboriginal land), national parks (Torres Strait Islander land) and national parks (Cape York Peninsula Aboriginal land); and
- provide for the finalisation of the Lower Balonne provisions for the Condamine and Balonne Resource Operations Plan.

6. Therefore, the bill would amend the:

- *Aboriginal Cultural Heritage Act 2003*;
- *Aboriginal Land Act 1991*;
- *Coastal Protection and Management Act 1995*;
- *Dividing Fences Act 1953*;
- *Fire and Rescue Service Act 1990*;
- *Forestry Act 1959*;
- Forestry Regulation 1998;
- Forestry (State Forests) Regulation 1987;
- *Forestry Plantations Queensland Act 2006*;
- *Land Act 1994*;
- *Land Title Act 1994*;
- *Mineral Resources Act 1989*;
- *State Development and Public Works Organisation Act 1971*;
- *Survey and Mapping Infrastructure Act 2003*;
- *Surveyors Act 2003*;
- *Torres Strait Islander Cultural Heritage Act 2003*;
- *Torres Strait Islander Land Act 1991*;
- *Vegetation Management Act 1999*; and
- *Water Act 2000*.

7. On a day to be fixed by proclamation, the bill would repeal the *Forestry Plantations Queensland Act*. Upon commencement, it would repeal the Forestry Plantations Queensland Regulation 2006.

8. In addition, the bill would effect consequential amendments to the nine Acts identified in the schedule.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

9. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

10. **Clauses 20, 45 and 50** would create new offences under the *Forestry Act*, with the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

Clause	New section	Offence	Proposed maximum penalty
20	18A(3) and (4)	Failure to comply with direction or requirement of plantation officer or stating false name or address	100 penalty units ($10 000)
20	18B(3)	Failure to comply with direction in relation to fire	10 penalty units ($1000)
45	61SJ(4) and (6)	Original mortgagee to keep record of steps or documents, or to comply with the chief executive's request to advise about steps or produce documents for inspection, to confirm mortgagor's identity	20 penalty units ($2000)
45	61SK(4) and (6)	Mortgagee transferee to keep record of steps or documents, or to comply with the chief executive's request to advise about steps or produce documents for inspection, to confirm mortgagor's identity	20 penalty units ($2000)
50	63A(1)	Plantation licensee must make reasonable provision for preventing, detecting, controlling and extinguishing fires on licence area	100 penalty units ($10 000)
50	63A(2)	Plantation licensee or plantation manager must do everything within its power to extinguish fires unlawfully lit in licence area	100 penalty units ($10 000)
50	63A(3)	Plantation licensee or plantation manager notify forest officer of fire in certain circumstances	100 penalty units ($10 000)

11. **Clause 45** (proposed section 61QH of the *Forestry Act*) would have the potential to affect the rights and liberties of individuals. New section 61QH would deem an act or omission of, for example, a plantation sublicensee or plantation manager, to be the act or omission of the plantation licensee.

12. Section 88 of the *Forestry Act* provides for offences generally and for loss or damage caused by an offence against a provision of the Act. If, for example, an act or omission of a plantation sublicensee is a contravention or failure to comply with a provision of the *Forestry Act*, under section 88(1) of the *Forestry* Act, the plantation sublicensee is guilty of an offence against the *Forestry Act*.

13. The committee invites the minister to provide information as to whether a penalty for an act or omission of a plantation sublicensee that is an offence against the *Forestry* Act has the potential to attach to, for example, a director of a plantation licensee.

14. **Clause 193** would amend section 130 of the *Land Title Act* to clarify that the section does not apply to a caveat lodged by the registrar of titles. The explanatory notes provide (at 18) the following rationale for amendment. It indicates that, as the purpose of the amendment is to clarify the application of the provision, sufficient regard is had to rights and liberties of individuals:

> *The intent of section 30 is to discourage persons from lodging caveats under section 122 for improper purposes, that is when there is no real basis on which an interest in land can be claimed. The registrar's power to lodge a caveat under section 17 is to assist in the registrar's statutory functions, which may require lodgement of a caveat to protect the integrity of the freehold land register and/or to protect the rights of persons with an interest in land in certain circumstances. The reversal of the onus of proof and compensation provided for in section 130 are not appropriate, and were never intended to apply, in relation to registrar's caveats. The amendment is for clarification as section 189(1)(i) already provides that no compensation is payable in relation to a registrar's caveat. However this could be interpreted as applying only to compensation under section 188 or section 188A and it is desirable to clarify that no compensation is available under section 130. The amendment does not abrogate any rights a person may have at common law.*

15. **Clause 239** would insert new section 5 of the *Water Act* providing a new meaning of a 'watercourse'. The new definition would state that the lateral extents of the watercourse would be the 'outer' banks. It may affect rights and liberties of land holders and others with relevant interests

16. In relation to the new definition, the explanatory notes state (at 17):

> *Clause 239 of the Bill, new section 5 (Meaning of watercourse) provides new criteria for determining the outer limits of State jurisdiction under the* Water Act*. The amendments, on commencement, may extend the State's jurisdiction into parts of privately owned land not previously under the State's jurisdiction for the purposes of the Act.*

The jurisdictional amendments do not involve any loss of private land area, but could involve the application of Water Act *requirements to land not previously subject to those requirements, for example, a requirement for to obtain a permit to take quarry material from a watercourse. It is arguable that this may be considered a diminution of property rights.*

It is unlikely that these amendments will negatively impact upon many landholders as the Department has consistently taken a practical approach to the administration of the Water Act *and asserted a broad jurisdictional extent in relation to watercourses. Consequently it is likely that there will be only insignificant changes to a small number of landholder's activities.*

The impacts of these amendments will be largely ameliorated by transitional provisions to be included in the Water Act *which will on a temporary basis maintain the authority of licences and permits for activities on land that, on the commencement of the new Act, becomes land under the jurisdiction of the department as a watercourse.*

The amendments are aimed at moving away from a problematical flow level based approach to the identification of the extent of a watercourse, and moving towards a natural feature based approach to provide greater certainty as to jurisdiction.

Administrative power

17. Section 4(3)(a) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

18. **Clauses 29, 34-5, 45 and 72** may not provide for administrative power to be subject to appropriate review.

19. Clauses 29, 34-5, and 72 generally deal with decisions about permits and licences under the *Forestry Act* and confer on the person dissatisfied with a certain decision a right of review to the chief executive against the decision. However, the amendments may not confer a right of external review.

20. Clause 45 would confer, under the *Forestry Act*, administrative power on the minister to give approval for matters relating to plantation licences, for example, transferring a plantation licence under new section 61QI. The clauses would confer, also under the *Forestry Act*, administrative power on the chief executive for matters relating to plantation licences, for example, transferring a related agreement to a new plantation licence. There does not appear to be a right of review from a decision of the minister to refuse to give approval or to grant approval on conditions. Similarly, there does not appear to be a right of review from the chief executive's refusal to approve.

21. As the explanatory notes do not appear to address these issues, the committee seeks information as to whether clauses 29, 34-5, 45, 72 and 243 are consistent with fundamental legislative principles.

22. **Clause 243** would amend the *Water Act* to insert a new part 4B. The new part 4B would amend the Condamine and Balonne Resource Operations Plan approved by the Governor in Council in 2008 to include the deferred aspect in the plan.

23. In relation to clause 243, the explanatory notes state (at 23):

The potential breach is in relation to the inclusion of a provision that affects the review and appeal rights for aggrieved persons which would ordinarily be available under existing process for finalisation of a Resource Operations Plan (ROP).

In this situation existing administrative powers to amend a ROP are not being used and instead legislative power is to be used which is excluded from review by the Judicial Review Act 1991*.*

Restricting the right to judicial review is considered justified in this case as it is balanced with the extensive consultation undertaken throughout the ROP development process and the robust merit review process undertaken by the ROP Referral Panel.

Extensive consultation was undertaken over a period of several years during the preparation of the draft CB ROP and prior to finalising the CB ROP, giving interested parties opportunity to provide input. This included public release of the notice of intention to prepare the draft CB ROP and submissions on the draft CB ROP.

In addition, the Chief Executive established a referral panel (ROP Referral Panel) to advise on relevant matters about the draft CB ROP and public submissions to it. A ROP Referral Panel is an expert panel of independent members of the public, established to review the draft CB ROP, any relevant submissions and make recommendations to the Chief Executive.

In preparing the final draft CB ROP the Chief Executive considered the recommendations of the ROP Referral Panel, including recommendations relating to the Lower Balonne provisions.

Finally, the Supreme Court of Queensland (in Munya Lake Pty Ltd & Ors v The Chief Executive, The Department of Natural Resources and Water) *considered and reviewed the previous decision process and found in favour of the Chief Executive and did not find fault.*

Natural justice

24. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

25. **Clause 110** may be inconsistent with principles of natural justice. The clause would replace section 155D of the *Land Act* and broaden the circumstances for reducing the term, including the original term, for which a term lease is granted. The clause would insert section 155DA requiring the minister to give an affected lessee notice of the proposal to reduce the term and advising of the right to make submissions about the proposed reduction. Section 155E would be amended to provide affected lessees an appeal right.

26. The explanatory notes discuss this issue including the safeguards provided for under proposed section 155DA (at 18):

Clause 110 replaces section 155D of the Land Act *that provides for the Minister's power to reduce the extended term of a rural lease. The replacement provisions will allow the Minister to reduce not only the extended term, but also the original term of the lease, if requirements that were met by the lessee at the time the original lease was granted cease being met, and those requirements formed the basis for the particular term of the lease being granted.*

It is arguable that these amendments would not be consistent with principles of natural justice because although an appeal against the Minister's decision would be available under section 155D, natural justice requires a right to make submissions before the decision is made. However, the amendment inserts a requirement that the lessee must be notified in writing of the proposed exercise of the power to reduce the term of the lease and the lessee may make a submission in response. Additionally, the decision must be notified in writing and is appealable.

Delegation of administrative power

27. Section 4(3)(c) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

28. **Clause 18** (new section 14) would amend the *Forestry* Act to provide that 'a reference in [the] Act to the Minister, the chief executive or the chief executive (fire) includes a reference to the Treasurer'.

29. The explanatory notes state (at 22):

It is proposed that the powers of the Minister and the Chief Executive under the Forestry Act *and the Chief Executive (fire) under the* Fire and Rescue Service Act 1990 *(Fire Act) will initially be exercised by the Treasurer.*

The rights of the Treasurer to exercise these powers will be terminated after an initial "bedding in" period by way of gazette notice. The relevant provisions are subject to a sunset clause. The conferral of powers does not deprive the Minister or the Chief Executive under the Forestry Act *and the Chief Executive (fire) of that head of administrative power and thus the overall administration of the* Forestry Act *will not be affected. The appropriation of these powers is necessary to facilitate the efficient and effective restructure of FPQ and the completion of transaction documentation.*

30. **Clauses 67 and 69** also provide for the delegation of administrative power.

31. Clause 67 would amend the *Forestry* Act to provide for the delegation of administrative power of the Minister's functions and powers under part 6D and 6E to the chief executive. Similarly, clause 69 would amend the *Forestry* Act to provide for the delegation of administrative power of the chief executive under certain provisions to plantation licensees, plantation sublicensees, plantation managers, plantation officers or certain registered mortgagees.

32. The explanatory notes (at 20-2) discuss the delegation powers including the limits and constraints on, and the appropriateness of, the delegation powers.

Onus of proof

33. Section 4(3)(d) of the *Legislative Standards Act* 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.

34. **Clause 45** (new section 61SG) provides that '[i]n all proceedings, the particulars of a registered document recorded in the register are conclusive of certain matters'. New section 61SG, to the extent

that it would apply to criminal proceedings, has the potential to reverse the on onus of proof in the proceeding.

35. The committee notes that the object of registration under the *Forestry Act* is to give certainty to the interests created by registration. To the extent the new section 61SG would relate to non-contentious matters, for example, that a document was registered, the committee does not consider new section 61SG objectionable.

36. However, to the extent that the particulars of a registered document would be conclusive evidence of a contentious matter in a criminal proceeding, for example all things implied in it by the *Forestry Act* or another Act, the clause may be objectionable because a party affected should be given an opportunity to challenge a fact sought to be proved.

37. The explanatory notes do not address this issue.

Immunity from proceeding or prosecution

38. Section 4(3)(h) of the *Legislative Standards Act* 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.

39. **Clauses 45 and 69** (new sections 61TV and 96E) would confer immunity from proceeding on certain persons for acts done or omissions made honestly and without negligence.

40. The committee generally observes, in respect of provisions such as clauses 45 and 69, that one of the principles underlying a parliamentary democracy based on the rule of law is that all people should be equal before the law. However, the committee notes that the provisions provide for liability to attach to the State and that for the immunity to be conferred, the officer would have to have acted honestly and without negligence.

Compulsory acquisition of property

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

42. **Clauses 24 and 45** (respectively inserting new sections 32B and 61RI(a) of the *Forestry Act*) would require compulsory acquisition of property. The committee notes that fundamental legislative principles presume that compulsory acquisition of property must only be made with compensation.

43. In this regard, the explanatory notes state (at 23):

Amendments will be made to the Forestry Act *to provide for the transition of certain areas of SPF of high conservation value back to the State at a certain date without payment of compensation to the plantation licensee. These "conservation hand back" areas have been identified by agreement with conservation stakeholders. The State is permitting the plantation licensee to harvest these areas at the end of the current growth cycle, and requiring the plantation licensee to remediate the land to an appropriate standard. Accordingly, the plantation licensee obtains the benefit of a single rotation. Potential bidders will be made aware of the conservation hand back areas intended to revert to the State. Given that:*

- *these areas have been identified as conservation areas;*
- *the plantation licensee's right to harvest these areas is limited to a single rotation; and*
- *the successful bidder will be aware of this limitation prior to making its bid, it is submitted that this does not constitute a compulsory acquisition of property.*

44. **Clause 215** would amend the *Survey and Mapping Infrastructure Act* and may provide for compulsory acquisition of property in certain circumstances, as outlined in the explanatory notes (at 16):

Clause 215, new sections 94 (No compensation for operation of div 2 or this division) and 121 (No compensation for operation of division 4 of this division) provide that no compensation will be payable in relation to the operation of the new ambulatory location rules being implemented by this Bill.

At each trigger point, a scheme of compensation for any statutory shifting of boundaries would appear to involve significant expense and difficulty with little benefit to land owners. For example, working out precisely where an ambulatory boundary used to be could involve difficult fact-finding, and application of difficult to apply legal principles, to achieve an answer that will be of no future benefit.

The first major trigger point is the commencement of the legislative changes. At this point in time, Clause 215 of the Bill inserts new sections 76 (Current adopted natural feature rule (tidal) provision) and 103 (Current adopted natural feature rule (non-tidal) provision) into the SMIA to provide that the boundary at law will, where possible, become the line of the current location of a natural feature shown in the current plan of survey, even though, immediately before the commencement of the legislative changes, the boundary could have been located at law

closer to the water than that current location. In other words, in some cases, at the first trigger point, the area of a parcel of land could be reduced by operation of statute.

45. The explanatory notes provide justification for the provision:

The operation of the first trigger point is justified by:

- *the necessity to maintain public access and ownership of Queensland beaches and the otherwise prohibitive cost of doing so should compensation be payable to all affected landholders;*
- *the location of the boundary will arguably continue to accord with a landholder's expectation that the current survey plan for the lot depicts the full extent of their land. The area described on the survey plan will not alter and the lot remains subject to erosion and accretion;*
- *the uncertainty in the current statutory definition of the boundary for non-tidal lots, making it difficult to determine the current location of the boundary at law;*
- *the potentially vast number of lots that may be affected and therefore the compensation payable could be quite large, particularly in the case of non-tidal lots; and*
- *the resource intensive process to identify all lots for which compensation may be payable. For non-tidal blocks it would be necessary to investigate stream conditions in order to determine (in accordance with recent court decisions) "where water normally flows".*

The other major trigger point is the registration of the first new plan of survey for the land after the commencement of the legislative changes.

Clause 215 of the Bill inserts new sections 80 (Original adopted natural feature rule (tidal) provision) and 108 (Boundary location criteria rule (non) tidal provision) that provide that:

- *for a tidal boundary, at this point in time the boundary at law will where possible become the current location of a natural feature identified by going right back to the first old plan of survey that adopted a natural feature; and*
- *for a non-tidal boundary, a natural feature identified under criteria stated in the new legislative provisions will locate the boundary at law.*

There is a possibility here is, again, that before the registration of the first new plan of survey, the boundary could have been located at law closer to the water than its new location. In other words, again, in some cases, at the second trigger point, the area of a parcel of land could be reduced by operation of statute. This trigger point occurs when the owner of the land decides to deal with the land in a way that requires a survey of the land.

*There has been an analogous situation in the local government context in which the High Court determined that if the surrender of property is required as a condition to consent, for example, to a subdivision approval, the acquisition is not compulsory as the developer has the option not to continue with the subdivision (*Lloyd v. Robinson *(1962)). The general principles of this case will apply to the proposed amendments. Accordingly, in this circumstance the fundamental legislative principle of acquisition with fair compensation is not breached.*

It must also be noted that the loss of area as outlined above may, in many cases, be technically true, but practically of little or no consequence. For example, for land with a tidal boundary, planning legislation and coastal protection legislation have over the years reduced the scope for development. For land with a non-tidal watercourse boundary, any loss of land area is balanced to some extent by a corresponding extension into the lost land of the riparian rights provided for in the Water Act*. (These rights are being transferred to the* Land Act*).*

Aboriginal tradition and Island custom[1]

46. Section 4(3)(j) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.

47. **Clauses 4 and 231** may not have sufficient regard to Aboriginal tradition and Island custom. The clauses respectively amend the definition 'native title party for an area' under section 34 of each of the *Aboriginal Cultural Heritage Act* and *Torres Strait Islander Cultural Heritage Act*.

48. Currently, section 34 of each Act provides:

34 Native title party for an area

(1) Each of the following is a native title party for an area—

(a) a registered native title claimant for the area;

(b) a person who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if—

[1] The committee thanks Ms Nicole Watson for her advice regarding the application of this example of fundamental legislative principles to the legislation.

(i) the person's claim has failed, but there is no other registered native title claimant for the area, and there is not, and never has been, a native title holder for the area; or

(ii) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or

(iii) the person's native title has been compulsorily acquired or has otherwise been extinguished;…

49. Clauses 4 and 231 would omit each section 34(1)(b)(i) and replace it with the following:

(i) the person's claim has failed and—

(A) the person's claim was the last claim registered under the Register of Native Title Claims for the area; and

(B) there is no other registered native title claimant for the area; and

(C) there is not, and never has been, a native title holder for the area; or

50. The explanatory notes indicate (at 19) that the amendments would have sufficient regard to Aboriginal tradition and Island custom:

The proposed amendment at clause 4 seeks to recognise the last registered native title claim over an area where there are two or more previously registered claimants for an area. Currently, section 34(1)(b)(i) does not distinguish between previously registered native title claimants and as a result, any previously registered claimant is considered to be the Aboriginal party for an area.

This does not cause any concerns where there are no overlaps to consider. However when dormant previously registered native title claims become active upon the dismissal/discontinuance/withdrawal/striking out of the last registered claim by the Federal Court, problems are created for stakeholders engaged in cultural heritage activities seeking to identify the native title party.

51. However, the committee notes that consultation regarding these amendments may not have been wide enough to identify rights that might be affected. The explanatory notes state (at 24) that consultation was undertaken with the Queensland Gas Company, Australia Pacific LNG, Origin Energy, Arrow Energy, Xstrata, Santos, representatives of the Barunggam People and members of the Wiri People Core Country native title claim group. The consultation did not extend, therefore, to any native title representative bodies or to the National Native Title Tribunal which maintains the register.

52. Further, the committee received submissions regarding clauses 4 and 231 from:

- Mr Andrew Preston, barrister; and
- Mr Greg Lee-Manwar, Approvals Manager, Surat Gladstone Pipeline, and Ms Jodhi Rutherford, Indigenous Relations Manager, Arrow Energy.

53. The committee has examined each submission and authorised its tabling and publication. The concerns expressed in the submissions are drawn to the attention of the Parliament.

54. The committee seeks further information from the minister regarding whether clauses 4 and 231 have sufficient regard to Aboriginal tradition and Island custom, including the consultation undertaken in this regard.

55. **Clauses 45 and 102** may have insufficient regard for Aboriginal tradition and Island custom.

56. Clause 45 would insert new section 61QA(2)(a). Under the new section, a plantation licence may contain terms granting to the plantation licensee an exclusive right to deal with natural resource products in the licence area. The explanatory notes (see 43-4) do not state whether the new section 61QA(2)(a) would have sufficient regard for Aboriginal tradition and Island custom.

57. Clause 102 would amend section 61 to allow for the terms of trustee leases and trustee subleases over operational deeds of grant in trust (DOGIT) to be for a maximum term of up to 100 years.

58. The explanatory notes identify (at 83) the objective of the amendment but do not provide information as to whether the amended provision would have sufficient regard to Aboriginal tradition and Island custom:

This provision is in recognition of the emerging need for trustees of operational DOGIT's to involve the private sector in the provisions of not only services but essential community infrastructure that significantly improves the community's access to services on these operational DOGIT's.

59. The committee seeks further information from the minister in respect of clauses 45 and 102.

Sufficient regard to the institution of Parliament

Amendment of Act other than by another Act

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

61. **Clause 18** would authorise the amendment of the *Forestry* Act by extending, by regulation, the operation of a provision for up to two years after the section commences.

62. A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as an 'Henry VIII' clause. In January 1997, the committee reported to the Parliament on Henry VIII clauses.[2] While the committee has generally opposed the use of Henry VIII clauses in bills, the committee's report stated that usually it did not consider provisions enabling definitions of terms to be extended by regulation to be Henry VIII clauses. Further, the committee stated that it considered Henry VIII clauses may be excusable, depending on the given circumstances, where the clause is to facilitate:

- immediate executive action;
- the effective application of innovative legislation;
- transitional arrangements; and
- the application of national schemes of legislation.

63. Where provisions fall within the scope of those considered 'Henry VIII' provisions, the committee then examines whether the provisions would represent an appropriate delegation of legislative power.

64. The relevant provision of the bill would fall within the third of the categories of Henry VIII provisions considered excusable by the committee. Further, the explanatory notes indicate (at 32) that clause 15 would represent an appropriate delegation of administrative power.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

65. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

66. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

[2] Report no 3, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, available at www.parliament.qld.gov.au/slc.

3. REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 9 March 2010

Responsible minister: Hon A Fraser MP

Portfolio responsibility: Treasurer and Minister for Employment and Economic Development

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 37** according priority as a first charge on land to a liability to pay an outstanding amount of land rich duty;
   - **clause 88** which would expressly override rights conferred by the *Property Law Act 1974;*
   - **clauses 63 and 71** respectively amending an existing offence provision and creating a new one;
   - **clause 54** making certain transfer duty exemptions dependent on an administrative power which may not be sufficiently defined;
   - **clause 60** extending the ground on which the Commissioner of State Revenue may suspend or cancel a self assessor's registration;
   - **clause 61** allowing the Commissioner of State Revenue to suspend, without notice, a self assessor's registration;
   - **clauses 8, 65, 85 and 101** providing for legislative provisions to have retrospective operation; and
   - **clauses 107-8** providing for retrospective commencement of gazette notices.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clauses 116-7** allowing the Governor to make a gazette notice endorsing proposed regulations under the *Trans-Tasman Mutual Recognition Act 1997* (Cth); and
   - **clauses 87-8** allowing the minister to make a gazette notice to revoke the declaration of an entity as a government owned corporation or a port authority or to exempt project dealings from requirements of the *Property Law Act.*
3. The committee invites the minister to provide information regarding the scope of new sections 11A, 15, 15A and 15B of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* which would authorise gazette notices and contract provisions to operate 'despite any other law or instrument'.

BACKGROUND

4. The legislation is to amend the State's revenue legislation to maintain currency and integrity and to ensure it operates as intended.

LEGISLATIVE PURPOSE

5. The bill is intended to amend (explanatory notes, 2-3):
   - revenue legislation to –
     - provide new or extended exemptions and concessions;
     - clarify the operation of the legislation or update or correct superseded terms or references; and
     - effect amendments necessary to protect revenue;
   - the *GST and Related Matters Act 2000* to repeal redundant legislative provisions;

- asset restructuring and disposal legislation to facilitate the restructure and divestment of the State's interests in a variety of businesses, assets and liabilities currently held through several Government Owned Corporations and other Government owned entities;
- legislation regulating the Metway group company and, specifically regarding residency restrictions as to directors;
- State superannuation legislation to simplify the current process for the continuation of eligibility for membership of QSuper for people who cease to be employees as a result of a restructure of a Government business; and
- mutual recognition legislation to confer the Executive Government with the power (currently exercisable by way of an Act of Parliament) to endorse regulations proposed under the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

6. Therefore, the bill would amend the:

- *Community Ambulance Cover Act 2003*;
- *Duties Act 2001*;
- *First Home Owner Grant Act 2000*;
- *GST and Related Matters Act 2000*;
- *Infrastructure Investment (Asset Restructuring and Disposal) Act*;
- *Land Tax Act 1915*;
- *Payroll Tax Act 1971*;
- *State Financial Institutions and Metway Merger Facilitation Act 1996*;
- *Superannuation (State Public Sector) Act 1990*;
- *Taxation Administration Act 2001*; and
- *Trans-Tasman Mutual Recognition (Queensland) Act 2003*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

7. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

8. **Clause 37** may affect rights and liberties of individuals. It would amend the *Duties Act* to provide that a liability to pay an outstanding amount of land rich duty would be a first charge on land owned by the land rich corporation (or any subsidiary) concerned in an acquisition.

9. In the explanatory notes to the Duties Bill 2001, legislative provision to be made regarding 'land rich duty' was described (at 42) in the following way:

> *Direct transfers of property are generally liable for duty at transfer duty rates of up to 3.75% of the property's full value. However, where property is acquired through the acquisition of shares in the company owning the property, the transfer attracts a lesser rate of duty (0.6%) on the net value of the interest in the company represented by the shares.*
>
> *Chapter 3, Part 1 addresses this issue by imposing duty on relevant acquisitions of shares in a land rich corporation at the general rates of transfer duty by reference to the land-holdings of the corporation.*
>
> *Further, the transactions that are subject to this duty may also be subject to transfer duty as acquisitions of Queensland marketable securities. If that is the case, in calculating the amount of land rich duty, a credit is allowed for any transfer duty imposed.*

10. Section 198 of the *Duties Act* sets out the circumstances where the Commissioner of State Revenue may register a charge over the land-holdings of a land rich corporation and the procedure for registering the charge. Currently, section 198 does not provide for such a charge to have priority over others.

11. New section 198(3) would allow the Commissioner to register a charge over land owned by the land rich corporation or its subsidiary under new part 4, division 5 of the *Taxation Administration Act* (part 4, division 5 of the *Taxation Administration Act*, as amended by clause 111, would provide for the registration and release of charges over land). New section 198(4) would state that a charge registered under the section has priority over all other encumbrances over the land.

12. The explanatory notes provide (at 31-2) justification for any breach of fundamental legislative principles:

The proposed amendments to the Duties Act 2001 providing that charges registered by the Commissioner in relation to land rich debts have priority has the potential for holders of existing registered securities over land of a land rich corporation and its subsidiaries to lose the priority of their securities to the Commissioner's first charge. For this to occur, however, the following events would need to occur. A relevant acquisition would need to happen, that is a person (alone or with related persons) must acquire 50 per cent or more of the interests in the land rich corporation or, where that has already happened, their interest must increase. The person must then default in payment of the land rich duty payable. Finally, the Commissioner must decide to register a charge over the land to ensure collection of the duty payable. In these circumstances, the risk of loss of priority of existing registered securities is very limited. Further, given the nature of a relevant acquisition for land rich duty, it is probable that lenders to the corporation will be aware of these transactions and will have opportunity to make appropriate arrangements to protect their interests.

Also, the changes will improve the effectiveness of Commissioner charges as a debt recovery tool, promote fairness and equity and are consistent with revenue laws in Western Australia, the Australian Capital Territory and the Northern Territory.

13. **Clause 88** would insert new section 15 into the *Infrastructure Investment (Asset Restructuring and Disposal) Act* to facilitate the divestment of certain 'declared projects' by way of 99 year leases. It would override existing statutory rights and may not have sufficient regard to rights and liberties of individuals.

14. New section 15 would abrogate rights under the *Property Law Act 1974*. It would provide:

(1) The Minister may, by gazette notice, declare a project dealing or a class of project dealings to be an exempt project dealing or exempt project dealings for this section.

(2) The *Property Law Act 1974*, section 121 and part 8, division 3, does not apply to an exempt project dealing.

(3) This section applies despite any other law or instrument.

(4) In this section—

project dealing means any lease granted or transferred to an entity in connection with a declared project.

15. The explanatory notes outline (at 32-3) the effect of new section 15 and indicate that it would have sufficient regard to rights and liberties of individuals:

Clause 88 inserts a new section 15 which abrogates certain statutory rights under the Property Law Act 1974. *The practical effect is to exclude the operation of section 121 and Part 8 Division 3 of the* Property Law Act 1994 *for long term leases granted in relation to declared projects. The excluded provisions provide consumer protections by deeming certain terms (relating to assignment and relief from forfeiture) to be included in leases. However, the relevant deemed terms are not suitable for the unique long term leasing arrangements associated with major commercial transactions offered by the State. This clause will only affect the third parties purchasing the long term lease rights involved in these major commercial transactions. The exclusion of the relevant deemed terms will provide the necessary commercial certainty for such long term transactions negotiated between the State and the relevant third parties. Further, the State could suffer significant financial detriment if it cannot provide appropriate commercial terms for the long term leases.*

16. **Clause 71** would create a new offence, with the potential to affect rights and liberties of individuals. The proposed offence and maximum penalty is identified in the table below.

Clause	New section	Offence	Proposed maximum penalty
First Home Owner Grant Act			
71	49A(8)	Failure, without reasonable excuse, to comply with garnishee notice	40 penalty units ($4000)

17. **Clause 63** would clarify the wording of an existing offence.

Clause	Section amended	Offence	Proposed maximum penalty
Duties Act			
63	481	Offence (for person other than self assessor to endorse instrument) reworded	200 penalty units ($20 000) (as for existing offence)

Administrative power

18. Section 4(3)(a) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

19. **Clause 54**, which would amend existing section 427 of the *Duties Act*, may make rights and liberties, or obligations, dependent on administrative power which may not be sufficiently defined or subject to appropriate review.

20. Currently, section 427 of the *Duties Act* provides that duty is not imposed on an instrument or transaction for a vesting of property in an incorporated association under specified provisions of the *Associations Incorporation Act 1981*. Prior to the enactment of *the Duties Act 2001*, an equivalent exemption was contained in the *Stamp Act 1894*.

21. Clause 54 would insert a new section 427(2) providing a duty exemption for the vesting of property of an unincorporated association on its incorporation under *the Corporations Act 2001* (Cth). The exemption would be subject to conditions, including that 'the association was formed with the object of … achieving another object the commissioner is satisfied is useful to the community' (new section 427(2)(a)(iii)).

22. The objective to be achieved by the amendment is described in the explanatory notes (at 15-6):

> *An unincorporated association may be incorporated under either the* Corporations Act 2001 *(Cwth) or the* Associations Incorporation Act 1981*. The vesting of an association's dutiable property in the newly incorporated association is a dutiable transaction on which transfer duty would usually be imposed. The* Duties Act 2001 *provides a transfer duty exemption for the vesting of property due to an association's incorporation under the Associations Incorporations Act 1981. However, there is no similar exemption in the case of an association incorporating under the* Corporations Act 2001 *(Cwth) as there was under the former* Stamp Act 1894*.*
>
> *Under an administrative arrangement in place since 20 November 2002, ex gratia relief has been provided from transfer duty otherwise payable on the vesting of property because of an association's incorporation under the* Corporations Act 2001 *(Cwth), in certain circumstances. The* Duties Act 2001 *is being amended to also provide exemption from transfer duty for a vesting of property in an association incorporated under the* Corporations Act 2001 *(Cwth). The exemption will impose conditions similar to those that existed under the* Stamp Act 1894*, and that are contained in a published administrative arrangement.*

23. The new section does not further define matters relevant to a determination by the Commissioner of State Revenue that an association is useful to the community. However, the explanatory notes suggest (at 30) that the proposed provision would have sufficient regard to rights and liberties of individuals:

> *The proposed duty exemption for vesting of property of an association incorporated under the Corporations Act 2001 (Cwth) operates on the basis that the Commissioner may approve whether an association's object is one which has an end useful to the community. When the exemption was contained in the* Stamp Act 1894*, the Minister was responsible for this approval. However, the delegated arrangements provide consistency in the operation of this exemption with the related exemptions for exempt institutions. Under those related provisions, the power to determine whether or not to register an institution as an exempt institution is vested in the Commissioner. These arrangements work well and are administratively efficient.*

24. The committee further notes that chapter 13 of the *Duties Act* provides for internal and external review of determinations of the commissioner.

25. **Clause 60** would extend the grounds on which the Commissioner of State Revenue may suspend or cancel a self assessor's registration.

26. It would provide, in section 465 of the Duties Act, new grounds for suspension or cancellation of a self assessor's registration; namely, where:

- a self assessor fails to –
  - pay a penalty amount or an instalment in relation to a penalty amount on time; or
  - give notice to the Commissioner under section 470 of ceasing to carry on business; or
- the Commissioner reasonably believes that, due to the self assessor's conduct, his or her registration poses an unacceptable risk that the self assessor will not comply with an obligation under the *Duties Act* or the *Taxation Administration Act*.

27. The explanatory notes provide information (at 30-1) which indicates sufficient regard to rights and liberties of individuals:

The amendments to extend the Commissioner's power to suspend and cancel duty self assessor registrations allow the Commissioner to make an administrative decision to cancel or suspend a duty self assessor's registration in wider circumstances than is currently permitted. In particular, suspension or cancellation will be permitted in cases where there is an unacceptable risk of non-compliance by the self assessor with their statutory obligations, to ensure the integrity of the self assessment system is not jeopardised, for non-payment of administrative penalties by non-compliant self assessors, or where self assessors have ceased, either permanently or temporarily, to carry on business. The proposed arrangements are in the public interest as they are required to protect the revenue from the risks associated with self assessor non-compliance.

Natural justice

28. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

29. **Clause 61** may be inconsistent with principles of natural justice. It would insert a new section 469A into the *Duties Act* to provide the Commissioner of State Revenue with a power to immediately suspend a self assessor's registration.

30. Currently, section 469 provides for the suspension or cancellation of registration. New section 469A(1) apply if the Commissioner reasonably believed that a ground existed for suspending or cancelling a self assessor's registration and that it would be necessary to suspend the registration immediately to:

- ensure the integrity of the self assessment system (defined in new section 469A(7)); or
- remove an immediate and unacceptable risk of non-compliance with the self assessor's obligations under the *Duties Act* or the *Taxation Administration Act*.

31. Under new section 469A(2) to (4), the commissioner:

- may decide to immediately suspend the self assessor's registration; and
- must give the self assessor an information notice which includes the period of the immediate suspension.

32. New section 469A(5) and (6) would provide a maximum of 56 days as the period of an immediate suspension.

33. Unless excluded in clear terms by statute, generally courts assume principles regarding natural justice or procedural fairness apply to decisions made in exercise of administrative power. These principles include a right to a fair hearing and a right to an unbiased decision.

34. To the extent that clause 61 would provide for the Commissioner to make a decision to suspend without first requiring that notice be given or providing an opportunity to be heard, clause 61 may not be consistent with principles of natural justice. However, justification for any breach of fundamental legislative principles is provided in the explanatory notes (at 31):

The amendments … remove a self assessor's right to be heard prior to immediate suspension in cases where it is necessary to protect the revenue. In these cases, the removal of the requirement for a prior show cause process is necessary to eliminate both the risk to revenue and of potential ongoing losses to the self assessor's clients associated with serious irregularities such as potentially fraudulent activity during the show cause period. However, in relation to the decision for immediate suspension itself, self assessors will be able to seek a review. In addition, self assessors whose registration is immediately suspended will be able to continue to carry on their business, though at some additional cost, as a result of, for example, having to arrange for a lodging agent or another registered self assessor to assess duty on their clients' behalf. In these circumstances, there is not the same imperative for a prior right to be heard given the public interest considerations.

Appropriate reviews of these decisions will continue, initially through the existing internal review process and subsequently, through appeal to the Queensland Civil and Administrative Tribunal. As such, the proposed arrangements provide an appropriate balance between the public interest and individual rights. The proposed arrangements are also broadly consistent with the position interstate, and with similar arrangements in Queensland's Legal Profession Act 2007 *and gambling legislation.*

35. In relation to the review that may be sought of a decision to immediately suspend registration, the committee notes that rights of review are provided in chapter 13 of the *Duties Act*. The committee also notes that, the explanatory notes identify (at 48) the nature of review available regarding a decision under new section 469A:

The decision to immediately suspend the self assessor's registration may be reviewed under chapter 13. Under this review, it is the decision of immediate suspension that is reviewed rather than the underlying ground of suspension which may ultimately be reviewed under the show cause process provided in sections 466 to 469.

Retrospective operation

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

37. **Clauses 8 and 65** would provide respectively for retrospective operation of amendments to the *Community Ambulance Cover Act* and the *Duties Act*.

38. Clause 8 would insert a new part 14 into the *Community Ambulance Cover Act* to provide transitional provisions. Part 14 (new sections 164 and 165) would provide that sections 48 and 60 as amended are to be taken to have had effect on and from 1 July 2003. Clause 5 would replace section 48 of the Act to extend a levy exemption for the Commonwealth to power card arrangements under which the Commonwealth is the user of the power card premises. Clause 6 would replace section 60 to extend a levy exemption for the Commonwealth to on-supply arrangements where the Commonwealth is the user of the separate area for the arrangement.

39. Clause 65 would insert a new chapter 17, part 13 into the *Duties Act* to provide transitional provisions. The proposed provisions in the new part 13 would provide for the retrospective operation of amendments, as set out below.

New section (section amended)	Relevant amendment/s	Retrospective operation (from)
614 (85)	Extending transfer duty concessions to the acquisition of a new right that is a lease of residential land on which a first home is to be constructed and for which a premium, fine or other consideration is payable	1 December 2003
615	New exemption from transfer duty for a dutiable transaction solely to effect a change of trustee where the transaction is part of an arrangement involving a change in the rights or interests of a beneficiary of the trust	13 August 2004
616	Retrospective commencement of amendment to section 151 (see clause 29: amendment to ensure application of a transfer duty exemption to gifts to a spouse or de facto partner of an interest in a home, whether or not the home is subject to a mortgage)	2 May 2003
618	Clarification that insurers registered under the *Duties Act* as self-assessors need not reregister – statutory assumption that taken to be insurers	14 January 2010
619	Various provisions of bill	14 January 2010
620	Amendments to section 416 (allowing the Commissioner a discretion to extend the start date by which an exempt institution must commence to use property for a qualifying exempt purpose)	1 March 2002

40. The committee examines legislation that could have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering whether sufficient regard is had to rights and liberties of individuals, the committee generally examines whether:

- the retrospective operation would be adverse to people other than the government; and
- individuals have relied on and would have legitimate expectations based on the existing law.

41. In this context, the committee notes that, although a proposed retrospective operation for a period of some years would be provided for some provisions by clauses 8 and 65, the explanatory notes indicate that the retrospectivity would confer benefits on individuals. As such, the explanatory notes (at 28-9) indicate sufficient regard to rights and liberties of individuals:

While retrospectivity raises fundamental legislative principle issues, each of these proposed amendments is beneficial in that they provide an exemption, concession or other benefit and the legislation has been administered under approved administrative arrangements. In addition, where these beneficial changes were

likely to apply to a wide range of clients, the terms of the administrative arrangements have been published by the Office of State Revenue.

42. More specifically, in respect of the amendments to be given retrospective operation to 14 January 2010, the explanatory notes state (at 30):

The amendments to the Duties Act 2001 *to impose insurance duty on life insurance riders issued by life insurers, and on insurance taken out with overseas, non-commercial captive and other insurers not required to be registered or authorised under Commonwealth legislation, will be retrospective from the date of announcement of the changes on 14 January 2010. This gives certainty to insurers, many of whom have continued to pay the duty on the basis of the legislation's intended operation and its operation under the repealed* Stamp Act 1894. *The Office of State Revenue has publicised the changes widely, including directly to the insurance industry, and is consulting as necessary to ensure effective implementation.*

43. **Clause 85** would amend the *Infrastructure Investment (Asset Restructuring and Disposal) Act* to provide for codes of practice with retrospective operation.

44. Clause 85 would insert a new section 10A to permit the minister to approve workforce transition codes of practice directed to ensuring appropriate and fair treatment of employees affected by projects undertaken under the legislation. New section 10A(2)(a) requires the minister to notify the making of the approval and, under new section 10A(3), such a notice would be subordinate legislation.

45. New section 10A(4) would then provide for possible retrospective commencement. It states:

A code of practice takes effect on the day the approval notice is notified in the gazette or, if an earlier or later day is stated in the approval notice as the day the code of practice takes effect, on that day.

46. The explanatory notes indicate (at 32) sufficient regard to rights and liberties of individuals as the codes of practice are to ensure appropriate and fair treatment of employees and agreement was reached with representatives of the employees regarding one code of practice already made:

Clause 85 inserts a new section 10A which permits the Treasurer to approve workforce transition codes of practice with retrospective operation. The Forestry Plantations Queensland Industrial Relations Working Party (which is comprised of representatives of Queensland Treasury, Department of Justice and Attorney General, Forestry Plantations Queensland Office ("FPQO") and relevant union delegates) has agreed to the FPQO Workforce Transition Code. The FPQO Workforce Transition Code was approved by the Treasurer and commenced on 26 October 2009. The proposed provision will be capable of retrospective operation to deal with those circumstances where the State, Unions and FPQO have agreed to the terms of the Code prior to the commencement of the Bill. It is submitted that this is beneficial legislation, since it is directed towards ensuring that the terms and conditions relating to affected employees are aligned with their current terms and conditions of employment.

47. The committee notes that the proposed provision would operate to allow all codes of practice made to have retrospective operation from the time of notification. Clause 85 is not confined to the FPQO Workforce Transition Code.

48. **Clause 101** also would provide for retrospective operation of an amendment to the *Payroll Tax Act*. The amendment would insert a new section 140 to change the territorial nexus for wages paid to employees providing services in more than one jurisdiction. It would be retrospective to 1 July 2009.

49. In respect of whether the retrospective operation would adversely affect individuals, the explanatory notes indicate that, for some individuals, this is likely to be the situation (at 29):

The impact on taxpayers will vary, as some may become liable to pay in a lower taxing jurisdiction when the wages were previously liable in a higher taxing jurisdiction, and vice versa.

50. In respect of whether individuals may have relied upon or have legitimate expectations based on the existing law, the explanatory notes state (at 29):

… the change ensures that Queensland's arrangements remain consistent with those applying in all other jurisdictions. As the other jurisdictions publicly announced an intention to change the nexus arrangements from 1 July 2009, it was necessary for Queensland to do the same to prevent double taxation or avoidance.

The Office of State Revenue has advised all taxpayers of the change.

51. Further information is provided (explanatory notes, 29-30) which suggests sufficient regard for rights and liberties of individuals:

… to minimise the impact of retrospectivity, employers have been given the option of adopting the new nexus arrangements from 1 July 2009 or continuing with the current arrangements until the law is amended and making any necessary adjustments in their 2009-10 return without interest or penalty tax liability, and without being taken to commit any offence in relation to the delay. Transitional provisions are included in the Pay-roll Tax Act 1971 *to give these arrangements effect. These provisions apply as follows.*

- *Where an employer accounts for any additional tax liability by the required time, no penalty under the* Pay-roll Tax Act 1971 *and no unpaid tax interest (UTI) or penalty tax under the* Taxation Administration Act 2001 *will apply for the employer. In relation to UTI and penalty tax (which is imposed automatically under the* Taxation Administration Act 2001 *and, consequently, by the Office of State Revenue's information system), the Commissioner will be required to fully remit any amount imposed under that Act, so that the employer will have no liability to pay any such amounts in these circumstances.*
- *Where an employer's liability increases under the new nexus arrangements and this affects the employer's ability to comply with either the* Pay-roll Tax Act 1971 *or the* Taxation Administration Act 2001*, the employer will not be taken to commit an offence under either Act if the employer, or an administrator for the employer, takes corrective action by the required time.*
- *Where an employer's liability decreases under the new nexus arrangements and the employer has lodged a final return before 21 July 2010 that includes wages that are no longer liable for payroll tax under the* Pay-roll Tax Act 1971*, the Commissioner must, on written application, make a reassessment to decrease liability.*

52. **Clauses 107-8**, amending the *Superannuation (State Public Sector) Act*, would provide for gazette notices to have retrospective operation.

53. Clause 107 would amend section 13A to introduce a new process for the continuation of eligibility for membership with QSuper after the transfer of an employee's employment. Where a person's employment is transferred from a State Public Sector Unit to an entity which is not a State Public Sector Unit, new section 13A(1)(c)(iii) would allow the minister to declare, by gazette notice, that the person keeps his or her existing and accruing rights relating to superannuation. New section 13A(5) would allow the gazette notice to have retrospective operation to the day the person became an employee of the new entity.

54. Clause 108 would amend section 13AA to provide for the same continuation of eligibility for membership with QSuper in the circumstances where an employer member ceased to be a unit of State public sector (as a result of a change of ownership or status of that entity in certain circumstances). Again, new section 13AA(1)(c)(iii) would allow the minister to declare, by gazette notice, that a person keeps his or her existing and accruing rights relating to superannuation and new section 13AA(5) would allow the gazette notice to have retrospective operation.

55. Justification for any breach of fundamental legislative principles is provided in the explanatory notes (at 34):

The amendments to sections 13A and 13AA are consistent with the fundamental legislative principles in so far as these amendments are intended to maintain the status quo in relation to an individual's existing or accrued rights in relation to superannuation. These amendments deal with the process and steps to ensure the continued QSuper membership for employees affected by a restructure of a Government business. However, the gazette notice will be capable of retrospective operation, as it is necessary to provide the appropriate flexibility for the State, QSuper and the new employer in restructuring the business and coordinating the transition of the relevant arrangements (including for superannuation).

Sufficient regard to the institution of Parliament

Delegation of legislative power

56. Section 4(4)(a) of the *Legislative Standards Act* 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.

57. **Clauses 116-7** would amend the *Trans-Tasman Mutual Recognition (Queensland) Act* to allow the Governor to make, as subordinate legislation, a gazette notice endorsing proposed regulations under the *Trans-Tasman Mutual Recognition Act 1997* (Cth). Currently, sections 7(2) and 15 of the *Trans-Tasman Mutual Recognition (Queensland) Act* provide that the express authority of an Act may confer delegated legislative power upon the Governor to make such a gazette notice.

58. Clause 116 would:

- omit section 7(2), allowing the Governor to make a gazette notice under section 7(1) to endorse a regulation under the Commonwealth Act, without the necessity for express authority to be conferred by another Act; and
- insert a new section 7(2) stating that a gazette notice made under section 7(1) is subordinate legislation.

59. Justification for any breach of fundamental legislative principles is provided in the explanatory notes (at 34-5):

By allowing the amendment of schedules to the Commonwealth TTMRA other than by another Act, these provisions might be seen as having insufficient regard to the institution of Parliament. The provisions will allow for the endorsement of regulations under the Commonwealth TTMRA by an Executive act, under section 7(1) of the Queensland TTMRA.

The allowance for an Act to be amended in this way is often referred to as an 'Henry VIII' clause. The Scrutiny of Legislation Committee has stated that Henry VIII clauses may be excusable, depending on the given circumstances, where the clause is to facilitate the application of a national scheme of legislation.

The Bill can be justified in this instance as it will play an important role in maintaining consistency of legislative change across jurisdictions, as part of the application of the Trans-Tasman Mutual Recognition Scheme, which is a national scheme of legislation.

The Trans-Tasman Mutual Recognition Scheme is an extension of the Mutual Recognition Agreement (MRA) in Australia and extends the benefits of the MRA to the market in goods and services between Australia and New Zealand. The mutual recognition legislation was passed by Queensland Parliament with the intention of promoting economic integration and increased trade between participants by reducing regulatory impediments to the movement of goods and people in registered occupations across jurisdictions.

Queensland is the only participating jurisdiction that requires an Act of Parliament to endorse regulations made under the Commonwealth TTMRA, leading to inefficiencies in the application of the national scheme of legislation.

It should be noted that the Bill provides that a gazette notice made by the Governor under section 7(1) is subordinate legislation. This provision further addresses possible concerns the amendments to the Queensland TTMRA do not have sufficient regard to the institution of Parliament, as Parliament has the opportunity to disallow the Governor's endorsement of proposed Commonwealth regulations.

It should also be noted that the amendments do not seek to alter the reference of power contained within the TTMRA and the amendments do not remove the requirements for an Act of Parliament before any amendments to the main body of the Commonwealth TTMRA are adopted.

Parliamentary scrutiny of delegated power

60. Section 4(4)(b) of the *Legislative Standards Act* 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.

61. **Clauses 87-8** would amend the *Infrastructure Investment (Asset Restructuring and Disposal) Act* to allow the minister to exercise power, similar in character to delegated legislative power, by way of a 'gazette notice'.

62. Gazette notices may be issued by the minister to:

- revoke the declaration of an entity as a government owned corporation or a port authority (new section 11A); and
- declare a 'project dealing' (any lease granted or transferred to an entity in connection with a declared project) or a class of project dealings to be an 'exempt project dealing' (one to which section 121 and part 8 division 3 of the *Property Law Act 1974* do not apply) (new section 15).[3]

63. The committee notes that clauses 87 and 88 do not contain provision (as in clause 116) for the gazette notices to be subordinate legislation. Further, a 'gazette notice' made under new sections 11A or 15 would not come within 'subordinate legislation' as it is defined in the *Statutory Instruments Act*. Accordingly, a gazette notice need not be tabled in the Parliament and would not be subject to possible disallowance under the mechanism provided in section 50 of the *Statutory Instruments Act*. In short, the proposed powers exercisable by the minister may not be sufficiently subjected to the scrutiny of the Legislative Assembly.

64. The explanatory notes state (at 34):

The purpose of the amendments to the Investment Infrastructure (Asset Restructuring and Disposal) Act 2009 *is to facilitate the restructure and divestment of the declared projects.* The Investment Infrastructure (Asset Restructuring and Disposal) Act 2009 *confers a broad suite of flexible powers on the Minister to ensure that the declared entities can be commercially restructured and the declared projects can proceed. A gazette notice is the preferred mechanism, as it provides the necessary flexibility to facilitate the commercial restructure and divestment of the declared projects. The proposed amendments adopt the same mechanism as already contemplated in this Act.*

[3] These provisions respectively relate to covenants not to assign without licence or warrant and relief from forfeiture.

65. In respect of the final sentence quoted from the explanatory notes, the committee observes that the Infrastructure Investment (Asset Restructuring and Disposal) Bill 2009 passed through the Parliament as an urgent bill and following suspension of Standing Orders. The committee was unable to report upon the bill prior to it becoming an Act of Parliament. Accordingly, legislative mechanisms 'already contemplated in this Act' have not been examined in a prior report of the committee to Parliament.

66. **Clauses 107-8** would amend the *Superannuation (State Public Sector) Act* to allow the minister to make declarations by way of gazette notices.

67. The operation of these proposed provisions is described above under the heading Retrospective operation. Justification for any breach of fundamental legislative principles is provided in the explanatory notes (at 34):

> *The amendments to sections 13A and 13AA are consistent with the fundamental legislative principles in so far as these amendments are intended to maintain the status quo in relation to an individual's existing or accrued rights in relation to superannuation.*

Amendment of Act other than by another Act

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

69. **Clauses 87-8** would amend the *Infrastructure Investment (Asset Restructuring and Disposal) Act* to authorise gazette notices and provisions of contract to operate 'despite any other law or instrument'.

70. Clause 87 would insert a new section 11A providing for the change of status of declared entities (Queensland Rail and the Port of Brisbane Corporation) as a result of their divestment under the Act. The explanatory notes state (at 53):

> *Where as a result of a declared project, a declared entity is no longer a GOC, port authority or owned by the Government, section 22 of IIARDA will apply to afford certain protections to the State and the declared entity. The practical effect is that section 22 precludes triggering certain contractual rights in counterparties (eg a third party's right to consent to a change of ownership of a declared entity).*

71. New section 11A provides for the change of status and/or ownership to be effected by way of a 'GOC declaration' (see above under the heading Parliamentary scrutiny of delegated power). New section 11A(2) states that, 'A GOC declaration has effect despite any other law or instrument'.

72. The explanatory notes address (at 33) the consistency of clause 87 with fundamental legislative principles:

> *Clause 87 inserts a new section 11A which affects certain third parties' contractual rights which could be triggered by the divestment of a declared entity by way of a transfer of shares. For example, where a declared entity ceases to be a GOC under the* Government Owned Corporations Act 1993*, a port authority under the* Transport Infrastructure Act 1994 *or owned by the Government, there will be a deeming of consent by third parties to the change of ownership or status of the declared entity. If this section does not override some third parties' rights, the divestment of the businesses may be delayed and in some cases prevented. These are significant commercial projects and the State and the ongoing businesses require commercial certainty.*

73. Clause 88 would insert new sections 15, 15A and 15B to allow the terms of a lease contract to operate 'despite any other law or instrument to the contrary'.

74. For the purposes of divestment of declared projects by way of 99 year leases, new section 15 would allow exclusion of certain statutory obligations required by provisions of the *Property Law Act*.

75. Similarly, new section 15A would allow property ordinarily regarded as a 'fixture' (an item of tangible personal property annexed to land in such a way as to become a part of the land) to be regarded as a 'chattel' (a movable possession).[4] It would permit 'separate leasing or dealing with fixtures from the underlying land' (explanatory notes, 54).

76. Under new section 15A(4), the lease provisions about fixtures particularised in new section 15A would have the force of law 'despite any other law or instrument to the contrary'.

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[4] See also section 6(1) of the *Bills of Sale and Other Instruments Act 1995*.

77. The explanatory notes indicate (at 33) consistency of clause 88 with fundamental legislative principles:

Clause 88 inserts a new section 15A which alters the common law position by permitting certain "fixtures" to be treated as "chattels". As this is a matter of technical construction and interpretation and does not affect third parties' rights, this clause is consistent with the fundamental legislative principles.

78. New section 15B(1) would identify leases to which the section would apply. New section 15B(2) and (3) would then state:

(2) A provision of a lease providing for a matter mentioned in subsection (1)(b) has the force of law as if the provision were an enactment of this Act.

(3) Subsection (2) applies despite any other law or instrument to the contrary.

79. Regarding new section 15B, the explanatory notes state (at 54):

A new section 15B overrides the common law to the extent that an agreed lease or condition is considered contrary to the common law. This clause allows the State, as lessor, to protect the State's interest under long term leases and provide appropriate commercial certainty for all parties.

80. In providing justification for any breach of fundamental legislative principles, the explanatory notes (at 33) again confine the operation of new section 15B to abrogation of the common law:

Clause 88 inserts a new section 15B which abrogates the common law should a lease term be interpreted as contrary to the common law. The new section 15B addresses the concern that the common law does not provide the necessary commercial certainty for the State in relation to unique long term leasing arrangements associated with major commercial transactions. The new section will only affect the third parties purchasing the long term leases involved in these major commercial transactions. Further, this section will benefit the State and the affected third parties by providing the necessary commercial certainty for the long term leases arrangements associated with the declared projects which are major commercial transactions. Further, this approach is justified as the State could suffer significant financial detriment, if the State cannot provide appropriate commercial terms for the long term leases.

81. The committee notes that the *Infrastructure Investment (Asset Restructuring and Disposal) Act*:

- does not define 'law'; and
- defines 'instrument' as including an oral agreement (definition in the schedule).

82. However, section 36 of the *Acts Interpretation Act 1954* provides that in an Act, the 'law' of a State includes:

(a) a law of the State; and

(b) a law in force in the State as part of the law of the State.

83. In accordance with this interpretation which appears to include statute law, the terms of a contract falling within new section 15A or section 15B would operate despite any other Act of Parliament or statutory instrument.

84. The committee invites the minister to provide information about the scope of new sections 11A, 15, 15A and 15B.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

85. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

86. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

4. SENIORS RECOGNITION (GRANDPARENTS PROVIDING CARE) BILL 2010

Date introduced: 10 March 2010

Responsible minister: Mrs R Menkens MP

Portfolio responsibility: Shadow Minister for Community Services and Housing and Shadow Minister for Women

Nature of bill: Private member's bill

ISSUES ARISING FROM EXAMINATION OF BILL

1. No matters regarding the application of fundamental legislative principles or the operation of certain statutory provisions are identified for the consideration of Parliament.

BACKGROUND

2. The legislation would recognise grandparents providing full-time care to grandchildren and ensure interests of such grandparents are relevant considerations for decisions affecting grandparents providing care.

LEGISLATIVE PURPOSE

3. The bill is intended to (explanatory notes, 1):

- implement a legislative framework that recognises the contribution of grandparents who provide care for their grandchildren;
- provide a mechanism to allow the recognition to be used as part of a decision-making process, ensuring a framework to assist decisions made by authorities on issues that directly affect grandparents providing care; and
- establish the Grandparent Carer's Charter, setting out the contributions of grandparents providing care, the importance of consideration of grandparents in decision-making, and the unique place they hold in the Queensland community.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

4. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

5. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

5. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 10 March 2010

Responsible minister: Hon RG Nolan MP

Portfolio responsibility: Minister for Transport

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 4** which would apply a no alcohol limit to all new driver licence holders, including new motorbike licence holders;
   - **clause 17** providing for alcohol interlock conditions on driver licences;
   - **clauses 4, 17, 27, 31, 72, 90, 119 and 128** creating a number of new offences or amending existing offences, some of which would provide for extended liability or strict liablity;
   - **clause 30** which would remove the availability of the defence in section 24 of the Criminal Code;
   - **clause 31** which would make special provision regarding matters to be established for offences regarding heavy vehicle speeding;
   - **chapter 3** which would provide for smartcard driver and marine licences;
   - **clauses 120-2** amending provisions regarding alcohol and drug testing of transit officers;
   - **clause 17** conferring administrative power on the chief executive regarding interlock condition exemptions and extensions;
   - **clause 119** which would confer significant administrative power on the chief executive in respect of 'special events';
   - **clauses 18, 28, 38-9, 49 and 113** which would alter evidentiary burdens in proceedings;
   - **clause 22** which would confer powers of entry exercisable without a warrant or consent;
   - **clauses 23-5** which would be statutory modifications of protections against self-incrimination;
   - **clause 129** providing for amendments to have retrospective operation;
   - **clause 45 (and similar provisions)** which would limit the State's liability for acts or omissions in relation to the keeping and use of a smartcard; and
   - **clause 17** which may not be drafted in a sufficiently clear and precise way.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **part 4** which would implement in Queensland national scheme legislation regarding heavy vehicle speeding; and
   - **clause 17** which would provide a broad delegation of legislative power to the chief executive.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
   - **chapter 3** (whether provisions regarding smartcard licences have sufficient regard to rights and liberties of individuals); and
   - **clause 17** (new section 91I – whether the definition of 'drink driving offence' is defined in a sufficiently clear and precise way).
4. The committee invites the minister to provide information about compliance of the explanatory notes with section 23 of the *Legislative Standards Act*.

BACKGROUND

5. The legislation is to amend transport legislation including to implement initiatives to address drink driving and to implement in Queensland national reforms addressing speeding of heavy vehicles.

LEGISLATIVE PURPOSE

6. The bill is intended to introduce significant amendments to:[5]

- provide for the introduction of alcohol ignition interlocks in Queensland for all high-risk drink drivers;
- extend the no alcohol limit to a broader range of drivers; and
- implement national reforms for heavy vehicle speeding.

7. It would amend the:

- *Acts Interpretation Act 1954*;
- *Adult Proof of Age Card Act 2008*;
- *Police Powers and Responsibilities Act 2000*;
- *Transport Infrastructure Act 1994*;
- *Transport Legislation Amendment Act 2007*;
- *Transport (New Queensland Driver Licensing) Amendment Act 2008*;
- *Transport Operations (Marine Pollution) Act 1995*;
- Transport Operations (Marine Pollution) Regulation 2008;
- *Transport Operations (Marine Safety) Act 1994*;
- *Transport Operations (Passenger Transport) Act 1994*;
- *Transport Operations (Road Use Management) Act 1995*;
- *Transport Operations (TransLink Transit Authority) Act 2008*;
- *Transport Planning and Coordination Act 1994*; and
- *Transport Security (Counter-Terrorism) Act 2008*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

8. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

Ch 2, part 2 – No alcohol limit

9. **Clause 4** would amend section 79(2A) of the *Transport Operations (Road Use Management) Act* to remove an existing age-based distinction and apply an existing no alcohol limit to all drivers within specified categories. Currently, a no alcohol limit applies to all drivers under 25 years of age who hold a learner, provisional or probationary licence or who do not hold a driver licence. Drivers in these categories who are 25 years or older are subject to a 0.05 blood/breath alcohol limit.

10. The committee notes that, while the legislation would no longer provide for different treatment on the basis of age, clause 4 would apply the no alcohol limit to all new licence holders, including new motorbike licence holders.

11. **Clause 4** would also amend the *Transport Operations (Road Use Management) Act* to create further new offences involving drugs and alcohol. The proposed offences, together with respective maximum penalties, are set out below.

New section	Offence	Proposed maximum penalty
79(2K)	Offence for class RE licence holders if riding a motorbike while over the no alcohol limit but not over the general alcohol limit	14 penalty units ($1400) or 3 months' imprisonment

[5] The Hon Rachel Nolan MP, Minister for Transport, Second Reading Speech, *Record of Proceedings (Hansard),* 10 March 2010, 780-781.

New section	Offence	Proposed maximum penalty
79(2L)	Offence for class RE licence holders if learning to ride a class R motorbike while over the no alcohol limit but not over the general alcohol limit	14 penalty units ($1400) or 3 months' imprisonment

Ch 2, part 3 - Alcohol ignition interlocks

12. **Clause 17** would amend the *Transport Operations (Road Use Management) Act* to insert a new part 3B regarding alcohol ignition interlocks. The new part may affect rights and liberties of individuals including freedom of movement, work-related rights and freedom of family life.

13. For the purposes of new part 3B, new section 91I would define relevant terms, including:

- 'alcohol ignition interlock', meaning a device that, when fitted to a motor vehicle, prevents the vehicle from being started unless the device is provided with a specimen of a person's breath containing either no alcohol or less than a particular concentration of alcohol; and
- 'drink driving offence', identifying the relevant offences that would lead to the imposition of an interlock condition on a person's driver licence.

14. Relevant proposed provisions include:

- new section 91J – part 3B, division 2 regarding interlock conditions will apply to a person who has been convicted of a drink driving offence and, as a result, has been disqualified from holding or obtaining a Queensland driver licence;
- new section 91K – after serving a relevant disqualification period, a person re-entering the driver licensing system will be granted a driver licence subject to an interlock condition;
- new section 91L –the person would be required to nominate the vehicle or vehicles he or she would drive during the period in which the interlock condition applied;
- new section 91W – that person would commit an offence if he or she drove a vehicle that did not have such a device fitted.

15. Accordingly, new part 3B would affect rights and liberties of individuals subject to alcohol interlock conditions. Potentially, rights and liberties of others – for example, family members – may be affected also.

16. The explanatory notes acknowledge (at 26-7) that the new part 3B may potentially breach fundamental legislative principles regarding rights and liberties of individuals. However, justification is provided for the proposed legislative provisions:

While these requirements may affect the individual's right to drive a motor vehicle on Queensland roads, any impact is justified by the need to ensure the person learns to appropriately separate the activities of drinking and driving. This is essential to minimise the risk these drink drivers present to both themselves and to other road users. The interlock condition will be imposed only where a person has been convicted by a court of a high level drink driving offence, a repeat drink driving offence in a five-year period or a specified drink driving related offence. In this way, the condition will be limited to those drink drivers that present the highest risk.

Once a vehicle has been fitted with an alcohol ignition interlock device, any person seeking to drive the vehicle will be required to provide a specimen of breath that contains less than the appropriate level of alcohol. Where that person's licence is not subject to an interlock condition, the device may require a lower level of alcohol than is currently permitted under the terms of the person's licence. For example, an open licence holder would normally be subject to the general alcohol limit as described in section 79A of the Transport Operations (Road Use Management) Act 1995*. If that person were to drive a vehicle fitted with an alcohol interlock, they would need to have an alcohol level below that permitted by the interlock device. Any impact on the rights of these people, however, is justified by the need to ensure the person who is subject to the interlock condition separates their activities of drinking and driving.*

17. **Clause 17** would also insert a number of new offence provisions in the *Transport Operations (Road Use Management) Act*, as identified below.

New section	Offence	Proposed maximum penalty
91W(1)	Driving a prohibited vehicle without a relevant interlock exemption	(a) if the motor vehicle driven by the person was not fitted with a prescribed interlock, whether or not it was a nominated vehicle for the person –

New section	Offence	Proposed maximum penalty
		(i) for a first conviction—28 penalty units ($2800); or (ii) for a conviction within 5 years after a previous conviction to which the circumstance mentioned in this paragraph applies—60 penalty units ($6000); or (b) if the motor vehicle driven by the person was not a nominated vehicle for the person but was fitted with a prescribed interlock—28 penalty units ($2800)
91W(4)	Failure, without reasonable excuse, to produce an interlock exemption certificate when asked by a police officer	28 penalty units ($2800)
91X(1)	Failure to comply with any restrictions applying to an interlock exemption	(a) for a first conviction – 28 penalty units ($2800); and (b) for a conviction within 5 years after a previous conviction – 60 penalty units ($6000)
91Y	Failure of person with interlock exemption to give notice of change in circumstances	28 penalty units ($2800)

18. In addition, new sections 91W(2) and 91X(2) state:

> If the court convicts a person of an offence against subsection (1), the court, in addition to imposing a penalty, must disqualify the person from holding or obtaining a Queensland driver licence for the following period—
>
> (a) for a conviction mentioned in paragraph (a)(i) of the penalty—3 months;
>
> (b) for a conviction mentioned in paragraph (a)(ii) of the penalty—6 months.

19. In respect of the consistency of these proposed offence provisions with fundamental legislative principles, and in particular of new sections 91W(2) and 91X(2), the explanatory notes state (at 27):

> *New Division 5 contains a number of offences that can apply to interlock drivers. Under the provisions of sections 91W(2) and 91X(2), disqualification periods will be imposed on those convicted of the associated offences. The imposition of these disqualification periods is an important component in ensuring maximum compliance with the interlock condition and any restrictions that might apply to an exemption from that condition. It is consistent with the mandatory disqualification periods that already apply to a number of unlicensed driving offences as mentioned in section 78(3)(b) to (e) of the* Transport Operations (Road Use Management) Act 1995*. In addition, it reflects the mandatory minimum disqualification periods that are imposed under section 86(1), (3) and (4) for a range of offences involving alcohol and drugs while driving a motor vehicle.*

Ch 2, part 4 - Heavy vehicle speeding

20. **Clause 27** would, in addition to the existing maximum penalty for extended liability offences to be moved to new section 57B(2)(f) in the *Transport Operations (Road Use Management) Act*, provide new offences and applicable maximum penalties for extended liability offences regarding heavy vehicle speeding. The proposed offences and maximum penalties are set out below.

New section	Offence	Proposed maximum penalty
57B(2)(a)	Heavy vehicle speeding offence of exceeding a speed limit of 50-60km/h	10 penalty units ($1000)
57B(2)(b)	Heavy vehicle speeding offence of exceeding a speed limit of 70-80km/h	(i) by less than 15km/h – 10 penalty units ($1000); (ii) by 15km/h or more – 40 penalty units ($4000)
57B(2)(c)	Heavy vehicle speeding offence, other than by the driver of a road train, of exceeding a speed limit of 90km/h	(iii) by less than 15km/h – 10 penalty units ($1000); (iv) by 15km/h or more – 40 penalty units ($4000)

New section	Offence	Proposed maximum penalty
57B(2)(d)	Heavy vehicle speeding offence, committed by the driver of a road train, of exceeding a speed limit of 90km/h	(v) by less than 15km/h – 40 penalty units ($4000); (vi) by 15km/h or more – 80 penalty units ($8000)
57B(2)(e)	Heavy vehicle speeding offence of exceeding a speed limit of 100km/h or more	(vii) by less than 15km/h – 40 penalty units ($4000); (viii) by 15km/h or more – 80 penalty units ($8000)
57B(2)(f)	Any other extended liability offence	The maximum penalty for an individual for committing the offence

21. The explanatory notes provide (at 46) the following information regarding clause 27:

This amendment inserts a new penalty regime that applies in relation to parties in the chain of responsibility who commit an extended liability offence that is a heavy vehicle speeding offence. The maximum penalty applying to those in the chain of responsibility is dependent upon the severity of the speeding offence committed by the driver of the heavy vehicle. The highest penalty that will apply to employers and operators is $8,000. This will apply when a driver is found to have been exceeding the speed limit by greater than 15 km/h in a high speed limit environment (for example when the speed limit that applies to the driver is 100km/h).

22. In respect of 'extended liability offences' the committee's practice is to draw the attention of the Parliament to the fact that a person's liability for such an offence may arise even where he or she is at some remove from the immediate act or omission which gives rise to liability for the offence. In respect of heavy vehicle speeding offences, people within the chain of responsibility (employers, prime contractors, operators, schedulers, loading managers and certain consignors and consignees) will be liable for a driver exceeding the speed limit in a heavy vehicle unless they are able to establish a 'reasonable steps' defence on the balance of probabilities. Extended liability offences are offences of strict liability.

23. However, the explanatory notes state (at 20-1) that the proposed offences would have sufficient regard to rights and liberties of individuals:

The reforms bring heavy vehicle speeding compliance within Queensland's existing chain of responsibility framework. Under this framework, attention is not focused upon speeding breaches committed by drivers. Rather, the role of parties within the transport chain is expressly recognized so that the root causes of heavy vehicle speeding may be identified and relevant parties may be prosecuted.

The amendments aim to ensure that those who are in a position to influence a decision by a driver of a heavy vehicle to breach speed limits are held liable in appropriate circumstances. The amendments are consistent with current chain of responsibility legislation developed for breaches of heavy vehicle mass, dimension and loading requirements and driving hour requirements under fatigue legislation. The core obligation requiring parties in the chain to take "reasonable steps" arises in the context of two types of offences as outlined below.

The amendments create a number of offences that impose a prospective duty on identified parties within the chain of responsibility. This duty is framed so that employers, prime contractors, operators, schedulers, loading managers and certain consignors and consignees must take all reasonable steps to ensure that their actions will not cause a driver to commit a speeding offence (new sections 163AD, 163AG, 163AI and 163AL of the Transport Operations (Road Use Management) Act 1995 *(in clause 31)). The legislation provides practical examples of reasonable steps a party may be required to take. These include, for example, for employers, prime contractors and operators: regular maintenance of vehicle components that relate to complying with speed limits (for example, speed limiters) and implementing programs to report and monitor incidents of speeding (new section 163AD of the* Transport Operations (Road Use Management) Act 1995*, in clause 31). For schedulers, examples of reasonable steps include:*

- *taking into account traffic delays;*
- *consulting drivers about their schedules and work requirements; and*
- *undertaking contingency planning in relation to schedules (new section 163AG of the Transport Operations (Road Use Management) Act 1995 in clause 31).*

The purpose of these new offences, as explained in the Regulatory Impact Statement that accompanied the National Transport Commission (Model Act on Heavy Vehicle Speeding Compliance) Regulations 2008*, is to create a series of positive duties that are specifically related to the activities performed by each party in the chain of responsibility. These duties are consistent with the duties that apply in Queensland for fatigue-related offences. These new requirements are aimed at ensuring that parties in the chain work to establish an environment that will*

assist drivers to avoid speeding and that these parties respond to patterns of breaches that suggest systemic faults in supply chain management.

24. It is further indicated (at 25-6) that the proposed maximum penalties have sufficient regard to rights and liberties of individuals:

It is a fundamental legislative principle that penalties should be proportionate to the offence. The Bill incorporates a new extended liability heavy vehicle speeding offence into section 57B and offences in the new chapter 5D of Transport Operations (Road Use Management) Act 1995*.*

The penalties are proportionate to the offences and are consistent throughout the Act and within the nationally agreed penalty range. Also, where relevant, penalties for heavy vehicle speeding offences are consistent with penalties for similar offences for heavy vehicle driver fatigue that have been adopted in Queensland.

25. **Clause 30** would amend the *Transport Operations (Road Use Management) Act* to remove the availability of the offence of 'honest and reasonable mistake' provided by section 24 of the Criminal Code as a defence to the prosecution of:

- an extended liability heavy vehicle speeding offence 57B(2); and
- breaches of speeding duties and offences contained in new chapter 5D, part 2 (to be inserted by clause 31).

26. Accordingly, a person charged with one of these offences could not raise in his or her defence that he or she had an 'honest and reasonable but mistaken belief'. The committee notes also that, as the heavy vehicle speeding offences are otherwise offences of strict liability, further defences in the Criminal Code ordinarily available in a determination of criminal responsibility would not be available either.

27. The explanatory notes provide (at 21-2 and 22-3) information to suggest that, although clause 30 would exclude section 24 in relation to heavy vehicle speeding offences, it has sufficient regard to rights and liberties of individuals:

A person charged with these offences will not have access to section 24 of the Queensland Criminal Code (see amendment to section 57H of the Transport Operations (Road Use Management) Act 1995 *in clause 30). That is, a party cannot attempt to avoid liability for the offence based on an "honest and reasonable but mistaken belief". It is considered that the exclusion of section 24 of the Queensland Criminal Code is justified on the basis that the policy underpinning these offences is to ensure that parties in the chain of responsibility will act with due diligence and care by taking proactive steps to ensure that heavy vehicle speeding offences do not occur. Furthermore, it is important to note that, as taking all reasonable steps is an element of the duty, the prosecution has the onus of proving beyond a reasonable doubt that the relevant party failed to take all reasonable steps to ensure that a speeding offence was not committed. If the prosecution is able to prove that the party had not acted reasonably, the Queensland Criminal Code, section 24, is unlikely to be of assistance to a defendant as they will be unable to establish that they acted reasonably.*

The overriding of section 24 of the Queensland Criminal Code for these offences (and for the offence discussed below) is permitted by section 24(2), which states that the operation of the section may be "excluded by express or implied provisions of the law"…

By removing the application of the Queensland Criminal Code, section 24, employers, prime contractors and operators will not be able to avoid liability simply by saying they did not know the driver was speeding. To allow them to avoid liability on this basis would seriously undermine the ability of the reforms to deliver the promised road safety benefits.

28. **Clause 31** would amend the *Transport Operations (Road Use Management) Act* to create further new offences regarding heavy vehicle speeding, with the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

New section	Offence	Proposed maximum penalty
163AD	Breach of duty of employer, prime contractor or operator to ensure business practices will not cause driver to exceed speed limit	80 penalty units ($8000)
163AE	Breach of duty of employer not to cause driver to drive if particular requirements not complied with	40 penalty units ($4000)
163AF	Breach of duty of prime contractor or operator not to cause driver to drive if particular requirements not complied with	40 penalty units ($4000)

New section	Offence	Proposed maximum penalty
163AG	Breach of duty to ensure driver's schedule will not cause driver to exceed speed limit	80 penalty units ($8000)
163AH	Breach of duty not to cause driver to drive if particular requirements not complied with	40 penalty units ($4000)
163AI	Breach of duty of loading manager to ensure loading arrangements will not cause driver to exceed speed limit	80 penalty units ($8000)
163AL(1) and (2)	Breach of duty of consignor or consignee to ensure terms of consignment will not cause driver to exceed speed limit	80 penalty units ($8000)
163AM	Breach of duty of consignor or consignee not to make a demand that may result in driver exceeding the speed limit	60 penalty units ($6000)
163AO	Making a prohibited request	80 penalty units ($8000)
163AP(1) and (2)	Entering into a prohibited contract	80 penalty units ($8000)

29. **Clause 33** would amend the *Transport Operations (Road Use Management) Act* to replace section 163E and insert a new section 163F.

30. Currently, section 163E contains an objective reasonableness test to be used in deciding causation in proceedings for a heavy vehicle fatigue offence. The new section 163E would extend to proceedings for an offence against chapter 5D, part 2 (inserted by clause 31).

31. The explanatory notes provide the following information (at 52) but do not specifically address consistency with fundamental legislative principles:

This section will assist courts in deciding whether the actions or inactions of specified persons in the chain of responsibility caused a driver to drive in excess of a speed limit applying to the driver of the vehicle. In particular a court may find that the person caused the driver to drive in excess of a speed limit if the court is satisfied that a reasonable person would have foreseen that the person's act or omission would be reasonably likely to cause the driver to speed (section 163E(4)).

32. New section 163F would state that, in a prosecution for an offence against against chapter 5D, part 2 (clause 31), it would not be necessary to prove that a driver exceeded a speed limit.

33. The explanatory notes indicate (at 52-3) that justification exists for new section 163F:

This is because the duties imposed on identified parties to take all reasonable steps to ensure that their actions will not cause a driver to commit a speeding offence are prospective duties. This means that, the duties apply independently of a driver's actual behaviour. For example, a consignor or scheduler can breach their obligations by imposing a deadline for the delivery of goods on a driver that could only be achieved by the driver exceeding speed limits. An offence occurs whether or not the driver actually carries out the delivery and commits a speeding offence.

Ch 3 – New driver licence legislation

34. **Chapter 3** would provide for driver and marine licences in the form of 'smartcards'. A large number of provisions in chapter 3 may have insufficient regard to information privacy rights and liberties of individuals.

35. Amendments would be effected to the:

- *Adult Proof of Age Card Act*;
- *Transport (New Queensland Driver Licensing) Act 2008*;
- *Tow Truck Act*;
- *Transport Operations (Marine Safety) Act*;
- *Transport Operations (Passenger Transport) Act*;
- *Transport Operations (Road Use Management) Act*; and
- *Transport Planning and Coordination Act*.

36. The amendments would allow for:

- a 'smartcard', to be the property of the State, but with a limitation on the State's liability for acts or omissions in relation to the keeping and use of a smartcard by the cardholder;
- the chief executive to keep information taken under one Act with information taken and kept under another Act;
- the authorisation of the use of information which may be collected under one Act and to reciprocally authorise information to be used under another Act, including for the purpose of the investigation of a suspected offence;
- the chief executive to take and retain a digital photo of a person for identification purposes;
- the introduction of a smartcard transport authority, which is a single smartcard evidencing the grant of one or more transport authorities; and
- miscellaneous minor amendments to facilitate the introduction of the new driver licence project.

37. The explanatory notes do not identify any possible inconsistency of the provisions regarding smartcard driver licences with fundamental legislative principles. Nor did the minister, in her second reading speech, provide information regarding whether the provisions have sufficient regard to rights and liberties of individuals. Indeed, chapter 3 of the bill was not referred to in the second reading speech.

38. In addition, the committee observes that the explanatory notes do not identify community consultation undertaken in respect of the proposed provisions in chapter 3.

39. The committee invites the minister to provide information about whether chapter 3 has sufficient regard to rights and liberties of individuals.

40. **Clause 72** would amend the *Transport (New Queensland Driver Licensing) Amendment Act* to create a new offence. The proposed offence and maximum penalty are set out below.

New section	Offence	Proposed maximum penalty
34A	Failure by authorised driver to notify of damage, loss or theft of authorising document issued by chief executive	20 penalty units ($2000)

Ch 4, part 4 – Marine safety

41. **Clause 90** would amend the *Transport Operations (Marine Pollution) Act* to amend an existing offence. The proposed offence and maximum penalty are set out below.

New section	Offence	Proposed maximum penalty
50A(2A)	Discharge of sewerage by prescribed ships – each culpable person for the discharge commits an offence	850 penalty units ($85 000)

42. The committee notes that the explanatory notes state (at 79):

This is not a new offence, however the new subsection simplifies the intent of the existing legislation.

43. However, the committee notes that new section 50A(2A) would provide for an offence of strict liability.

44. **Clause 91** would amend section 55AA of the *Transport Operations (Marine Safety) Act* to significantly reduce the maximum penalty. Currently, the offence of failing to display a garbage placard on a ship 12 metres or more in length attracts a maximum penalty of 850 penalty units ($85 000). Section 55AA was inserted by *the Transport and Other Legislation Amendment Act 2008*.

45. Clause 91 would reduce the maximum penalty to 20 penalty units ($20 000).

46. The explanatory notes state (at 80):

This adjustment is more appropriate for the minor nature of this offence brings it in line with similar legislation in other Australian jurisdictions.

Ch 4, part 5 – Passenger transport

47. **Clause 119** would insert a new section 119H into the *Transport Operations (Passenger Transport) Act* to create a new offence. The proposed offence and maximum penalty are set out below.

New section	Offence	Proposed maximum penalty
67H(1)	Failure to gain chief executive's approval for special event services	200 penalty units ($20 000)

48. **Clauses 120-2** would amend provisions of the *Transport Operations (Passenger Transport) Act* regarding alcohol and drug testing of transit officers.

49. Clause 120 would amend section 113D to include saliva as a drug testing media. Clause 121 would amend section 113G to allow saliva (as well as urine) to be taken as a specimen for use in the testing of a transit officer for the use of drugs. Clause 122 would replace section 116 and omit section 117 (Protection from liability for doctors advising on drug test). The effect of new section 116 is outlined in the explanatory notes (at 85-6):

New section 116(1) replicates the previous provision that allows the chief executive to require a transit officer to submit to an alcohol test or drug test under certain circumstances. New subsection 116(2) specifies a relevant entity must conduct an alcohol or drug test of a transit officer. New subsection 116(3) provides power to make a regulation about the requirements for notifying transit officers of the results of an alcohol or drug test. New subsection 116(4) defines a number of terms used in undertaking a drug or alcohol test on a transit officer. The subsection establishes that:

• an alcohol test is a test of the breath of the transit officer for deciding whether the officer is over the low alcohol limit set out under section 113D(2) of the Act; and

• that a drug test is a test of the saliva or urine of the transit officer for deciding whether the officer has evidence of a dangerous drug or prescribed substance as set out under section 113D(5) of the Act.

The subsection also sets out that a relevant entity is an entity the chief executive engages to conduct alcohol or drug tests of transit officers.

Ch 4, part 6 – TORUMS generally

50. **Clause 128** would amend the *Transport Operations (Road Use Management) Act* to replace an existing offence. The proposed new offences and maximum penalties are set out below.

New section	Offence	Proposed maximum penalty
133(1)(j)	Failure to make record about repairs	40 penalty units ($4000) or six months' imprisonment
133(4)	Failure to keep record about repairs	40 penalty units ($4000) or six months' imprisonment
133(5)	False or misleading statement in record about repairs	40 penalty units ($4000) or six months' imprisonment

Administrative power

51. Section 4(3)(a) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Ch 2, part 3 – Alcohol ignition interlocks

52. **Clause 17** would confer administrative power on the chief executive to:

- grant an interlock exemption (an exemption from the application of an interlock condition, granted under new section 91Q) (new part 3B, division 3); and
- extend an interlock driver's 'prescribed period' (defined in new section 91N).

53. The new division regarding interlock exemptions provides that a person can apply for an interlock exemption (new section 91P). A chief executive is required to decide an application for an exemption within 28 days and may grant an exemption if he or she is satisfied of matters identified in new section 91Q(3). The chief executive may request further information or documents (new section 91Q(4)). An applicant is to be notified in writing of the decision (new section 91R). Internal and external review is available regarding a decision to refuse an application.

54. The grounds on which the chief executive may grant an exemption are stated in new section 91U, with the procedure prescribed in new section 91V.

55. Regarding the administrative power to be conferred on the chief executive by new section 91U, the explanatory notes state (at 27) that sufficient regard is had to rights and liberties of individuals:

> *New section 91U specifies grounds upon which the chief executive may extend the interlock period. Included in those grounds is whether the person drove a nominated vehicle when they knew or reasonably ought to have known that the interlock device in the vehicle was not operating properly or that it had been interfered with. In relation to the "reasonably ought to have known" aspect in these provisions, there are two factors that are relevant. The first is that the devices have inbuilt mechanisms to warn users when they are not operating properly including, for example, LED warning lights or buzzers. The second is that, at the time of having an interlock device installed in a vehicle, the person receives extensive training on the use of the device and the features and functions it contains. This includes those features that indicate when the device is not operating properly.*

Delegation of administrative power

56. Section 4(3)(c) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

Ch 4, part 1 – Tollway corridors

57. **Clauses 85-6** would provide for the minister, rather than the Governor in Council, to lease local government tollway corridors. Clause 85 would amend section 84C of the *Transport Infrastructure Act* and clause 86 would amend section 105J. The committee notes that the explanatory notes state (at 77) that the proposed amendments would be consistent with amendments to the *Land Act 1994* made by the Parliament in 2007.

Ch 4, part 5 – Special events

58. **Clause 119** would insert a new part 4 (Special events) into *the Transport Operations (Passenger Transport) Act*, conferring significant administrative power on the chief executive in respect of events declared to be special events.

59. New section 67F would allow the chief executive to declare a special event in a non-TransLink area. Under new section 67G, the chief executive may coordinate all scheduled passenger services to and from special events in the non-TransLink area.

60. New section 67H(1) would provide that it is an offence (maximum penalty – 200 penalty units ($20 000)) to enter into or perform a contract or arrangement for the provision of scheduled passenger services to or from a special event without the chief executive's written approval. Approval may be given on the chief executive's own initiative. Approval may be subject to conditions, and (new section 67I(4)):

> The conditions may include a requirement that, before the special event approval applies to a person, the person must pay the chief executive a contribution to the chief executive's costs of coordinating the relevant scheduled passenger services.

61. New section 67H(2) would then provide that a contract or arrangement made or entered into in contravention of section 67H(1) has no effect to the extent of the contravention.

62. In respect of clause 119, the explanatory notes state (at 29-30) that the administrative powers to be conferred on the chief executive are appropriate:

> *The amendments include an offence provision whereby the chief executive's approval will be required prior to a person entering into or performing a contract; or an arrangement for the provision of scheduled passenger services for a declared special event. Any such contract or arrangement that does not receive the chief executive's approval will have no effect with regard to these services.*
>
> *This may breach fundamental legislative principles with regard to the delegation of an administrative power in appropriate cases; and to appropriate persons. However, the exercise of that power is subject to Legislative Assembly scrutiny. The amendments include a transitional provision that allows existing contracts or arrangements entered into prior to commencement of the Act, to continue for a period of 12 months.*

The transitional provision has been designed to minimise the impact on any person currently relying on existing contractual arrangements for the provision of scheduled passenger services to and from special events. Importantly, the provisions enable the chief executive to ensure the most efficient and effective services are provided to special events as well as maintaining the contracted general route services for the area. The provisions are a reasonable balance between ensuring the best public transport services for an area, against the rights and liberties of individuals and the delegation of a legislative power.

The amendments also extend the TransLink special event declarations to include all scheduled passenger services. The declarations were previously limited to mass transit services, which were defined as general route services (a subset of scheduled passenger services). This amendment recognises that many scheduled passenger services to special events are not general route services. This is because they are not available to the public for general purposes as they can only be used by individuals to attend the special event. It is not expected that the extension to all scheduled passenger services will have any significant detrimental effect on operators. However, it will allow TransLink to better coordinate all public transport services to special events for the benefit of event attendees and other public transport users.

Onus of proof

63. Section 4(3)(d) of the *Legislative Standards Act* 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.

64. Legislation provides for the 'reversal' of the 'onus of proof' where it declares the proof of a particular matter to be a defence or when it refers to acts done without justification or excuse, the proof of which lies on the accused.

65. **Clauses 18, 28, 38-9, 49 and 113** would alter evidentiary burdens in proceedings.

Ch 2, part 3 – Alcohol ignition interlocks

66. Clause 18 would amend section 124 of the *Transport Operations (Road Use Management) Act* to insert a number of new evidentiary provisions relating to alcohol interlocks. The explanatory notes (at 27-8) identify the way in which the new provisions would alter usual evidentiary burdens and indicate justification exists:

Clause 18 of the Bill amends section 124 to insert a number of new facilitation of proof provisions relating to interlocks into the Transport Operations (Road Use Management) Act 1995*. These provisions allow various certificates signed by the chief executive or the commissioner and certified copies of various documents to be evidence of the matters stated in them. Those matters are administrative matters including, for example, whether a particular vehicle was a nominated vehicle for a person, whether a person had been granted an interlock exemption and whether the chief executive had received an application for an interlock exemption. As the evidence provided by these certificates and documents will not be conclusive evidence, the relevant person will have the opportunity to challenge the matters stated in them.*

Ch 2, part 5 – Speed and redlight cameras

67. Clause 38 would amend section 120 of the *Transport Operations (Road Use Management) Act.* New section 120(2A) would provide for an evidentiary certificate regarding the testing and accuracy of 'photographic detection devices'. A person wishing to challenge the evidence must give notice of his or her intention to do so.

68. The committee notes that, in addition to altering the evidentiary burden by providing for certificates to be evidence of certain matters, some of the matters to be certified are to be prescribed by regulation. In this context, the explanatory notes state (at 54) the nature of the matters to be prescribed by regulation.

69. Regarding the consistency of clause 38 with fundamental legislative principles, the explanatory notes state (at 28):

Amendments to section 120 of the Transport Operations (Road Use Management) Act 1995 *provide that the commissioner of police can sign a certificate as evidence that photographic detection devices are producing accurate results potentially infringe the fundamental legislative principle that legislation should not reverse the onus of proof without justification. Proposed section 120(2A) is in similar terms to existing section 124(1)(pf), but is being inserted in section 120 which deals with other evidentiary matters concerning photographic detection devices. New section 120A of* Transport Operations (Road Use Management) Act 1995 *which allows a certificate to provide evidence of shortest practicable distance, time and the average speed of a vehicle between two points also potentially infringes the fundamental legislative principle that legislation should not reverse the onus of proof without justification. Although the certificates are evidence of the matters stated in them, they are not conclusive evidence. A defendant can challenge the matters stated in the certificates and lead evidence to rebut them. The evidentiary certificates merely provide a convenient way for a court to be informed by the prosecution about the matters provided for in the certificates and prevent the need to call witnesses unless the evidence is challenged,*

streamlining court proceedings. The Transport Operations (Road Use Management) Act 1995 *already contains a significant number of evidentiary aids and these aids are consistent with the general policy underlying the provisions of the Act.*

70. Clause 39(4) would insert a new section 120A to allow an evidentiary certificate signed by the commissioner to facilitate evidence in the prosecution of speeding offences detected by point-to-point camera systems. A point-to-point camera system takes account of the time it takes a motor vehicle to travel between two camera locations to calculate the vehicle's average speed over that distance.

71. New section 120A would provide for the average speed of a vehicle to be evidence of the actual speed at which the vehicle travelled on a road between two points. The explanatory notes state (at 56):

Although the vehicle's speed may have varied over the distance (at times it may have been travelling slower than the average speed, but at times it would have been travelling faster than the average speed), it must have travelled at the average speed at some point along its journey between the two points.

72. New section 120A(3) would provide the formula for calculating a vehicle's average speed, using a multiplier of 3.6 to convert the distance and time measured in metres and seconds to an average speed in kilometres per hour. New sections 120A(2) and (3) would provide that the distance used to calculate the average speed would be the shortest practicable distance a vehicle could have travelled between the two camera locations. The explanatory notes say (at 56):

This ensures that the calculation of average speed is conservative and acts in favour of the offender, as the vehicle is likely to have travelled a longer distance.

73. New section 120A(4) would provide for an evidentiary certificate, signed by the commissioner, to be evidence as to the distance travelled, time elapsed and average speed of a motor vehicle. Again, the explanatory notes indicate (at 56):

The average speed may be calculated by the photographic detection device, as point-to-point camera systems are able to produce a report that calculates a vehicle's average speed.

Ch 3, part 1 – New driver licence legislation

74. Clause 49 would insert a new section 23A into the *Adult Proof of Age Card Act*. For an offence involving the giving of false or misleading documents (in sections 22(1) or 23(1) or (2)), the new section would facilitate proof of the fact that the document was given to the chief executive or another person. The explanatory notes indicate (at 58) that justification exists for the provision:

This section reflects section 53A of the Transport Operations (Road Use Management) Act 1995.

Ch 4, part 4 – Marine safety

75. Clause 113 would amend section 210 of the *Transport Operations (Marine Safety) Act* to place an evidentiary onus on a defendant where age was an element of an offence.

76. New section 201(9) would state:

A statement in a complaint for an offence against this Act that a person is or is not, or was or was not, at any time or date stated in the complaint of, under or over a stated age is evidence of the matter stated, and in the absence of evidence to the contrary is conclusive evidence of the matter.

77. The explanatory notes indicate (at 30-1) that sufficient regard is had to rights and liberties of individuals:

The proposed amendment partially reverses the onus of proof by placing an evidentiary burden on the defendant in situations in which age is an element of an offence. The onus is reversed to the extent that where a prosecutor has provided evidence of a person's age, and the defendant knows that assertion is incorrect, it is the responsibility of the defendant to lead evidence of the correct age of the person. The assertion is conclusive only if the defendant fails to lead such evidence.

The partial reversal of the onus of proof is consistent with the general policy underlying the Act, and relates to a matter that may be peculiarly within the defendant's knowledge, but is extremely difficult for the prosecution to prove. Enforcement officers may ask a person their age, but they are not required to answer. A copy of a birth certificate cannot be obtained by enforcement officers from the Registry of Births, Deaths and Marriages as they do not meet the eligibility criteria and the Registry of Births, Deaths and Marriages will not disclose details to a third party unless the disclosure is authorised by law. Consequently, the administration of the legislation with regard to these offences would be impractical.

In the circumstances, Maritime Safety Queensland is of the view that the enhancement of marine safety, through the efficient administration of the Transport Operations (Marine Safety) Act 1994 *justifies reversing the onus of proof, and the proposed provision does not contravene section 4(3) (d) of the* Legislative Standards Act 1992*.*

Ch 2, part 4 - Heavy vehicle speeding

78. **Clause 28** imposes an evidential burden upon defendants extended liability offences regarding heavy vehicle speeding. The relevant offences, to be inserted by clause 27 (new section 57B) are identified above.

79. Clause 26 would extend definitions in section 57AB to include matters relevant to a speeding offence committed by the driver of a heavy vehicle. Clause 28 would then replace sections 57DB and 57DC. These sections outline:

- the matters a court may take into account when determining whether a person had taken all reasonable steps to avoid the commission of offences relating to a heavy vehicle fatigue management offence (section 57DB); and
- when a person charged with a heavy vehicle fatigue offence is to be regarded as having taken all reasonable steps (new section 57DC).

80. Clause 28 would amend these sections to extend to heavy vehicle speeding offences the requirement to establish a 'reasonable steps' defence on the balance of probabilities (explanatory notes, 47):

The obligation on a party in the chain of responsibility to take reasonable steps arises in the context of two types of heavy vehicle speeding offences. Firstly, employers, prime contractors, operators, schedulers, loading managers and certain consignors and consignees must take all reasonable steps to ensure that their actions will not cause a driver to commit a speeding offence (new sections 163AD, 163AG, 163AI and 163AL in clause 31). Secondly, section 57B(2AA) provides that where an influencing person is charged with an extended liability offence (including a heavy vehicle speeding offence), the person has the benefit of the reasonable steps defence. The reasonable steps defence is contained in existing section 57D. The defence is that the person did not know and could not reasonably be expected to have known, of the offence, and, either the person took all reasonable steps to prevent the offence or that there were no steps the person could reasonably be expected to have taken to prevent the offence.

81. The explanatory notes provide (at 22-4) a lengthy justification for clause 28:

Legislation should not reverse the onus of proof in a criminal proceeding without adequate justification (s.4(3)(d) of the Legislative Standards Act 1992*). The amendment to section 57AB of the* Transport Operations (Road Use Management) Act 1995 *in clause 26 makes a speeding offence committed by a heavy vehicle driver an extended liability offence. This means that if a driver of a heavy vehicle is proved to have committed a speeding offence, then under section 57B of the* Transport Operations (Road Use Management) Act 1995*, anyone who is an "influencing person" as defined in section 57AB is taken to have committed a heavy vehicle speeding offence. Maximum penalties that apply to the influencing person depend upon the speed limit that applies to the driver of the heavy vehicle and how far that limit was exceeded (see amendment of section 57B in clause 27). While these influencing persons will not be able to rely on the Queensland Criminal Code, section 24, they will have the benefit of the reasonable steps defence and the defence of not being in a position to influence the conduct of the driver (see section 57B (2AA)).*

Included in the list of "influencing persons" for a heavy vehicle speeding offence are those parties who have the highest level of liability under the national model law. Those parties are employers, prime contractors and operators. They have been identified as having a major influence over the actions of the driver. It is therefore considered appropriate that a higher standard of liability should apply to these parties. Other parties in the chain of responsibility (such as consignors, loaders and schedulers) are recognised as having more limited control over a driver's decision to speed and are therefore not accorded liability under this offence.

The creation of this offence and any potential breach of the fundamental legislative principle of reversing the onus of proof is considered to be justified as it will assist in ensuring that employers, prime contractors and operators refrain from exerting pressure on drivers to speed, such as by imposing unrealistic deadlines or by offering financial incentives to exceed the speed limit. By removing the application of the Queensland Criminal Code, section 24, employers, prime contractors and operators will not be able to avoid liability simply by saying they did not know the driver was speeding. To allow them to avoid liability on this basis would seriously undermine the ability of the reforms to deliver the promised road safety benefits.

Employers, prime contractors and operators will have the benefit of the reasonable steps defence. In order to be in a good position to prove this defence, these parties would need to ensure that their everyday business practices are aimed at ensuring that drivers do not commit speeding offences. The legislation has been designed to help achieve the goal that speed compliance be part of normal and reasonable business practice rather than being an extra burden placed on the business. Table 8 in the Regulatory Impact Statement accompanying the model legislation gives some illustrative examples as to what reasonable steps these parties could be expected to take. These examples of reasonable steps include:

• informing customers of the effect unreasonable scheduling or deadlines can have on speed;

• ensuring schedules enable drivers to comply with speed limits;

• informing and requiring drivers to report speeding issues; and

• staff counselling.

Furthermore, consistent with the approach taken in other areas of chain of responsibility, these parties will be able to demonstrate that they took all reasonable steps by showing that they complied with all relevant standards and procedures, including, for example, an industry code of practice in relation to matters to which the offence relates (see amendment to section 57F of the Transport Operations (Road Use Management) Act 1995 *in clause 29).*

This amendment potentially infringes the fundamental legislative principle of reversing the onus of proof by excluding the operation of section 24 of the Criminal Code (an excuse that the prosecution must disprove), and replacing it with a defence that the defendant must establish on the balance of probabilities. As can be seen from the nature of the possible steps set out in the paragraph above, the information necessary to prove this defence is particularly within the defendant's knowledge, rather than the prosecutor's knowledge, and would be extremely difficult for the prosecution to prove. For example, without mounting a significant investigation, with commensurate disturbance to the defendant's operation through searches of property and seizure of evidence, it would be almost impossible for a prosecutor to have sufficient knowledge of the defendant's business to show what steps they did not take, but reasonably could have taken, to prevent a speeding offence. It is less disruptive and hence easier for a defendant to provide evidence of its practices and procedures that are aimed at informing and requiring drivers to report speeding issues, in comparison to what the prosecution would need to do in order to establish this as part of an offence. Therefore, the reversal of the onus of proof is considered justified in this instance.

Power to enter premises

82. Section 4(3)(e) of the *Legislative Standards Act* 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.

Ch 2, part 4 - Heavy vehicle speeding

83. **Clause 22** would amend the *Transport Operations (Road Use Management) Act* to confer authorised officers with powers to enter premises. In specified circumstances, the powers of entry may be exercised without a warrant or consent.

84. Clause 22 would amend section 26A which confers authorised officers with powers of entry and post entry powers. As amended, section 26A would provide for entry:

- to 'a place of business of a responsible person', with 'responsible person' defined in schedule 4 but stated not to include persons who pack, load or unload goods or containers and owners and operators of weighbridge facilities or an agent, employer, employee or subcontractor of an excluded person; and
- in order to investigate a suspected commission of one or more heavy vehicle speeding offences (to be inserted by clauses 26 to 27 and 31);

85. The explanatory notes outline (at 44) the intended operation of amendments to section 26A:

The term 'responsible person' is defined in schedule 4 and lists those involved in the heavy vehicle industry and may have knowledge about the commission of a transport offence involving a heavy vehicle. In relation to the commission of a speeding offence by a driver, persons who pack, load, unload goods or containers, and owners and operators of weighbridges are not considered to have a significant degree of influence over whether a speeding offence may be committed by a driver. (These parties are likely to have a much higher degree of influence over whether or not an overloading offence is committed, for example). For this reason, these parties, and an agent, employer, employee or subcontractor of any one of these parties, have been omitted from the definition of "responsible person" in relation to the investigation of a heavy vehicle speeding offence. The effect of this amendment is that the business premises of packers, loaders, and owners/operators of weighbridges, and any agent, employer, employee or subcontractor of one of these persons will not be able to be searched without warrant or consent when conducting an investigation of a suspected heavy vehicle speeding offence.

86. In relation to the powers to be conferred on authorised officers to enter a place of business of a responsible person, the explanatory notes identify a possible inconsistency with fundamental legislative principles. However, lengthy justification is provided (at 24-5). The committee notes that, as stated in the final paragraph, the proposed Queensland legislation includes additional safeguards to those contained in the model law:

The Transport Legislation Amendment Act 2007 *amended the* Transport Operations (Road Use Management) Act 1995 *to incorporate new enforcement powers from the National Transport Commission (Road Transport Legislation—Compliance and Enforcement Bill) Regulations 2006. The National Transport Commission (Model Act on Heavy Vehicle Speeding Compliance) Regulations 2008 applies these powers to the investigation and enforcement of chain of responsibility speeding offences. These powers allow authorised officers to enter certain places in limited circumstances without warrant or consent and to search and seize evidence in circumstances provided for in the* Transport Operations (Road Use Management) Act 1995. *These powers are available in relation to the investigation of suspected offences against a transport Act. Therefore, they will be available to*

conduct investigations in relation to a suspected commission of the new chain of responsibility heavy vehicle speeding offences incorporated by this Bill. These are the offences incorporated into section 57B and the offences in the new chapter 5D of the Transport Operations (Road Use Management) Act 1995*. This amendment raises the fundamental legislative principle relating to the entry of premises without warrant (s.4 (3) (e) of the* Legislative Standards Act 1992*). However, similar to previous national heavy vehicle reforms, tight controls will be applied to the use of this power. These include:*

• a restriction to only use the power when destruction of evidence of an offence is considered imminent;

• the requirement to seek police approval prior to entry in the case of suspected death or injury; and

• the requirement to obtain a post-entry approval from a Magistrate.

Should this approval not be given, evidence seized will be returned to the defendant. In line with the national legislation, consent or a warrant is still required if an authorised officer needs to enter either an unattended place or a place which is used predominately for residential purposes.

The extension of these powers to the investigation of suspected heavy vehicle speeding offences is justifiable. It is vital that all available evidence that would point to the involvement of a party in the chain of responsibility in the commission of a speeding offence be accessible. This will assist in ensuring these parties may be brought to account for their actions. The explanatory notes accompanying the Transport Legislation Amendment Bill 2007 discussed these powers in relation to the investigation of other heavy vehicle offences. As explained in those notes, the exercise of these powers will assist in preventing the possibility of contamination, destruction or removal of crucial evidence if consent to enter a place is denied or if a period elapses before a warrant is obtained. For example, a scenario could arise where a search of a truck intercepted at the roadside leads to a suspicion that someone else in the transport chain is responsible for exerting pressure on a driver to commit a speeding offence. These enter, search and seizure provisions will assist in limiting the amount of time during which evidence relevant to the commission of the offence may be concealed or removed.

Furthermore, in the adoption of the heavy vehicle speeding reforms, business premises that may be entered and searched without warrant or consent has been limited to the premises of those persons who may be held liable under the legislation for the commission of an offence. For example, the business premises of loaders and unloaders will not be able to be automatically entered, as these parties have not been identified as those with potential liability under the legislation. This is due to their lack of influence on speeding compliance by a driver.

This limitation on the type of business premises that may be entered without warrant or consent is a departure from the model law provisions. The approach has been adopted to adequately take into account the rights of individuals in accordance with fundamental legislative principle considerations.

Protection against self-incrimination

87. Section 4(3)(f) of the *Legislative Standards Act* 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.

Ch 2, part 4 - Heavy vehicle speeding

88. **Clauses 23-25** would amend the *Transport Operations (Road Use Management) Act* to require provision of information and assistance regarding the investigation of heavy vehicle offences. The amendments would be statutory modifications of protections against self-incrimination. In particular, clauses 23 to 25 would override the common law protection of the right to silence.

89. Clause 23 would amend section 48A which confers authorised officers exercising powers in relation to heavy vehicles or transport of dangerous goods with further powers to require personal details. The further powers are conferred for the purposes of the investigation of suspected offences against a transport Act. Clause 23 would extend the powers to the conduct of investigations of chain of responsibility heavy vehicle speeding offences (to be inserted by clauses 26, 27 and 31).

90. The explanatory notes outline (at 44) the intended scope of the powers, stating that only a 'responsible person' as defined by section 26A as amended by clause 22 need comply:

[W]hen investigating one of these new offences, an authorised officer may require a responsible person for a heavy vehicle, who may be able to help with the investigation of the offence, to provide their personal details. However, persons who pack, load, unload goods or containers, owners and operators of weighbridges, and any agent, employer, employee or subcontractor of one of these parties will not be required to provide their details. This is achieved through the change in the definition of "responsible person" for the purpose of this section.

91. Clause 24 would amend section 49A, allowing an authorised officer to direct a responsible person for a heavy vehicle to provide information about a heavy vehicle. As amended, section 49A would apply in relation to investigation of suspected heavy vehicle speeding offences, but would require provision of information only by a 'responsible person' as defined in clause 22.

92. Clause 35 would amend section 50AB which confers authorised officers with power to require help to find and access particular documents or information. Again, only a 'responsible person' is required to comply.

93. The explanatory notes do not address specifically the consistency of clauses 23 to 25 with fundamental legislative principles.

Retrospective operation

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

Ch 4, part 6 – TORUMS generally

95. **Clause 129** would provide for amendments to the *Transport Operations (Road Use Management) Act* to have retrospective operation.

96. Clause 127 is to insert a new section 66(3)(k) to ensure that local governments may make local laws about the regulation of vehicle access to public places that are local government controlled areas. Clause 129 is intended to validate:

- past local laws which relate to the regulation of vehicle access to a public place that is a local government controlled area; and
- any enforcement action taken under the local law.

97. The committee examines legislation that would have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:

- the retrospective operation would be adverse to people other than the government; and
- people have relied on and would have legitimate expectations based on the existing law.

98. The committee accepts that retrospective legislation may be necessary in some circumstances to clarify the law. Clause 129 is not merely of that nature as it is to validate past laws and actions taken under them, with the retrospectivity to extend to the time of enactment of each relevant local law. The explanatory notes state (at 28), however, that sufficient regard would be had to rights and liberties of individuals:

> *The* Transport Operations (Road Use Management) Act 1995 *is being amended to include a validation provision to deal with a technical legislative inconsistency. This will ensure the validity of any past local laws made relating to the regulation of vehicle access to public places that are also land or infrastructure owned, held in trust or otherwise controlled by a local government. This provision will also ensure the validity of any enforcement action taken under the local law. This curative amendment will overcome any inconsistency that may exist between provisions of existing local laws and sections 66(1) and 147 of the Act, which reserve powers about regulating vehicle access to "public places" to the State. There may be some overlap between the concept of a "public place" and land or infrastructure owned, held in trust or otherwise controlled by a local government. It is not anticipated that any rights and liberties of individuals will be affected by the amendments, as State and local authorities and the community have always conducted themselves on the basis that local governments have the necessary powers to make these local laws and the validation provision merely confirms this to be the case, restoring the reasonable and legitimate expectation of the existing law.*

Immunity from proceeding or prosecution

99. Section 4(3)(h) of the *Legislative Standards Act* 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.

Ch 3, part 1 – New driver licence legislation

100. **Clause 45 (and similar provisions)** would limit the State's liability for acts or omissions in relation to the keeping and use of a smartcard.

101. Clause 45 would amend section 6 of the *Adult Proof of Age Card Act*. The explanatory notes state (at 13 and 58):

> *The Bill inserts a consistent provision in the* Tow Truck Act 1973*,* Transport Operations (Marine Safety) Act 1994*,* Transport Operations (Passenger Transport) Act 1994*, and the* Transport Operations (Road Use Management)

Act 1995 *to declare a smartcard is State property. As a consequence of this amendment, the* Tow Truck Act 1973*,* Transport Operations (Marine Safety) Act 1994*,* Transport Operations (Passenger Transport) Act 1994*,* Transport Operations (Road Use Management) Act 1995 *and the* Adult Proof of Age Card Act 2008 *will also be amended to provide a limit on the State's liability for acts or omissions in the keeping and use of a smartcard by the cardholder…*

An adult proof of age card may contain the cardholder's personal information and the legislation restricts access to this information. The amendment will allow the State's property interest to stand despite the cardholder's statutory right to store, or have certain information stored on the card.

Clear meaning

102. Section 4(3)(k) of the *Legislative Standards Act* 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 way.

Ch 2, part 3 – Alcohol ignition interlocks

103. **Clause 17**, which would amend the *Transport Operations (Road Use Management) Act* to insert a new part 3B regarding alcohol ignition interlocks, may not be drafted in a sufficiently clear and precise way.

104. The explanatory notes describe the operation of new part 3B as follows (at 17):

A mandatory alcohol ignition interlock condition is to be imposed on the licence of those people returning to the driver licensing system after serving a disqualification for a high level drink driving offence, a repeat drink driving offence in a five year period or a specified drink driving related offence. The interlock condition will be imposed by legislation as a condition of re-entering the licensing system. A person whose licence is subject to the interlock condition will only be authorised to drive a motor vehicle that has been fitted with an approved alcohol ignition interlock.

105. New section 91I would provide definitions for provisions regarding alcohol ignition interlocks. The definition of 'drink driving offence' that describes the 'high level drink driving offence' states that it would be:

(c) an offence against section 79(1), involving a motor vehicle, while under the influence of liquor;

106. Section 79(1) provides the offence of driving while under the influence. The legislation does not define the term 'under the influence of liquor'. While there is a legal presumption provided in the Act that a person who is over the 'high alcohol limit' (of 0.15%) is 'under the influence of liquor', a person may be convicted of driving 'under the influence' based on evidence of indicia provided at trial. Indicia may be used to establish that a person was 'under the influence of liquor' if a breath testing instrument had not been available at the relevant time.

107. The committee notes the significant consequences resulting from alcohol interlock conditions and invites the minister to provide information regarding whether the definition of 'drink driving offence' in new section 91I identifies with sufficient clarity a high level drink driving offence, conviction of which will attract an alcohol interlock condition on a person's driver licence.

Sufficient regard to the institution of Parliament

Institution of Parliament

108. Fundamental legislative principles include requiring that legislation have sufficient regard to the institution of Parliament. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

109. **Part 4** would amend the *Transport Operations (Road Use Management) Act* to implement in Queensland national scheme legislation.

110. The committee notes that the explanatory notes provide (at 20):

Although some of the proposed amendments relating to heavy vehicle speeding compliance potentially infringe fundamental legislative principles (FLPs), the need to address the dangerous practice of heavy vehicle speeding is considered to justify any potential impact on individual rights. For the purpose of national consistency, it is important that the model law provisions be adopted as closely as possible. Sufficient safeguards, as explained further below, have been placed in the legislation for the protection of the rights of individuals.

111. In respect of national scheme legislation the committee's practice is to draw to Parliament's attention to the importance of adequate legislative scrutiny.[6] Despite executive pressure to merely ratify a scheme without question, each Parliament should ensure responsibility for both joining and remaining in a cooperative legislative scheme.

Delegation of legislative power

112. Section 4(4)(a) of the *Legislative Standards Act* 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.

113. **Clause 17** would amend the *Transport Operations (Road Use Management) Act* to delegate legislative power to the chief executive to make regulations:

> … under this division [part 3B, division 6 – Other provisions about interlocks] including, for example, for making provision about the following –

114. The committee notes that the regulation-making power conferred on the chief executive is worded very broadly. The explanatory notes state (at 27) that the delegation is appropriate:

> *Section 91Z provides the power to make regulations not only for the matters specifically identified in section 91Z(a) to (d) but also more broadly. This regulation-making power is essential to ensure sufficient flexibility in the operation and delivery of the interlock scheme. For example, it will allow the legislation to keep pace with developing technologies to ensure the scheme can take advantage of new devices and features that become available.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

115. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- a bill substantially uniform or complementary with legislation of the Commonwealth or another State.

116. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

117. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and generally contain the information required by section 23.

Consistency with fundamental legislative principles

118. Under the heading Rights and liberties, the committee noted that, as chapter 3 would provide for driver and marine licences in the form of 'smartcards', a large number of provisions in chapter 3 may have insufficient regard to rights and liberties of individuals and, in particular, rights to privacy.

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6 See: Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006), [1.2.3.5].

119. The committee noted that the explanatory notes did not identify:

- any possible inconsistency of the provisions regarding smartcard driver licences with fundamental legislative principles; or
- community consultation undertaken in respect of the proposed provisions in chapter 3.

120. The committee invites the minister to provide information about compliance of the explanatory notes with section 23 of the *Legislative Standards Act*.

Substantial uniformity with legislation of another jurisdiction

121. The explanatory notes identify two elements of the bill which are to implement nationally consistent legislation regarding respectively heavy vehicle speeding and the discharge of sewerage by ships.

122. In relation to heavy vehicle speeding, the explanatory notes state (at 7):

> *Amendments to the* Transport Operations (Road Use Management) Act 1995 *adopt provisions from the* National Transport Commission (Model Act on Heavy Vehicle Speeding Compliance) Regulations 2008. *This is national model legislation developed by the National Transport Commission aimed at reducing deaths and injuries from crashes involving speeding heavy vehicles. In recognition of the role that parties other than the driver play in relation to speed compliance, the amendments focus upon parties in the chain of responsibility rather than on the driver. The parties identified in the legislation include employers, prime contractors, operators, schedulers, loading managers and certain consignors and consignees. Each of these parties who can influence whether or not speeding occurs will have a measure of responsibility to ensure that their activities do not influence, encourage or require the driver to speed. If one of these parties is found not to have discharged its responsibilities, it will be liable for a fine of between $300 and $8,000 depending upon the severity of the offence.*
>
> *Drivers of heavy vehicles are not regulated by the model law as there is already a well-established compliance and enforcement framework that targets drivers. This framework includes the allocation of demerit points, fines and driver licence sanctions.*
>
> *The model law is consistent with other nationally developed model laws governing mass, dimension and loading of heavy vehicles and fatigue management implemented in Queensland on 29 September 2008.*

123. In relation to proposed amendments to maritime legislation regarding ship sourced sewerage, the explanatory notes state (at 10):

> *The amendments to the* Transport Operations (Marine Pollution) Act 1995 *and the* Transport Operations (Marine Pollution) Regulation 2008 *clarify that prescribed ships, for example, a large trading or passenger ship visiting a Queensland port from overseas, cannot discharge untreated sewage anywhere in coastal waters. The proposed amendment clarifies that prescribed ships may discharge treated sewage in accordance with set conditions, except in prohibited discharge waters where no discharge of sewage is allowed. This amendment achieves the original intent of section 50A, which is to implement* the International Convention for the Prevention of Pollution from Ships*, 1973 (commonly known as MARPOL) and clarifies that no ship can discharge in prohibited discharge waters in Queensland. Additionally, an amendment will adjust the penalty provision for the existing garbage placard requirement to be consistent with similar minor offence penalty provisions under the legislation.*

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 9 MARCH TO 22 MARCH 2010

(Listed in order of sub-leg number)

SLNo 2010	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, MS)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
17	Water Resource (Whitsunday) Plan 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
18	Water Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
19	Animal Management (Cats and Dogs) Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
20	Building Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
21	Standard Plumbing and Drainage Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
22	Transport Planning and Coordination Amendment Regulation (No.1)		26/02/2010	9/06/2010	9/03/2010	10/06/2010
23	Transport Legislation Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
24	Forestry (State Forests) Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
25	State Penalties Enforcement Amendment Regulation (No.2) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
26	Jury Amendment Regulation (No.1) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
27	Public Trustee Amendment Regulation (No.2) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
28	Workplace Health and Safety (Codes of Practice) Amendment Notice (No.2) 2010		26/02/2010	9/06/2010	9/03/2010	10/06/2010
29	Proclamation commencing remaining provisions		25/02/2010	9/06/2010	9/03/2010	10/06/2010
30	South-East Queensland Water (Distribution and Retail Restructuring) Notice 2010		1/03/2010	9/06/2010	9/03/2010	10/06/2010
31	Public Service Amendment Regulation (No.1) 2010		5/03/2010	9/06/2010	9/03/2010	10/06/2010
32	Fair Trading (Toy-like Novelty Cigarette Lighter) Order 2010		5/03/2010	9/06/2010	9/03/2010	10/06/2010

* EN – Explanatory Notes. RIS – Regulatory Impact Statement. MS – Ministerial Statement.

SUBORDINATE LEGISLATION UNDER CONSIDERATION

6. TRANSPORT LEGISLATION AMENDMENT REGULATION (NO.1) 2010

Date tabled: 4 August 2009

Disallowance date: 8 October 2009

Responsible minister: Hon RG Nolan MP

ISSUES ARISING FROM EXAMINATION OF LEGISLATION

1. The committee invites the minister to provide information as to whether the **section 8** has sufficient regard to rights and liberties of individuals.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

2. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

3. Section 8 amended schedule 10 of the Transport Operations (Marine Safety) Regulation 2004. It made amendments regarding pilotage fees for arrival, departure or removal of a ship and made specific amendments regarding one pilotage area, Port Alma.

4. Explanatory notes regarding the amending regulation were not prepared. To assist the committee's examination of section 8, the committee invites the minister to provide information regarding the consistency of section 8 with fundamental legislative principles.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

7. VALUATION OF LAND AND OTHER LEGISLATION AMENDMENT ACT 2010

Date introduced: 11 February 2010

Responsible minister: Hon S Robertson MP

Portfolio responsibility: Minister for Natural Resources, Mines and Energy and Minister for Trade

Date passed: 09 March 2010

Committee report on bill: 02/10; at 37 - 44

Date response received: 10/03/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 26-7, 32-3, 37, 39, 51 and 54** which would alter, and in some cases limit, review of administrative power conferred by the *Valuation of Land Act 1944*;
   - **clause 33** which may be inconsistent with principles of natural justice;
   - **clause 52** providing for amendments regarding 'unimproved value' to operate retrospectively; and
   - **clause 5**, which would amend the definition of 'unimproved value' in the *Valuation of Land Act*, and may not be drafted in a clear and precise way.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 21** which would allow a decision of the chief executive to amend both an Act and subordinate legislation.
3. The committee invites the minister to provide information regarding whether **clause 54** would fetter the discretion of the Land Court.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

4. The committee thanks the minister for the information provided in his letter.
5. The committee makes no further comment regarding the bill.

Hon Stephen Robertson MP
Member for Stretton

Queensland Government

Minister for Natural Resources, Mines and Energy and Minister for Trade

Ref CTS 04153/10

09 MAR 2010

SCRUTINY OF
10 MAR 2010
LEGISLATION COMMITTEE

B7.10

Mrs Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mrs Miller

The Honourable Anna Bligh MP, Premier and Minister for the Arts, has approved amendments to be moved during consideration in detail to the Valuation of Land and other Legislation Amendment Bill 2010. The amendments only relate to the *Valuation of Land Act 1944*.

The Bill, introduced into Parliament on 11 February 2010 amends the *Valuation of Land Act 1944* to:

- clarify the definition of unimproved value and the associated terminology;
- provide for a more focussed process of objection designed to resolve disputes more efficiently at the objection stage; and
- allow for the use of a schedule of valuations (the general valuation schedule) and an adjustment factor in the statutory valuation process.

It is proposed to remove and insert the following provisions:

- remove in Clause 7 of the Bill section 5(3)(a)(i) and (ii) and in Clause 26 section 42A (1)(d)(v) and Clause 37 section 52AA(1)(d)(v) to ensure that there is no requirement that the valuation assessment be limited by a requirement to adopt the depreciated value of improvements recorded in an owner's books of account;
- remove the provisions from the Bill regarding the use of a schedule of valuations (the general valuation schedule) and an adjustment factor in the statutory valuation process), with those proposals to be subject to further consultation with key industry stakeholders along with other future proposed reforms to the valuation process and the State Valuation Service;
- insert a new provision to validate valuations issued or made and in effect at any time on or from 30 June 2002 but before the commencement and clarify the effect of sections 28 and 29A with respect to those valuations, noting that the term commencement is defined in the amendments to mean the date of assent of the amending Act;

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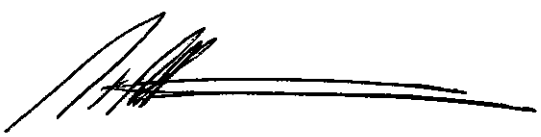
- insert a new provision in the Bill to provide for a sunset clause for the amendments, such that the amendments with the exception of the amendment to validate existing valuations (sections 105 and 106 of the amending Act), are to expire on 30 June 2011; and
- insert a new provision in the Bill which provides that the amendments to the definition of unimproved value do not apply until 1 July 2010 to those appeals which, at the time of passage of the Bill, are before the Land Courts (including appeal courts).

A copy of the proposed amendment and supplementary explanatory notes are attached for your information.

Yours sincerely



STEPHEN ROBERTSON MP

Att

PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

8. PUBLIC HEALTH AMENDMENT REGULATION (NO.2) 2009 SL234.09

Date tabled: 10 November 2009
Disallowance date: 11 March 2010
Responsible minister: Hon P Lucas MP
Committee report on sub-leg: 12/09; at 12
Date response received: 19/03/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information about whether the regulation has sufficient regard to rights and liberties of children and young people.

CORRESPONDENCE RECEIVED FROM MINISTER

2. The committee thanks the minister for the information provided in his letter.
3. The committee makes no further comment regarding the subordinate legislation.

Hon Paul Lucas MP

Queensland Government

Deputy Premier
Minister for Health

MI167056
MO: 09002407

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller

I write in response to your letter dated 23 November 2009, regarding the *Public Health Amendment Regulation (No.2) 2009* (the Regulation). I note the Committee seeks information about whether the Regulation has sufficient regard to the rights and liberties of children and young people.

The restrictions under the *Public Health Act 2005* (the Act) regarding the performance of cosmetic procedures surgery on children are intended to apply to procedures that are of a higher risk and invasive nature and performed primarily for aesthetic purposes.

The procedures that are exempted by the Regulation from the definition of 'cosmetic procedure' in Section 213A of the Act include those that have a cosmetic benefit but are performed on children to correct a deformity, congenital abnormality or physical effect of a medical condition, illness or trauma (for example, cranial-facial surgery) and those that are performed on children primarily for cosmetic reasons but are not considered to be high risk, such as otoplasty (ear surgery).

It was never intended that the exempted procedures be captured by the definition of cosmetic procedure in the Act. However, some key medical stakeholders expressed concerns that the definition of cosmetic procedure did not make a clear distinction between procedures undertaken for purely aesthetic reasons and those undertaken to restore function or correct an abnormality, such as facial reconstruction to address significant facial asymmetry following the removal of a cancerous tumour.

The purpose of the Regulation is to remove any doubt that the exempted procedures are not intended to be captured by the definition of cosmetic procedure. Unless this doubt was removed, there were concerns that some health practitioners might delay performing these procedures on a child until the child turned 18 because the practitioners feared they may be at risk of being prosecuted for performing the procedure that has a cosmetic benefit. This would be detrimental to the child's best interests and be contrary to the objective of the restrictions in the Act.

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Exempting the procedures in the Regulation does not mean that the procedures may be performed on a child regardless of whether the person performing the procedure believes it is in the best interests of the child. Health practitioners performing such procedures would be subject to the same legal and ethical obligations that apply to the performance of surgical procedures generally.

It is therefore considered that the Regulation has sufficient regard to rights and liberties of children and young people.

I thank the Committee for giving me the opportunity to clarify the above issues.

Should you have any queries regarding my advice to you, Ms Jo Briskey, Policy Advisor, will be pleased to assist you and can be contacted on telephone 3234 1191.

Yours sincerely

PAUL LUCAS MP
Deputy Premier
Minister for Health

9. TRANSPORT OPERATIONS (ROAD USE MANAGEMENT – VEHICLE REGISTRATION) AMENDMENT REGULATION (NO.1) 2010 SL3.10

Date tabled: 9 February 2010

Disallowance date: 15 April 2010

Responsible minister: Hon Ms RG Nolan MP

Committee report on sub-leg: 03/10; at 12

Date response received: 19/03/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information about whether the amendment regulation has sufficient regard to rights and liberties of individuals.

CORRESPONDENCE RECEIVED FROM MINISTER

2. The committee thanks the minister for the information provided in her letter.

3. The committee makes no further comment regarding the subordinate legislation.

Hon Rachel Nolan MP
Member for Ipswich

Our ref: MC48046

Your ref: SL3.10

Queensland Government

Minister for Transport

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Ms Miller Jo-Ann

Thank you for your letter of 8 March 2010 about the *Transport Operations (Road Use Management-Vehicle Registration) Amendment Regulation (No.1) 2010 SL3.10.*

Section 68AA of the *Transport Operations (Road Use Management-Vehicle Registration) Regulation 1999* (the Regulation) currently provides for the chief executive to release information (which may include personal information) to toll road operators, local government tollway operators and other persons where a registered operator of a vehicle has not paid the fee for the use of the toll road.

Brisbane City Council wishes to undertake its own prosecution of toll evaders on their Local Government toll roads (similar to its processes for parking offences).

To enable this to occur, an amendment is required to authorise the chief executive to release an extract from the vehicle register to a local government, or to a person acting for the local government, for the purpose of the local government enforcing tolling offences committed in relation to a local government tollway in the local government area.

The process used to identify vehicles for toll compliance purposes commences when the registration number of a vehicle, without a valid tolling product, is identified using Automated Number Plate Recognition or visual inspection from an image of the vehicle captured at the toll point.

The Toll Road Operator (TRO) or local government TRO makes a request to the department for information. In response to a request, specific authorised information is extracted from the vehicle register to match the registration number of the vehicle and returned to the requesting TRO enabling appropriate follow-up action. Information provided covers the name and address details, whether in full or in part, of the vehicle's current, or previous, registered operator and the effective date and the expiry date of the vehicle's registration.

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Under the *Transport Infrastructure Act 1994* (TI Act), a Notice of Demand (NOD) may be issued to the vehicle's registered operator by the TRO or local government TRO requesting payment of the toll. Failure to comply with the NOD will result in enforcement action being taken, either by a Penalty Infringement Notice (PIN) being issued under the *State Penalties Enforcement Regulation 2000* (SPER) or by serving a complaint and summons under *the Justices Act 1886*. For offences committed in a local government area, the required enforcement action may be taken by the local government.

Information from the vehicle register may only be released where the TRO, local government TRO or local government enforcing tolling offences and the chief executive have entered into contractual arrangements, which includes conditions imposed by the chief executive about the provision of the information and the use and disclosure of the information. The contract stipulates conditions for data access, use, security, privacy, on-release of information, auditing, inspection and termination procedures. A breach of conditions may result in the revocation of access to vehicle and personal information held on the vehicle register and/or interstate road transport agency data.

The department maintains a log of each requestor's enquiries for audit and billing purposes.

Information from the vehicle register provided by the department cannot be on-released to a person acting on behalf of a TRO, local government TRO or local government enforcing tolling offences (subcontractor) without the department's written approval.

A request for approval must detail the function that the subcontractor will be performing that requires them to have access to information from the vehicle register. The purpose for which the subcontractor requires access to information from the vehicle register must be relevant to the function that they will be performing (for example, a mailing house would need the names and addresses of the people to whom the letters were to be mailed). However, access to information for the on-selling of debt will not be approved.

Where the department has granted approval for a TRO to use a sub-contractor, that organisation must sign an agreement which then forms part of the TRO contract with the department.

The department must be immediately notified of any breach of the requirements and ensure the security of its access and use (including storage and disclosure) of the data and the system and maintain security procedures which are sufficient to enable it to comply with the requirements of the contract.

It is an offence under the Regulation for anyone receiving the information to use or disclose it other than in accordance with the contractual conditions.

If you would like more information, please call Bruce Couch, Senior Business Manager (Transport Policy) in Road Safety and System Management on (07) 3253 4018. Mr Couch will be pleased to assist.

Yours sincerely

RACHEL NOLAN MP
Minister for Transport

10. WILD RIVERS AMENDMENT REGULATION (NO.1) 2009 SL283.09

Date tabled: 9 February 2010
Disallowance date: 15 April 2010
Responsible minister: Hon S Robertson MP
Committee report on sub-leg: 03/10; at 13
Date response received: 19/03/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information about whether the amendment regulation has sufficient regard to Aboriginal tradition and Island custom.

CORRESPONDENCE RECEIVED FROM MINISTER

2. The committee thanks the minister for the information provided in his letter.
3. The committee makes no further comment regarding the subordinate legislation.

Hon Stephen Robertson MP
Member for Stretton

Queensland Government

Minister for Natural Resources, Mines and Energy and Minister for Trade

Ref CTS 04375/10

17 MAR 2010

SL.283.09

Mrs Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mrs Miller

Thank you for your letter dated 8 March 2010 regarding the Wild Rivers Amendment Regulation (No. 1) 2009.

My comments with respect to the relevant pages of the Scrutiny of Legislation Committee's Legislation Alert No. 3 of 2010, which relates to the aforementioned subordinate legislation, are as follows:

The effect of the Wild Rivers Amendment Regulation (No.1) 2009 is to ensure that 'a jetty, boat ramp or pontoon on, or providing access to, Indigenous land' may be constructed and is not, for example, 'prohibited development' under the *Sustainable Planning Act 2009.*

The proposal to amend the *Wild Rivers Regulation 2007* came about during the consultation process for the Archer Basin, Lockhart Basin and Stewart Basin wild river declaration proposals, which were declared as wild river areas on 3 April 2009.

During this process, submissions were received from Traditional Owners who raised the issue that the construction of private boat ramps and jetties was not considered 'specified works' (though public jetties and boat ramps were considered 'specified works') and as such could not be constructed in high preservation areas.

This was a significant issue for Traditional Owners as structures such as boat ramps and jetties would provide access to their country and outstations during the wet season when vehicular access is limited. It was not deemed appropriate for these to be public facilities as some of the country is culturally significant and access should be restricted.

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The construction of private boat ramps and jetties also allows for safe access in crocodile inhabited areas, and provides potential for economic development such as ecotourism.

To ensure that boat ramps, jetties and pontoons constructed on, or for access to, Indigenous lands are not prohibited development in wild river areas, the Wild Rivers Amendment Regulation (No.1) 2009 prescribed these as specified works. Prescribing specified works permits a development application to be lodged, in cases where it would otherwise have to be refused, to be received. Specified works must still be assessed against all relevant requirements (for example, under the *Sustainable Planning Act 2009* and the *Fisheries Act 1994*, if applicable) including any applicable codes for the development.

This amendment is considered to have sufficient regard to Aboriginal tradition and custom, as it was intended to address the concerns of Traditional Owners about enabling access to Indigenous land.

Should you have any further enquiries, please do not hesitate to contact Ms Judith Jensen, Director, Water Legislation, Policy and Pricing of the department on telephone 3330 6108.

Yours sincerely

STEPHEN ROBERTSON MP