



Legislation Alert

Scrutiny of Legislation Committee

53rd Parliament

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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*:

<i>Legislative Standards Act</i>	<i>Statutory Instruments Act</i>
<ul style="list-style-type: none"> • Meaning of 'fundamental legislative principles' (section 4) • Explanatory notes (part 4) 	<ul style="list-style-type: none"> • 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:

Rights and liberties of individuals	Bills and subordinate legislation	
	<ul style="list-style-type: none"> • 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 	
Institution of Parliament	Bills	Subordinate legislation
	<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • 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 – <ul style="list-style-type: none"> – in appropriate cases to appropriate persons – if authorised by an Act.

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/tailedPapers).

PART 1 – BILLS EXAMINED

1. HEALTH LEGISLATION (HEALTH PRACTITIONER REGULATION NATIONAL LAW) AMENDMENT BILL 2010

Date introduced: 25 March 2010
Member: Hon PT Lucas MP
Portfolio responsibility: Deputy Premier and Minister for Health

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 54, 55, 61 and 117** as they have the potential to affect rights to privacy of personal information;
 - **clauses 38, 57, 100 and 124 and the schedule (section 66)** inserting new offence provisions, or amending offences in the various health Acts to be amended by the bill;
 - **clause 15** providing for retrospective commencement of a transitional regulation-making power; and;
 - **clauses 57 and 117** respectively conferring on certain officers immunity from proceedings for acts done or omissions made; and;
 - **clause 55** 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 **clause 15** which would allow the amendment of an Act other than by another Act.
3. The minister is invited to provide information about whether **clause 121** would make rights and liberties, or obligations, dependent on administrative power which is insufficiently defined or not subject to appropriate review.

BACKGROUND

4. Pursuant to the Council of Australian Government *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions*, the bill is the third and final piece of legislation required to implement the national scheme in Queensland.

LEGISLATIVE PURPOSE

5. The bill is intended to make (explanatory notes, 1-2):
 - administrative and consequential amendments to legislation across Government required to accommodate and appropriately reflect the commencement of the national scheme, including transferring responsibility for administering pharmacy ownership restrictions from the Pharmacists Board of Queensland (to be abolished on commencement of the national scheme) to Queensland Health;
 - minor amendments to the *Health Practitioner Regulation National Law Act 2009* (to allow the Governor in Council to make regulations containing provisions of a transitional or savings nature) and the schedule to that Act containing the Health Practitioner Regulation National Law (to ensure the statutory privilege attached to conciliation processes conducted by participating jurisdictions' health complaints entities are not inadvertently undermined by the mandatory notification requirements of the National Law); and
 - minor amendments to the *Queensland Institute of Medical Research Act 1945* to help the QIMR perform its statutory functions more effectively and efficiently while an ongoing review of the Act is being completed.

6. Therefore, the bill would amend the:
 - *Ambulance Service Act 1991*;
 - *Dental Technicians and Dental Prosthetists Registration Act 2001*;
 - *Health Practitioner Regulation National Law Act 2009*;
 - *Health Practitioners (Professional Standards) Act 1999*;
 - *Health Services Act 1991*;
 - *Medical Radiation Technologists Registration Act 2001*;
 - *Nursing Act 1992*;
 - *Pharmacists Registration Act 2001*; and
 - *Queensland Institute of Medical Research Act 1945*.
7. In addition, the bill would repeal 14 health portfolio Acts and effect consequential amendments to 42 Acts listed in the schedule.

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*.
9. **Clauses 57 and 100** would insert new offences in the *Health Practitioners (Professional Standards) Act* and the *Pharmacists Registration Act* respectively, creating new offences with the potential to affect rights and liberties of individuals. The proposed offences and maximum penalties are outlined in the table below.

Clause	New section	Offence	Proposed maximum penalty
<i>Health Practitioners (Professional Standards) Act</i>			
57	405Q(3)	Failure by investigator to return identity card after appointment ends	10 penalty units (\$1000)
57	405R(3)	Failure by inspector to return identity card after appointment ends	10 penalty units (\$1000)
<i>Pharmacists Registration Act</i>			
100	141A	Failure to give chief executive notice of change of ownership of business	50 penalty units (\$5000)
100	141B	Failure to give chief executive notice of change of particulars of business	50 penalty units (\$5000)

10. **Clauses 38 and 124 (schedule, section 66)** would amend the wording of existing penalties in the *Health Practitioners (Professional Standards) Act* and *Dental Technicians and Dental Prosthetists Registration Act* respectively. However, the maximum penalty for each offence would not be changed.

Clause	Section amended	Offence, as amended	Maximum penalty
<i>Health Practitioners (Professional Standards) Act</i>			
38	76	Failure by investigator to return identity card	10 penalty units (\$1000)
<i>Dental Technicians and Dental Prosthetists Registration Act</i>			
124 (sched, s66)	125(1)	Taking or using a restricted title	1000 penalty units (\$100 000)

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11. **Clauses 54-5, 61 and 117** have the potential to affect rights to privacy of personal information
 12. Clause 54 would amend section 392 of the *Health Practitioners (Professional Standards) Act* to modify the application of confidentiality requirements. Amendments to be made by clause 54(1) to (13) may affect individuals' rights to privacy of personal information as they would extend exemptions to the confidentiality requirements under section 392.
 13. The explanatory notes state (at 38):

Clause 54 amends section 392 (Confidentiality) to accommodate the redistribution of roles and responsibilities effected by the commencement of the National Scheme. Section 392 restricts the disclosure of information about another person's affairs acquired by a relevant person in performing functions under the Act. As a person performing functions under new Part 12A will be performing functions in relation to National Scheme registrants, section 392 will continue to have some application to information arising in relation to National Scheme registrants. That is, it is intended to apply, where relevant, to information acquired under either Part 12A or the remainder of the Act.
 14. In this context, the committee notes that under amendments to be made by clause 54, members of existing State boards and the Office of the Medical Board of Queensland which are to be abolished on commencement of the national law, would continue to be bound by confidentiality provisions (explanatory notes, 40):

Subclause (11) amends section 392(5)(a), which defines a 'relevant person' for the purposes of the section as including a member of a board, to include a person who is or was a member of a former board. This recognises that a number of existing State boards will be abolished on the commencement of the National Law, and ensures the confidentiality provisions continue to apply to the members of these abolished boards.

Subclause (12) replaces section 392(5)(j), which defines a 'relevant person' for the purposes of the section as including the executive officer or a staff member of the OMB, with a new subsection defining a 'relevant person' as including the former executive officer or staff of the OMB. This recognizes that the OMB will be abolished on the commencement of the National Law, and ensures the confidentiality provisions continue to apply to the former executive officer and staff of this abolished entity.
 15. Clause 55 would insert new section 392A of the *Health Practitioners (Professional Standards) Act* to empower a board to give written notice and information about a registered health practitioner to 'an entity of the Commonwealth or a State' in certain circumstances.
 16. In relation to clause 55, the explanatory notes state (at 40-1):

Clause 55 inserts a new section 392A (Disclosure to protect health or safety of patients or other persons). This new section provides that a State board which reasonably believes that a registered health practitioner poses a risk to public health or patient safety may give written notice of that risk to a Commonwealth or State entity responsible for taking action in relation to that risk.

This mirrors the power of a national board under the National Law to disclose, in appropriate circumstances, registrant information it is otherwise required to keep confidential, making an equivalent power available to State boards.
 17. Clause 61 would amend section 33(1) of the *Health Services Act* which prohibits disclosure of information acquired in certain circumstances. The amendment would extend the circumstances under which information may be disclosed.
 18. Regarding clause 61, the explanatory notes (at 45-6) provide information regarding the balance struck between the risk of harm to the public and the benefits of maintaining confidentiality of registered health practitioners:

The purpose for which QACs may be established, and the significant protections afforded to them, place QACs clearly within the intended scope of the exemption to mandatory notification under section 141(4)(d) of the National Law. However, in certain circumstances, the risk of harm to the public which Part 8, Division 2 of the National Law is in part intended to mitigate outweighs the benefits of maintaining confidentiality in relation to the information gleaned by QACs. In particular, where a practitioner's conduct places the public at risk of substantial harm because they have an impairment (the third category of 'notifiable conduct' under section 140 of the National Law), or at risk of substantial harm because of their significant departure from accepted professional standards (the most potentially serious type of conduct within the fourth category under section 140 of the National Law), the risk is sufficient to require this conduct to be notified even where the notifying practitioner forms the requisite reasonable belief on the basis of information gleaned as a member of a QAC.

Clause 61 therefore inserts an additional purpose for which information may be recorded and disclosed under section 33(1) of the Health Services Act to allow a registered health practitioner to notify the National Agency that another health practitioner has behaved in a way which constitutes public risk notifiable conduct. This has the effect of permitting a member of a QAC who forms a reasonable belief that another practitioner's conduct either falls within the third category of notifiable conduct for the purposes of the National Law, or falls within the fourth
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category and is serious enough to place the public at risk of substantial harm, to notify the National Agency of this, notwithstanding that the belief was formed while performing functions as a member of the QAC.

19. Clause 117 would insert new section 201 of the *Pharmacists Registration Act*. New section 201 would permit the chief executive to disclose a document or information obtained under the *Pharmacists Registration Act* to:

- the Pharmacy Board of Australia, established under the Health Practitioner Regulation National Law; or
- an entity established under the *National Health Act 1953* (Cth).

20. New section 210(2) would provide safeguards to limit the disclosure power. Further, the explanatory notes provide (at 60-1) information suggesting consistency with fundamental legislative principles:

Section 201 allows the chief executive to disclose documents or information obtained under the Act to the Pharmacy Board of Australia or an entity established under the National Health Act (Cwlth). However, disclosure may be made only if the chief executive is satisfied that the documents or information will be collected, stored and used in a way that ensures protection of the privacy of persons to whom it relates and is necessary for the relevant entity to perform its functions.

The need for disclosure could arise where the Pharmacy Board of Australia seeks information about a pharmacist's pharmacy ownership interests that could be relevant to a complaint about the pharmacist which is being investigated by the Pharmacy Board. The authority for disclosure will also enable Queensland Health to respond to requests from Medicare Australia in connection with applications it receives for approval to establish or relocate a pharmacy.

Statutory authorisation for the disclosure is necessary to ensure that disclosure by the chief executive does not contravene Queensland Health's obligation under the Information Privacy Act 2009 to comply with the National Privacy Principles.

Administrative power

21. 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.
22. **Clause 121** would amend section 9 of the *Queensland Institute of Medical Research Act* to confer the chief executive with administrative power to approve all agreements and arrangements (entered into by the Council under section 9) other than those between the Council and Queensland Health's chief executive on behalf of the State. The legislation does not define the power further. Neither the legislation nor the *Queensland Institute of Medical Research Act* appears to provide internal or external review mechanisms regarding the approval decision of the chief executive.
23. As the explanatory notes do not provide information about whether clause 121 is consistent with fundamental legislative principles, the committee invites the minister to provide the information about whether clause 121 makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Retrospective operation

24. 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.
25. **Clause 15** would allow the making of a transitional regulation with retrospective operation to 1 July 2010.
26. New section 9A(1) of the *Health Practitioner Regulation National Law Act* would provide:
- (1) A regulation (a **transitional regulation**) may make provision about a matter for which—
- (a) it is necessary to make provision to allow or facilitate the change from the operation of a law of the State relating to health practitioners to the operation of the Health Practitioner Regulation National Law; and
- (b) this Act does not make provision or sufficient provision.

Example for paragraph (a)—

*A transitional regulation may provide for a National Board for a health profession to continue and decide an application under the *Right to Information Act 2009* that was made to an abolished local registration authority.*

27. New section 9A(2) would then state that a transitional regulation may have retrospective operation to a day not earlier than the day new section 9A commences (1 July 2010, as provided in clause 2).

Section 9A and any transitional regulation made under it would expire on 30 June 2013 (new section 9A(4)).

28. Clause 15 is intended to provide a broad delegation of legislative power (and is discussed also under the heading Amendment of an Act other than by another Act below). Its intended retrospective operation is described in the explanatory notes (at 26):

Clause 15 inserts new section 9A into the National Law Act to provide a head of power for the Governor in Council to make a transitional regulation.

This amendment is necessary to facilitate the implementation of the National Scheme in Queensland. For this reason, the power includes an ability for a regulation to have retrospective application. However, retrospectivity is only allowed to a day not earlier than the commencement of the provision.

29. Where legislation may have retrospective operation, the committee examines whether the retrospectivity might have any adverse effects on rights or liberties or whether obligations imposed retrospectively might be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:

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

30. In this regard, the explanatory notes provide information (at 26) to indicate justification for any breach of fundamental legislative principles:

The ability to make a regulation containing provisions of a transitional nature may be used to allow or facilitate the change from the operation of a law in Queensland to the operation of the National Law. The power is therefore limited to only transitional matters. Furthermore, the clause provides that the ability to make a regulation, and any regulation made under the power, expires on 30 June 2013. This time period will cover the initial transition of the first ten health professions into the National Scheme from 1 July 2010, and the transition of additional professions from 1 July 2012.

Immunity from proceeding or prosecution

31. 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.

32. **Clauses 57 and 117** would amend respectively the *Health Practitioners (Professional Standards) Act* and *Pharmacists Registration Act* to confer immunity from proceeding on certain officers for acts done or omissions made.

33. The committee generally observes, in respect of provisions such as clause 57 and 117, 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.

34. Clauses 57 and 117 respectively provide for liability to attach to the Australian Health Practitioner Regulation Agency established under the *Health Practitioners Regulation National Law Act* and State. Further, for the immunity to be conferred under the *Pharmacists Registration Act*, the officer would have to have acted honestly and without negligence. However, the committee notes that new section 405U of the *Health Practitioners (Professional Standards) Act* would not appear to require officers to have acted honestly and without negligence. The explanatory notes, while providing justification for any inconsistency with fundamental legislative principles (at 18-9), do not address the circumstances in which immunity would be conferred or new section 405U:

Clause 117 of the Bill inserts a provision in the Pharmacists Registration Act that specifies that an official is not civilly liable for an act done, or omission made, honestly and without negligence under the Act. An 'official' means the chief executive, an inspector, an officer of Queensland Health, a health service employee appointed under the Health Services Act 1991 or another person acting under the direction of a person in one of the aforementioned categories.

The question arises as to whether there is adequate justification for the conferral of this immunity. It is not considered appropriate for an individual to be made civilly liable as a consequence of exercising their functions or powers under the Act, if exercised honestly and without negligence. As such, the provision prevents civil liability from attaching to an official and instead, such liability attaches to the State. This is consistent practice where legislation creates functions or powers exercisable by an individual.

Similarly, clause 57 inserts a new section 405U into the Professional Standards Act. This new section transfers liability for acts done or omissions made by persons acting under that Act or under a repealed health practitioner registration Act from the relevant Queensland registration board to the National Agency. This does not affect the scope of the existing vesting of liability in the relevant board, but simply nominates the appropriate body under the

National Scheme in which liability should instead be vested. For the reasons outlined above, it is considered that this transfer of liability is proportionate and appropriate.

Clear meaning

35. 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.
36. **Clause 55** would insert new section 392A of the *Health Practitioners (Professional Standards) Act* to empower a board to give written notice and information about a registered health practitioner to 'an entity of the Commonwealth or a State' in certain circumstances.
37. New section 392A may permit disclosure of personal information about a health practitioner to any entity of the Commonwealth or a State as the expression 'an entity of the Commonwealth or a State' is not defined or limited in any way. Accordingly, clause 55 may not be drafted in a sufficiently clear and precise way.

Sufficient regard to the institution of Parliament

Amendment of Act other than by another Act

38. 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.
39. **Clause 15** may authorise the amendment of an Act by way of subordinate legislation. As clause 15 would be a transitional regulation-making power with retrospective operation, it has been discussed under the heading Retrospective operation.
40. Clause 15 would insert new section 9A(2) of the *Health Practitioner Regulation National Law Act* to empower the Governor in Council to make a transitional regulation 'about a matter for which it is necessary to make provision to allow or facilitate the change from the operation of a law of the State relating to health practitioners to the operation of the *Health Practitioner Regulation National Law* and [the] Act does not make provision or sufficient provision'.
41. 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.¹ 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.
42. 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.
43. The relevant provision of the bill would fall within the third and fourth categories of Henry VIII provisions considered excusable by the committee. Further, the explanatory notes provide (at 17-8):

The following safeguards have been incorporated into the power:

 - *the power is limited to a regulation providing for a matter of a transitional or savings nature. This restricts the matters for which a regulation may be made;*
 - *the power is subject to a 'sunset' clause, which provides for the expiry of the power on 30 June 2013. This approach is consistent with the approach taken for the regulation-making power under the Health Practitioner Regulation National Law (section 305) and, while the period until expiry is not as long as that prescribed in section 305 (five years), will ensure that transitional issues can be addressed for professions entering the National Scheme at a later date (1 July 2012); and*

¹ Report no 3, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, available at www.parliament.qld.gov.au/slc.

- *regulations made under the provision will be subject to the application of section 50 of the Statutory Instruments Act 1992, enabling a motion for disallowance.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

44. 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.
45. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.
46. 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.

Substantial uniformity with legislation of another jurisdiction

47. In relation to the bill being substantially uniform or complementary with legislation of the Commonwealth or another State, the explanatory notes provide significant information (see 1-4 and 16-7). Regarding consistency of the legislation with fundamental legislative principles, the explanatory notes state (at 16-7):

The Bill makes consequential amendments stemming from implementation of a national scheme. The Explanatory Notes for the previous two Bills for the National Scheme, the Health Practitioner Regulation (Administrative Arrangements) National Law Bill 2008 and the Health Practitioner Regulation National Law Bill 2009, discuss whether national scheme legislation has sufficient regard for the institution of Parliament. Those Notes observe that the Scrutiny of Legislation Committee (the SLC) has previously noted that national scheme legislation may raise concerns about the authority of a State government to respond to, or distance itself from, the actions of a joint Commonwealth and State regulatory authority and the effect of executive pressure upon Parliaments to merely ratify the legislation. The SLC considered these concerns as they arise in relation to the previous two Bills for the National Scheme in its Alert Digests No. 12 of 2008 and No. 10 of 2009.

The Notes for the previous Bills further observe that the introduction of national scheme legislation in a State or Territory Parliament for adoption by other participating States and Territories is a standard approach to implementing national schemes in areas, like health, where relevant legislative powers rest with the States and Territories, and not with the Commonwealth. In the case of the National Scheme, the Notes identify that Queensland Parliament remains sovereign. This sovereignty arises both because Queensland is the host jurisdiction for the national scheme legislation and because the power to decide whether to apply or to continue applying the National Law in Queensland rests with Queensland Parliament.

In its consideration of Health Practitioner Regulation National Law Bill, Parliament was satisfied that the benefits of the National Scheme, such as improved safeguards, reduced red tape, greater efficiency and improved workforce mobility, are sufficient to justify Queensland's application of national scheme legislation. Parliament consequently endorsed Queensland's entry into the National Scheme.

It is considered that, as the current Bill only makes those administrative and consequential amendments required to give effect to Parliament's decision to host and apply the National Law, no new fundamental legislative principles regarding national scheme legislation arise.

2. LAND TAX BILL 2010

Date introduced: 23 March 2010
Responsible minister: Hon AP 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:
 - **clauses 22, 31(2), 42-3 and 49** conferring the Commissioner of State Revenue with discretionary administrative powers which may not be sufficiently defined;
 - **clause 81** which may appear to make obligations dependent on administrative power not subject to appropriate review;
 - **clause 62** which may allow the delegation of administrative power regarding recovery of unpaid land tax other than in appropriate cases and to appropriate persons;
 - **clause 31(2)** which may impose obligations retrospectively; and
 - **clause 10**, providing an inclusive definition of 'owner', which may be ambiguous and/or not 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 **the bill generally**, which has been drafted to allow the commissioner to issue rulings regarding the interpretation and application of provisions of the legislation.

BACKGROUND

3. Within a program of legislation modernisation undertaken by the Office of State Revenue, the bill would repeal the *Land Tax Act 1915* and replace it with legislation drafted in plain English and restructured to simplify the provisions.

LEGISLATIVE PURPOSE

4. The bill is intended to (explanatory notes, 1):
 - rewrite the *Land Tax Act*, with new provisions to operate from 30 June 2010;
 - introduce extended payment arrangements for land tax, allowing a taxpayer to spread the incidence of his or her land tax liability over a longer period;
 - cap the increase in value on which land tax is to be assessed for the 2010-11 financial year; and
 - introduce a single registration for charitable institutions applying to land tax, payroll tax and duties tax streams.
5. In addition to replacing the *Land Tax Act*, the bill would amend the:
 - *Airport Assets (Restructuring and Disposal Act) 2008*;
 - *Body Corporate and Community Management Act 1997*;
 - *Building Units and Group Titles Act 1980*;
 - *Duties Act 2001*;
 - *Industrial Development Act 1963*;
 - *Payroll Tax Act 1971*;
 - *South Bank Corporation Act 1989*;
 - Taxation Administration Regulation 2002; and
 - *Valuation of Land Act 1944*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Administrative power

6. 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.
7. **Clauses 22, 31(2), 42-3 and 49** would confer the Commissioner of State Revenue with discretionary administrative powers which may not be sufficiently defined.
8. Clause 32 would make provision for the rate of land tax generally. It would provide for different rates (set out in schedules 1 and 2) for:
 - resident individuals; and
 - companies, absentees and trustees.
9. The committee identifies four matters for consideration regarding whether clauses 22, 31(2), 42-3 and 49 make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined.
10. First, in relation to the assessment of land tax, clause 22 would provide for assessment of co-owners of land. Under clause 22(1), a co-owner would be assessed only on the proportion of the land that he or she owned. Clause 22(2) makes it clear that for clause 22(1), joint tenants are to be taken to hold equal interests in the land. (However, at common law, a joint tenant owns an undivided share in the whole of the land.) Despite clause 22(1), if there were five or more co-owners, clause 22(4) would allow the commissioner to assess the land as if it were held on trust by one of them for the others. Clause 22(5) then states that the commission may make an assessment mentioned in clause 22(4) only if there are at least five co-owners and the commissioner considers the land is used for investment or commercial purposes. Clause 22(6) identifies factors the commissioner would be required to consider in deciding whether the land was used for investment or commercial purposes.
11. Second, in relation to determinations as to the rate of land tax to be paid, clause 31 would provide a definition of an 'absentee' owner. The inclusive definition is in part reliant upon a decision of the commissioner as clause 31(2)(a) states that an 'absentee' owner includes a person who cannot satisfy the commissioner that he or she ordinarily resides in Australia.
12. Third, in relation to exemptions, clause 42(1) and (2) would provide that where certain land was used as a home but also for a non-exempt purpose, that part of the land used as a home would be exempt land. Under clause 42(3), the commissioner would be required to apportion the taxable value of the land accordingly. Clause 42 would be subject to clause 43, the effect of which would be that where a home was held on trust and another unit or other property was held on trust for the same family, the commissioner would have a discretion regarding whether the benefit of a home concession applied once only.
13. Finally, in relation to charitable institutions, clause 49 would provide that, if a charitable institution was intending within a prescribed period to use vacant land predominantly for exempt purposes, the institution might apply to the commissioner for an extension of the period (the 'use requirement period').
14. The explanatory notes state that these proposed provisions providing the commissioner with discretion to decide matters relevant to land tax liability may appear to have insufficient regard to rights and liberties of individuals. However, information provided (at 10) suggests that the administrative powers to be conferred are sufficiently defined and subject to appropriate review:

[W]here appropriate these provisions specify criteria that are required to be considered when exercising these discretions. This contrasts to the current position under the Land Tax Act 1915 which, despite containing corresponding discretions, in most cases fails to specify relevant criteria. Where possible, the criteria specified in the Bill have been drafted in a clear and unambiguous way.

In some cases these criteria may be considered inconclusive (such as the inclusive list of criteria for determining use as a principal place of residence, and the meaning of "use for investment or commercial purposes" in the case of co-owned land). In these cases, additional criteria have been specified in the Bill to provide further certainty for taxpayers. Public Rulings containing further guidelines for the exercise of these Commissioner discretions will also be published by the Office of State Revenue. As the Commissioner's decisions are ultimately

open to challenge via the objection, review and appeal processes that will apply to the resulting land tax assessments under the Taxation Administration Act 2001, it is considered that the proposed provisions strike an appropriate balance between ensuring the effective operation of the land tax regime and having sufficient regard to the rights and liberties of individuals and the institution of Parliament.

15. **Clause 81** may make obligations dependent on administrative power which is not subject to appropriate review.
16. Clause 81 would prevent objection, appeal or review regarding a land tax assessment on the ground that a valuation of land under the *Valuation of Land Act 1944* was excessive. A legislative note and the explanatory notes (at 24) state that objection and appeal rights against valuations are available under the *Valuation of Land Act*.
17. The committee notes that, although the explanatory notes do not specifically address the consistency of clause 81 with fundamental legislative principles, apart from the prohibited ground, objection, appeal or review of a land tax assessment should otherwise be available.

Delegation of administrative power

18. 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.
19. **Clause 62** may allow the delegation of administrative power regarding recovery of unpaid land tax other than in appropriate cases and to appropriate persons.
20. Clause 62(1) would provide that the commissioner may require a mortgagee of land to pay, for the owner of the land, an amount of unpaid land tax on the land. Then, under clause 62(2), a mortgagee who has paid an amount of unpaid land tax under clause 62(1) would be entitled to recover the amount from the owner as a debt.
21. The explanatory notes state (at 10-1):

The Bill also provides the Commissioner with discretion to recover unpaid land tax from a mortgagee and to apply anti-avoidance provisions, as is currently the case in the Land Tax Act 1915. The power to recover unpaid land tax from a mortgagee is a long standing land tax security provision. The Land Tax Act 1915 specifically provides that the mortgagee can recover the amount from the taxpayer, which is usually done by adding the amount to the moneys secured under the mortgage. The need to protect the revenue and reduce the risks associated with avoidance activity justifies any apparent breach of the principles regarding delegation of administrative power.

Retrospective operation

22. 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.
23. **Clause 31(2)**, which would confer discretionary administrative power to reassess a land tax liability for a previous period, may impose obligations retrospectively.
24. Clause 31(2) would allow the commissioner to reassess a land tax liability for previous periods if:
 - a non-resident taxpayer was assessed at lower resident rates because his or her absence was employment-related and would be less than five years but was subsequently for a longer period; and
 - a charitable institution had been granted an exemption but did not use the land for an exempt purpose within the use requirement period.
25. However, the explanatory notes indicate (at 11) that the proposed provision would have sufficient regard for rights and liberties of individuals:

While the Land Tax Act 1915 does not currently contain corresponding provisions, these provisions are reflective of current practice. As such, it is considered that these provisions do not retrospectively affect rights and liberties of taxpayers. These concessions are granted in anticipation of compliance with the conditions after the event and the requirement to comply is clear in the legislation. Reassessment is not therefore retrospective but, rather, entitlement to the concession never existed in the first place. The alternative approach of assessing on a non-concessional basis and then reassessing when the conditions are subsequently met increases red tape and defers the benefit of the concession for eligible taxpayers.

Equity considerations also require that the benefit of exemptions and concessional rates be reassessed in the case of ineligible taxpayers. It is also noted that the Taxation Administration Act 2001 will limit reassessments to a 5 year period, and that taxpayers have the usual rights of objection and review or appeal in relation to reassessments.

Clear meaning

26. 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.
27. **Clause 10** may be ambiguous and may not be drafted in a sufficiently clear and precise way.
28. The dictionary (schedule 4) states that the meaning of 'owner' of land is provided by clause 10. Clause 10 provides:

Meaning of owner

- (1) The owner of land includes the following—
- (a) a person jointly or severally entitled to a freehold estate in the land who is in possession;
 - (b) a person jointly or severally entitled to receive rents and profits from the land;
 - (c) a person taken to be the owner of the land under this Act.
- (2) The fact that a person is the owner of land under a provision of this Act does not prevent another person also being the owner of the land.
- (3) This section is subject to sections 12 to 14, 22 and 23.
29. The explanatory notes state that the bill will impose land tax on the owner of taxable land and acknowledge (at 9-10) that the inclusive definition of 'owner' in clause 10 may raise the fundamental legislative principle that whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation is unambiguous and drafted in a sufficiently clear and precise way. However, justification is provided for the widely drafted definition:

Casting the definition of "owner" in exhaustive terms would raise the potential for avoidance through contrived structures. A number of instances where a person will be regarded as owner are specifically mentioned in the section to provide certainty for taxpayers. As such, the scope for owners not mentioned specifically is limited in practice. The proposed definition also reflects the current definition in the Land Tax Act 1915, which despite being in the Act in its current form since 1995, has not been the subject of legal dispute.

Sufficient regard to the institution of Parliament

Delegation of legislative power

30. 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.
31. **The bill generally** has been drafted to allow the commissioner to issue rulings regarding the interpretation and application of provisions of the legislation, as described in the explanatory notes (at 4):

As with all tax legislation, the Land Tax Act 1915 is supplemented by a series of Public Rulings that explain how the Commissioner interprets and applies specific provisions.

32. However, the explanatory notes further indicate (at 4) that relevant provisions of the bill are intended to ensure appropriate regard to the institution of Parliament:

However in the some instances, Public Rulings have also been used to supplement the Land Tax Act 1915 to address some of its deficiencies. Contemporary legislative standards require that in these instances the text of the Rulings should be included in the legislation. In particular:

- Public Ruling Land Tax Act 1915 003E.2.2 Principal Place of Residence Deduction-house demolished or vacant due to renovations *explains when the Commissioner will allow a principal place of residence deduction where a taxpayer is not residing in a property because renovations are being undertaken, even though there is no reference in the Land Tax Act 1915 to a deduction applying in these circumstances.*
- Public Ruling Land Tax Act 1915 025.1.2 Joint Owners – Application of section 25(2A) *when the Commissioner will exercise his discretion under section 25 Land Tax Act 1915 to assess land tax at trustee rates where the land is owned by 5 or more co-owners. The Ruling lists general considerations such as whether the land is held for investment purposes and whether the taxable value of the land exceeds the threshold for trustee liability, even though these considerations are not referred to in the legislation.*

By incorporating these general principles in the legislation, the Bill provides clarity, certainty and transparency for taxpayers and greater accountability for the Commissioner.

OPERATION OF CERTAIN STATUTORY PROVISIONS**Explanatory notes**

33. 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)).
34. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

3. PROPERTY AGENTS AND MOTOR DEALERS AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 24 March 2010
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: Minister for Tourism and Fair Trading

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** providing buyers under residential property contracts with different statutory protections of rights from those afforded to sellers;
 - **clauses 4, 10 and 15 and the schedule (sections 48-9 and 58)** creating new offence provisions and amending existing offence provisions;
 - **clause 5** (new section 645) which may affect contractual rights of buyers under contracts made prior to commencement; and
 - **clause 4** which may not be drafted in a sufficiently clear and precise way.

BACKGROUND

2. The bill is to make changes to the *Property Agents and Motor Dealers Act 2000* and the *Body Corporate and Community Management Act 1997* following a review by the former Service Delivery and Performance Commission.

LEGISLATIVE PURPOSE

3. The bill is to amend chapter 11 of the *Property Agents and Motor Dealers Act* and to make related amendments to the *Body Corporate and Community Management Act*. The amendments have the following objectives (explanatory notes, 1):

The Bill will simplify the processes for the delivery and presentation of contracts for the sale of residential property, while still maintaining consumer protection provisions, and thereby promote greater certainty in residential property sales. The Bill also makes miscellaneous amendments to the PAMD Act that aim to reduce red tape for industry.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES²

Sufficient regard to rights and liberties of individuals

Rights and liberties

4. 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*.
5. **Clause 4** (new sections 366, 368C and 369 of the *Property Agents and Motor Dealers Act*) would provide buyers under residential property contracts with different statutory protections of rights from those afforded to sellers. The different protections include:
 - new section 366 requires a lawyer to make disclosures to a buyer regarding the lawyer's independence, but there is no equivalent requirement for a seller's lawyer to declare his or her independence;

² The committee thanks Mr Tim O'Dwyer for providing advice to assist its examination of the bill.

- new section 368C requires a seller to give a buyer a copy of a warning statement (see new section 368 as to the content), but makes no requirement for a seller to be provided with consumer protection information (although new section 363(b) regarding the purposes of the chapter is not itself confined to buyers); and
 - new section 369 provides a buyer, but not a seller, with a 'cooling-off period' (see also new section 363(a)).
6. The committee observes, however, that the explanatory notes (at 1) provide reasons for the bill which are not, in respect of new sections 368C and 369, confined to buyers:

The purpose of the current Chapter 11 provisions are to: (1) give a cooling-off period for persons entering into relevant contracts; (2) require all proposed relevant contracts and relevant contracts to include consumer protection information, including advising of the cooling-off period; and (3) enhance consumer protection by ensuring the independence of lawyers acting for buyers.

7. **Clauses 4, 10 and 15 and the schedule (section 58)** would create new offences in the *Property Agents and Motor Dealers Act* and the *Body Corporate and Community Management Act* and have the potential to affect rights and liberties of individuals. The proposed offences and respective maximum penalties are identified in the table below. The proposed offences use the term 'relevant contract', which is defined to mean 'a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction' (new section 364).

Clause	New section	Offence	Proposed maximum penalty
<i>Property Agents and Motor Dealers Act</i>			
4	368A(6)	Failure of seller to prepare relevant contract with warning statement and to draw buyer's attention to warning statement	200 penalty units (\$20 000)
4	368C(3)	Failure of seller to prepare relevant contract with warning statement	200 penalty units (\$20 000)
4	370(6)	Failure of seller to refund buyer deposit within 14 days after termination of relevant contract under section 368A(2)(c)(i)	200 penalty units (\$20 000)
4	370A(4)	Failure of seller to refund buyer deposit within 14 days after termination of relevant contract under 370A(1).	200 penalty units (\$20 000)
Schedule (s54)	375	Failure of licensee to open trust account at approved financial institution	200 penalty units (\$20 000)
<i>Body Corporate and Community Management Act</i>			
10	206A(6)	Seller to repay to buyer any amount paid to seller towards purchase of a lot within 14 days if contract terminated under section 368A(2)(c)(ii) of <i>Property Agents and Motor Dealers Act</i>	200 penalty units (\$20 000)
15	213A(6)	Seller to repay to buyer any amount paid to seller towards purchase of a lot within 14 days if contract terminated under section 368A(2)(c)(ii) of <i>Property Agents and Motor Dealers Act</i>	200 penalty units (\$20 000)

8. **The schedule (sections 48-9)** would clarify existing offences, as outlined in the table below.

Clause	Section amended	Offence	Maximum penalty
<i>Property Agents and Motor Dealers Act</i>			
Schedule (s48)	327(1)	Offence reworded (motor dealer who is a principal licensee must notify change of place)	200 penalty units (\$20 000) (as for existing offence)
Schedule (s49)	327(3)	Offence reworded (motor dealer who is a principal licensee must notify opening of place)	200 penalty units (\$20 000) (as for existing offence)
Schedule (s55)	377	Offence reworded (licensee must give notice of trust account opening, name change or closing)	200 penalty units (\$20 000) (as for existing offence)

9. **Clause 5** (new section 645) may affect contractual rights of buyers under contracts made prior to commencement.
10. The bill would amend various provisions in chapter 11 (Residential property sales) of the *Property Agents and Motor Dealers Act*. It would insert also a new chapter 19, part 8 containing transitional provisions. One of the transitional provisions, new section 645, would provide that, upon commencement of the bill, a buyer who was a party to a contract entered into prior to commencement could not terminate the contract in accordance with provisions of chapter 11 existing at the time of the contract but then amended by the bill.
11. The explanatory notes provide information about the effect of clause 5 (at 5, see also 12-5):
- The Bill will provide that a buyer under a contract entered into prior to the commencement of the amended Chapter 11, will only be able to terminate that contract for the reasons provided in the amended Chapter 11. That is, these buyers will be afforded the same rights to terminate the contract as buyers under contracts entered into after commencement.*
- This means a buyer under an existing contract will lose the right to terminate the contract for the technical failure by a seller, or the seller's agent, to present the warning statement, or information sheet for a unit sale, in the way prescribed under the pre-amendment Chapter 11. For example, for a relevant contract that has been made at the time of commencement, a buyer will not be able to terminate that contract under the pre-amendment section 367 of the PAMD Act, after commencement, for failure to give the proposed relevant contract with the warning statement as the top sheet. Buyers are unlikely to suffer any material detriment as a result of this type of breach.*
12. Further, the explanatory notes provide justification for the proposed provision and indicate (at 5-6) sufficient regard to rights and liberties of individuals:
- The Bill provides that a buyer will still be able to terminate a contract for residential property if the warning statement or information sheet, for a unit sale, is not given, or if the seller fails to give a clear statement directing the proposed buyer's attention to the warning statement or information sheet, if for a unit sale. The termination right is limited to 90 days after a copy of the relevant contract has been received by the buyer.*
- The limited extinguishing of termination rights under the pre-amendment Chapter 11 provisions is considered justified as the impact on buyers will be minimised and it will restore certainty to the marketplace. It will balance the rights between buyers and sellers more equitably. The proposal will only remove the technical reasons for termination which are unlikely to result in financial loss or diminished assets for the buyers. It will also ensure parity between contracts made prior to amendment and those made on or after commencement.*
- Key consumer protection measures, such as the cooling-off period and the requirement to attach a warning statement remain unchanged. Buyers are able to place additional terms and conditions within the sale contract such as finance approval and building and pest inspections. The transitional amendments do not affect those existing rights.*

Clear meaning

13. 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.
14. **Clause 4** (new sections 363, 364, 366, 368C and 369-70 of the *Property Agents and Motor Dealers Act*) may not be drafted in a sufficiently clear and precise way.
15. First, new sections 363, 369 and 370 all refer to a 'buyer'. This term would be defined in new section 364 as including the buyer's agent authorised to act for the buyer in relation to the matter.
16. Neither the amendments nor the *Property Agents and Motor Dealers Act* displace the application of the *Acts Interpretation Act*. Therefore, the application of section 32C of the *Acts Interpretation Act* to the identified provisions of the *Property Agents and Motor Dealers Act* would imply that a reference to a buyer includes a reference to more than one buyer.
17. However, as drafted, the amendments do not appear to cater clearly for the contingency of more than one buyer. For example, new section 369 provides a definition for 'cooling-off period'. If each buyer receives a copy of the relevant contract on different days, it is not clear how the cooling-off period is calculated. Accordingly, ambiguity may arise from the wording of:
- new section 363 which outlines the purposes of the amended Chapter 11;
 - new section 368C which requires a seller to give 'a buyer' a copy of the relevant contract;
 - new section 369 which defines the cooling-off period for a relevant contract – the period commences on 'the day the buyer receives a copy of the relevant contract from the seller' (new section 369(1)(a)(i)), but does not state whether each buyer must receive a copy of the relevant contract; and

- new section 370(2) which provides that a buyer may terminate a relevant contract on specified grounds before the relevant contract settles 'by giving signed, dated notice of termination to the seller', but does not make it clear who must sign the notice (possibilities may include one buyer, all buyers or the buyer's agent authorised to act).
18. The explanatory notes do not appear to provide information to clarify the drafting of these provisions.
 19. Second, new section 366(1) provides that the section applies if a buyer 'engages a lawyer in relation to the proposed purchase or purchase of a residential property under a proposed relevant contract or a relevant contract'. The term 'engages' is not defined. Accordingly, as drafted, the proposed provision may not be sufficiently clear and precise; for example, engagement might be oral or in writing or effected merely by placing the name of a lawyer on the relevant contract (without providing instructions or a written retainer).
 20. Third, provisions of the bill may be ambiguous as to how documents are to be 'given' or 'communicated', particularly where there is more than one buyer (as above) or if the buyer is not a natural person. New section 366(2) would require a lawyer engaged by a buyer to provide the buyer with a lawyer's certificate, the section does not state how the certificate must be given, but the explanatory notes state that the certificate must be 'in the approved form' (at 8). New section 368C requires that a seller 'give' a buyer a copy of the relevant contract. Further, new section 369(2) requires a buyer to 'communicate' acceptance of a seller's offer to the seller.
 21. Finally, new section 368C may use the terms 'a copy of the relevant contract' and 'the relevant contract' interchangeably. This may lead to ambiguity also.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

22. 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)).
23. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23

PART 2 – SUBORDINATE LEGISLATION EXAMINED**SUBORDINATE LEGISLATION TABLED: 23 MARCH TO 7 APRIL 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
33	Domestic Building Contracts Regulation 2010		12/03/2010	3/08/2010	23/03/2010	4/08/2010
34	Queensland Building Services Authority Amendment Regulation (No.1) 2010		12/03/2010	3/08/2010	23/03/2010	4/08/2010
35	Fisheries and Other Legislation Amendment and Repeal Regulation (No.1) 2010		12/03/2010	3/08/2010	23/03/2010	4/08/2010
36	Transport Legislation Amendment Regulation (No.2) 2010		12/03/2010	3/08/2010	23/03/2010	4/08/2010
37	Proclamation commencing remaining provisions		12/03/2010	3/08/2010	23/03/2010	4/08/2010
38	Electrical Safety (Installation of Ceiling Insulation) Notice 2010		9/03/2010	10/06/2010	23/03/2010	4/08/2010
39	Disaster Management (Extension of Disaster Situation - Roma) Regulation 2010		12/03/2010	3/08/2010	23/03/2010	4/08/2010
40	Motor Accident Insurance Amendment Regulation (No.1) 2010		19/03/2010	3/08/2010	23/03/2010	4/08/2010
41	Traffic Amendment Regulation (No.1) 2010		19/03/2010	3/08/2010	23/03/2010	4/08/2010
42	Land Sales Amendment Regulation (No.1) 2010		19/03/2010	3/08/2010	23/03/2010	4/08/2010
43	Disaster Management (Further Extension of Disaster Situation - Roma) Regulation 2010		19/03/2010	3/08/2010	23/03/2010	4/08/2010
44	Rural and Regional Adjustment Amendment Regulation (No.1) 2010		19/03/2010	3/08/2010	23/03/2010	4/08/2010
45	Nature Conservation (Protected Plants Harvest Period) Notice 2010		19/03/2010	3/08/2010	23/03/2010	4/08/2010

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

SUBORDINATE LEGISLATION UNDER CONSIDERATION

4. ELECTRICAL SAFETY (INSTALLATION OF CEILING INSULATION) NOTICE 2010

Date tabled: 23 March 2010
Disallowance procedures date: 3 July 2010
Responsible minister: Hon CR Dick MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The invites the minister to provide information about whether the subordinate legislation has sufficient regard to the rights and liberties of individuals.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

2. Section 4(2)(a) of the *Legislative Standards Act* provides that fundamental legislative principles include requiring that legislation has sufficient regard to rights and liberties of individuals.
3. Under section 26 of the *Electrical Safety Act 2002*, a 'relevant person' has obligations for electrical safety and a failure to discharge the obligation is an offence. Depending on the consequences that result from the commission of the offence, the maximum penalty ranges from 2000 penalty units (\$200 000) or three years' imprisonment to 500 penalty units (\$50 000) or six months' imprisonment.
4. Section 42 of the Act delegates legislative power to allow the making of ministerial notices about electrical safety obligations. Section 43(2) states:
 - (1) Unless otherwise stated in a ministerial notice, the notice does not prescribe all that a person to whom the notice applies must do, or must not do, to discharge the person's electrical safety obligation in relation to the electrical risk mentioned in the notice.
 - (2) However, for applying the obligation offence provision, the person fails to discharge the electrical safety obligation in relation to the electrical risk if the person contravenes the ministerial notice.
5. The Electrical Safety (Installation of Ceiling Insulation) Notice requires a 'relevant person' to discharge specified electrical safety obligations. Apart from section 4(2) of the notice, the notice applies to each person who conducts a business or undertaking that includes the installation of ceiling insulation (section 3(1)). Section 4(2) of the notice applies to a worker who installs ceiling insulation (section 3(1)).
6. A number of provisions of the notice (sections 5 and 9 and definitions of 'final subcircuit' and 'submains' in the schedule) make reference to the term 'wiring rules'. 'Wiring rules' is defined in the schedule to mean 'AS/NZS 3000:2007 (Electrical installations) (known as the Australian/New Zealand Wiring Rules)'. A note to the definition states, 'The wiring rules may be purchased from Standards Australia'.
7. Consequently, the wiring rules are not readily accessible and individuals may have difficulty ascertaining the nature of the obligations that must be met.
8. As no explanatory notes were tabled regarding the notice, the committee invites the minister to provide information about whether the legislation is consistent with fundamental legislative principles.

Clear meaning

9. 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.
10. Section 7(a) of the notice states:

- (1) Before ceiling insulation is installed in a building in the conduct of a relevant person's business or undertaking, the relevant person must—
 - (a) conduct an on-site operational assessment of the electrical risk from the installation of the ceiling insulation; and
 - (b) implement any control measures necessary to prevent a person's exposure to the electrical risk.
 - (2) Each relevant person responsible for the installation of the ceiling insulation must keep a record of the on-site operational assessment for 5 years after the assessment is conducted.
11. For section 7, a 'relevant person' is each person who conducts a business or undertaking that includes the installation of ceiling insulation. However, the term 'on-site operational assessment' or 'operational assessment' is not defined under the legislation. In the absence of a clear meaning ascribed to these latter terms, it may be difficult for a person to understand clearly the obligations to be discharged under section 7 of the notice.
12. Again, the committee invites the Minister to provide information about whether, in this regard, the legislation is consistent with fundamental legislative principles.

5. FISHERIES AND OTHER LEGISLATION AMENDMENT AND REPEAL REGULATION (NO. 1) 2010

Date tabled: 23 March 2010
Disallowance procedures date: 4 July 2010
Responsible minister: Hon TS Mulherin MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The invites the minister to provide information about whether the subordinate legislation has sufficient regard to the rights and liberties of individuals and, in particular, whether the legislation:
 - makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - is unambiguous and drafted in a sufficiently clear and precise way.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Administrative power

2. 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.
3. Section 19 of the Amendment and Repeal Regulation inserted new sections 739 and 743 of the Fisheries Regulation dealing with undecided applications under the repealed Fisheries (Freshwater) Management Plan 1999. New sections 739 and 743 each provide that the applications are taken to be applications under the Fisheries Regulation.
4. It is not clear whether the administrative power to decide the applications under the Fisheries Regulation is defined in the same way as under the repealed Fisheries (Freshwater) Management Plan 1999.
5. No explanatory notes were tabled regarding the Amendment and Repeal Regulation. Accordingly, the committee invites the minister to provide information about whether new sections 739 and 743 of the Fisheries Regulation are consistent with fundamental legislative principles.

Clear meaning

6. 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.
7. Two issues arise regarding whether the Amendment and Repeal Regulation is unambiguous and drafted in a sufficiently clear and precise way.
8. First, section 4 of the Amendment and Repeal Regulation repealed section 16 of the Fisheries Legislation Amendment Regulation (No. 1) 2008. That section (section 16) had, in turn, amended section 185A of the Fisheries Regulation 2008. Section 2(4) of the Fisheries Legislation Amendment Regulation (No. 1) 2008 states that section 16 commences on 2 April 2010.
9. The committee invites the minister to provide information about the aggregate effect of:
 - section 2(4), providing for the commencement of section 16 of the Fisheries Legislation Amendment Regulation (No. 1) 2008; and
 - the repeal effected in section 4 of the Fisheries and Other Legislation Amendment and Repeal Regulation (No. 1) 2010 on 12 March 2010.

10. Second, section 23(8) of the Amendment and Repeal Regulation inserted in the Fisheries Regulation definitions of 'eel trap' and 'round eel trap' (schedule 11, part 2). Each definition makes reference to the term 'cod-end', however, that term is not itself defined.
11. In this context, the committee invites the Minister to provide information about whether the legislation is drafted in a sufficiently clear and precise way.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

6. 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
Date passed:	24 March 2010
Committee report on bill:	04/10 (at 5-15)
Date response received:	24 March 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

- 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.
- 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.
- 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.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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



Hon Stephen Robertson MP
Member for Stretton



Queensland
Government

Ref CTS 05151/10

24 MAR 2010

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

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

SCRUTINY OF
24 MAR 2010
LEGISLATION COMMITTEE

B.10.10

Dear Ms Miller

Thank you for your letter of 22 March 2010 concerning the Natural Resources and Other Legislation Amendment Bill 2010.

My comments with respect to the relevant pages received of the Scrutiny of Legislation Committee's Legislation Alert No. 4 of 2010, which relates to the aforementioned Bill, are as follows:

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

- ◆ **Clause 45 (proposed section 61QH of the *Forestry Act 1959*)** – deems an act or omission of, for example, a plantation sublicense or plantation manager, to be the act or omission of the plantation licensee.

I note the Committee's concern as to whether section 61QH would have the effect of applying vicarious criminal liability to the plantation licensee. I take this opportunity to clarify the operation of this provision.

The purpose of section 61QH is to place a high onus on the plantation licensee to comply with its obligations under the plantation licence, under the related agreements and under the Act, particularly the plantation licensee's obligations under new section 61QE (Statutory obligations). In each case, the possible consequence of non-compliance is in the nature of cancellation or termination of the plantation licence or (for breach of section 61QE) removal of an area from the licence area. The plantation licensee will be able to avoid breach by including appropriate obligations in its contracts with any plantation sublicensee or plantation manager, or any agent, contractor or customer, and appropriately supervising their activities. If the plantation licensee were to be able to avoid its obligations to preserve public access by subcontracting (by way of example), the policy objectives of the Bill would be compromised.

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In relation to criminal liability, though, it is understood that a Court would be unwilling to construct section 61QH as a provision which confers vicarious criminal liability on the plantation licensee, given the seriousness of the outcome and the lack of a clear intention being apparent from the provision. The provision refers to a contravention of an obligation of the plantation licensee, rather than to a contravention of the Act.

In relation to the Committee's particular question about directors' liability, where the Bill provisions refer specifically to a plantation licensee or plantation sublicensee, only those corporations are capable of committing the breach in question, and the provision does not render a director liable for the conduct of the corporation. Where it is intended to make a director liable for the criminal acts and omissions of a corporation, specific drafting is required (see eg. section 167 of the *Workplace Health and Safety Act 1995*). This position does not affect liability for aiding, abetting and procuring-type offences.

- ◆ **Clause 193** – amends the *Land Title Act 1994* to clarify that the section does not apply to a caveat lodged by the registrar of titles.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

- ◆ **Clause 239** - inserts 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.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

Does the legislation make the rights and liberties, or obligations of individuals dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?

- ◆ **Clauses 29, 34, 35, 45 and 72 (amendments to the *Forestry Act 1959*)**

Clause 29 – provides a right of review of decisions by a decision maker exercising delegated power in relation to section 35 permits.

Clause 34 - provides a right of review of decisions by a decision maker exercising delegated power in relation to section 55 licences.

Clause 35 - provides a right of review of decisions by a decision maker exercising delegated power in relation to section 56 permits.

Clause 45 – inserts new parts 6D and 6E into the *Forestry Act 1959*. Generally speaking transactions affecting the plantation licence or the plantation sub-licence require Ministerial approval, and transactions affecting a related agreement require approval from the Chief Executive.

Clause 72 – inserts new part 10. Part 10 inserts new section 128 which concerns FPQ sales permits.

In relation to the Committee's particular questions, it is understood that there is a concern that:

- the right of review added by clauses 29, 34, 35 and 72 is not "external" review; and
- there is no right of review from the decisions of the Minister or the Chief Executive under new parts 6D and 6E.

The amendments to the *Forestry Act 1959* made by clauses 29, 34, 35 and 72 establish a right of review for persons who have an issue about a permit or licence administered by the plantation licensee or an associated entity (as delegate) by application to the Chief Executive. This is a new right that did not appear previously in the *Forestry Act 1959* (that is, decisions about these permits/licences currently attract neither internal nor external review, except judicial review under the *Judicial Review Act 1959*).

The types of permits/licences which may be granted under the *Forestry Act 1959* range from commercial permits (such as for stock grazing and bee keeping) through to "once off" recreation-type permits (such as for a bicycle race or photography trip). Given this, it was considered that provision for an external review (other than under the *Judicial Review Act 1991*, which remains available) was not necessary, and could be administratively burdensome for the plantation licensee (particularly since the permitting/licensing system now operates satisfactorily without such a mechanism). However, the Bill does provide for appropriate supervision and review of delegated decision making by the plantation licensee.

The decisions which the Minister or the chief executive will make under new parts 6D and 6E of the *Forestry Act 1959* will concern substantial commercial transactions. It is correct that the amendments do not establish a right to external review of these decisions (other than under the *Judicial Review Act 1991*). Given the size of the likely transaction, and the commercial considerations (including the importance of facilitating a level playing field as between the plantation licensee and other plantation forestry operators, so far as possible), it was not considered appropriate to interfere with the rights of external review that currently exist. Each decision made under this statutory regime is a decision to which judicial review applies under the *Judicial Review Act 1959*. This Bill does not interfere with that right.

- ◆ **Clause 243** - amends the *Water Act 2000* 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.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

Does the legislation reverse the onus of proof in criminal proceedings without adequate justification?

- ◆ **Clause 45 (new section 61QA, *Forestry Act 1959*)** - empowers the Minister to grant a corporation the right to deal with natural resource product on specified State plantation forest or specified parts of State plantation forest for the purpose of plantation forestry and for incidental purposes under the *Forestry Act 1959*, by entering into an agreement with the corporation and provides for the matters that may be included in a plantation licence.

In relation to the Committee's particular question, it is understood that there is a concern whether there is an adverse effect on an individual if the conclusive effect was not rebuttable.

New section 61SG precisely mirrors section 303 of the *Land Act 1994*. The arrangements governing the register of plantation licences are largely based on those applicable to the register of interests in State land established under the *Land Act 1994*.

It should be noted that the proof facilitated by new section 61SG relates only to registration status, and not the underlying genuineness or substantive content of documents recorded in the register. In regard to subparagraph (c), this provision is intended to allow a person to – for example – rely on the absence of a document in the register, where the document is valid only on registration, as establishing that no interest of the relevant kind exists.

Is the legislation consistent with the principles of natural justice?

- ◆ **Clause 110** - replaces section 155D of the *Land Act 1994* and broadens the circumstances for reducing the term, including the original term, for which a term lease is granted. The clause inserts 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.

The Ministerial power under Clause 110 to reduce the term of a lease or an extension is not inconsistent with the provisions of existing sections 155D and 214E of the *Land Act 1994*. Clause 110 is intended to clarify the grounds on which the Minister may reduce an original lease term or lease extension subject to procedural fairness—namely that if requirements that were met by the lessee at the time the original lease or lease extension was granted cease being met, and those requirements formed the basis for the particular term of the lease or lease being granted. This applies to requirements relating to land condition, nature conservation agreements or covenant and Indigenous access and use agreements.

Natural justice underpins decision-making on State land dealings on a routine basis in consideration of section 20 of the *Judicial Review Act 1991*. Under this section, the applicant may apply for a statutory order of review if there is a breach of natural justice. In addition, there are fact sheets and guidelines for decision makers that they are required to consider when making administrative decisions. The decision maker is required to act in good faith and without bias, and grant an oral or written hearing to any person whose interests will be adversely affected by the decision under the Act, before the decision is made.

Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?

- ◆ **Clause 18 (new section 14)** - would amend the *Forestry Act 1959* 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'.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

- ◆ **Clauses 67 and 69** - provide for the delegation of administrative power. Clause 67 amends the *Forestry Act 1959* 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 amends the *Forestry Act 1959* 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.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

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

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

As the committee has noted, 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.

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

- ◆ **Clauses 24 and 45** - insert new sections 32B and 61RI(a) of the *Forestry Act 1959* respectively to require compulsory acquisition of property. The committee notes that fundamental legislative principles presume that compulsory acquisition of property must only be made with compensation.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

- ◆ **Clause 215** - amends the *Survey and Mapping Infrastructure Act 2003* and may provide for compulsory acquisition of property in certain circumstances.

The Committee has noted the explanation that was provided in the explanatory notes on this issue and has not sought any further clarification. I have nothing further to add in relation to this clause.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?

- ◆ **Clauses 4 and 231** - respectively amend the definition 'native title party for an area' under section 34 of each of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*.

I note the committee's reference as to whether the amendments have sufficient regard to Aboriginal tradition and Island custom. I take this opportunity to clarify the operation of these clauses.

The observation has been made by the Committee that the consultation regarding these amendments may not have been wide enough to identify rights that may have been affected. It is important to recognise that the amendments give effect to the operational policy that was determined at the time the legislation came into effect in April 2004. It is therefore submitted that this clarifying amendment follows the extensive consultation process that preceded the implementation of the original legislation. This process was spread over four years and included consultation with 43 Aboriginal and Torres Strait Islander communities.

With regard to the Committee's reference to consultation with native title representative bodies and the National Native Title Tribunal, I make the following comments. The Acts recognise Aboriginal and Torres Strait Islander People as the primary guardians, keepers and knowledge holders of Aboriginal and Torres Strait Islander cultural heritage. As a consequence, native title representative bodies are a point of contact for land users who seek to comply with the Acts in consulting with the relevant traditional owner group. Similarly, the National Native Title Tribunal serves as a register of native title claims, and has no direct involvement in the operation of the Acts except for the provision of necessary data.

It is also important to note that the amendment seeks to clarify the native title party in those limited situations where there is more than one previously registered native title claim for an area. These parties consequently lose their status as the native title party when a new claim is registered over the area thus enabling new rights to those claims that can meet the independent threshold test administered by the National Native Title Tribunal.

- ◆ **Clauses 45** – inserts a new section 61QA(2)(a) into the *Forestry Act 1959* under which, a plantation licence may contain terms granting to the plantation licensee an exclusive right to deal with natural resource products in the licence area.

In relation to the Committee's particular question, it is understood that there is a concern that the Explanatory Notes do not state whether the grant of an exclusive right to deal with, including get and sell, natural resource product in the licence area under new section 61QA(2)(a) would have sufficient regard for Aboriginal tradition and Island custom.

The attention of the Committee is respectfully drawn to page 23 of the Explanatory Notes which expressly deals with the grant of a plantation licence. The grant of an exclusive right to deal with the natural resource product is a right of commercial exploitation of the plantation trees. Advice has been received that the entry into a plantation licence in these terms may be validly done under section 24JA of the *Native Title Act 1993* (Cth). It is not a right of exclusive possession and the rights of the general public to lawfully enter the plantation licence area are preserved by the Bill.

- ◆ **Clause 102** – amends section 61 of the *Land Act 1994* 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.

An operational DOGIT is granted for a specific purpose and can only be used for that purpose. Operational uses could be for an aerodrome, educational facilities, hospitals or local government functions etc. The majority of operational DOGIT's are held by government departments, local governments, grammar schools and religious bodies.

Previously the term of these trustee leases and trustee subleases were only able to be granted for a maximum term of 30 years however to enable greater private investment into significant community infrastructure and/or services a longer term of lease is considered necessary. This amendment only relates to operational DOGIT's and not Indigenous DOGIT's.

The proposed amendment does not affect Aboriginal traditions and Island customs.

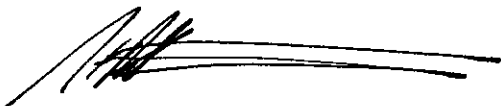
Does the Bill authorise the amendment of an Act only by another Act?

- ◆ **Clause 18** - authorises the amendment of the *Forestry Act 1959* by extending, by regulation, the operation of a provision for up to two years after the section commences.

I note the committee's comments that the relevant provision of the bill would fall within the third of the categories of Henry VIII provisions considered excusable by the committee (to facilitate transitional arrangements). Further, the explanatory notes indicate (at page 32) that clause 15 would represent an appropriate delegation of administrative power.

I trust this information clarifies the situation. Should you have any further inquiries, please contact Mr Rex Meadowcroft, Director, Legislative Development Services, Governance and Strategy of my department on telephone 33305746.

Yours sincerely



STEPHEN ROBERTSON MP

7. 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
Date passed:	23 March 2010
Committee report on bill:	04/10 (at 15-26)
Date response received:	24 March 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

- 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.
- 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*.
- 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'.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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



Hon Andrew Fraser MP
Member for Mount Coot-tha



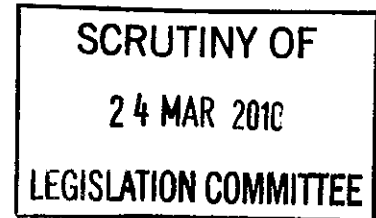
**Queensland
Government**

Treasurer of Queensland

TRX-12252

23 MAR 2010

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



B9, 10

Dear Jo-Ann

Thank you for your letter of 22 March 2010 enclosing pages of the Committee's Legislation Alert No. 4 of 2010 relating to the Revenue and Other Legislation Amendment Bill 2010.

My reply to the issues raised by the Committee is set out in the enclosed document.

I trust this information is of assistance.

Yours sincerely

ANDREW FRASER
Treasurer
Minister for Employment and Economic Development

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RESPONSE TO SCRUTINY OF LEGISLATION COMMITTEE'S COMMENTS

Clause 37 **Amendment of s 198 *Duties Act 2001***

Under this clause, a charge for land rich duty will be a first charge, there is potential for the amendment to affect existing security holders. However, as the explanatory notes point out, the circumstances will be limited and the nature of these transactions is such that existing security holders may be in a position to make arrangements to protect their interests.

Clause 88 **Inserts new section 15 *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009***

Clause 88 inserts new sections 15, 15A and 15B to allow the terms of a lease to operate despite any other law or instrument to the contrary. For the purposes of divestment of declared projects by 99 year leases, new section 15 would allow the exclusion of certain statutory obligations required under the *Property Law Act 1975*. 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). It would permit separate leasing or dealing with fixtures from the underlying land which abrogates the common law should a lease term be interpreted as contrary to the common law. The new section 15B overrides the common law to the extent that an agreed lease or condition is considered contrary to the common law.

The Government has announced that *Abbot Point Coal Terminal* and *Port of Brisbane* would be divested by way of 99 year leases and that QR Limited's below rail coal network would be divested by way of a 99 year lease.

New sections 15, 15A and 15B provide the necessary flexibility to commercially restructure the above mentioned businesses. In particular, it is noted that the proposed lease terms have not been settled for these transactions.

By way of example - the practical effect of:

- the new section 15 will exclude the application of section 121 and part 8, division 3 of the *Property Law Act 1975* to the above mentioned 99 year leases;
- the new section 15A will facilitate the separate leasing of the below rail coal infrastructure from the rail corridor land in relation to QR Limited;
- the new section 15B will exclude the application of the common law in relation to the interpretation of lease terms. While the terms of these leases have not been settled, they may include provisions which, for example, require the rent to be repaid upfront, circumscribe termination rights and specify the amounts payable on termination.

**Clauses 63 and 71 Replacement of s 481 *Duties Act 2001*
Insertion of new ss 49A–49D *Duties Act 2001***

The Committee's comments are noted. Clause 63 clarifies the operation of an existing offence provision and retains the existing penalty. Clause 71 inserts a new offence in relation to failure, without reasonable excuse, to comply with a garnishee notice. The offence is consistent with similar offences and penalties in revenue legislation.

Clause 54 Amendment of s 427 *Duties Act 2001*

The Committee's comments that the new exemption does not further define matters to be taken into account by the Commissioner of State Revenue in deciding if an association's purpose is useful to the community are noted. A similar provision was in the *Stamp Act 1894*, and has been applied administratively for the *Duties Act 2001*. The current arrangements have worked well and provide the Commissioner with flexibility in administering the provision. Where an association is dissatisfied with the Commissioner's determination, part 6 of the *Taxation Administration Act 2001* provides rights of review, by objection and by appeal to the Queensland Civil and Administrative Tribunal or the Supreme Court.

Clause 60 and 61 Amendment of s 465 *Duties Act 2001*

The amendments to the Commissioner's power to suspend and cancel a self assessor's registration strike an appropriate balance between protection of the revenue and the integrity of the self assessment system, on the one hand, and the rights and liberties of individuals, on the other. This is particularly the case in relation to the Commissioner's right to immediately suspend registration without notice in cases of serious breaches of a self assessor's obligations. The rights of review under the *Duties Act 2001* apply in these cases.

**Clauses 8, 65, 85 and 101 Insertion of new pt 14 *Community Ambulance Cover Act 2003*
Insertion of new ch 17, pt 13 *Duties Act 2001*
Insertion of new s 10A *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*
Insertion of new pt 9 *Payroll Tax Act 1971***

These clauses have retrospective effect, and in some cases for a number of years. Many of the amendments, in relation to the amendments to revenue legislation, are beneficial and have operated under administrative arrangements. Amendments with a potentially detrimental impact have been proposed only where necessary to ensure consistency with interstate taxing arrangements or to provide certainty to the relevant industry to which the provisions apply. In all cases of potential detrimental impact, notice has been given to affected taxpayers.

Clause 85 inserts 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 *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*. The new section 10A(4) provides for possible retrospective commencement and 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.” The clause will be applied to approve the already made FPQO Workforce Transition Code approved on 26 October 2009.

It is not unusual for negotiated agreements to commence on a day prior to the agreement being finalised. This approach will remove any gap between the time when the code is agreed between the relevant parties and approved by the Treasurer and, therefore, this is also beneficial to ensuring that employees’ rights are protected.

Clause 116 **Amendment of s 7 *Trans-Tasman Mutual Recognition (Queensland) Act 2003***

With respect to whether clause 116 has sufficient regard to the institution of Parliament, I note the issues arising from the Committee’s examination of the bill. In relation to this clause the Committee identified relevant justifications in the explanatory notes regarding inconsistency with fundamental legislative principles.

The Committee identifies that the delegation of power will allow the Governor to make a gazette notice to endorse a regulation under the Commonwealth *Trans-Tasman Mutual Recognition Act 1997* without the express authority of an Act. This delegation of power is appropriate to facilitate the application of the Trans-Tasman Mutual Recognition Scheme, which is a national scheme of legislation. The clause will assist with maintaining consistency of legislative change across jurisdictions. The clause subjects the exercise of this delegated power to the scrutiny of the Legislative Assembly by providing such a gazette notice to be subordinate legislation. I consider that the clause strikes an appropriate balance between facilitating the efficient application of the Trans-Tasman Mutual Recognition Scheme and having sufficient regard to the institution of Parliament.

Clause 87 **Amendment of *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009***

Clause 87 inserts a new section 11A dealing with certain consequences in relation to the change of status and ownership of declared entities (such as QR Limited and Port of Brisbane Corporation Limited).

Firstly, the scope of section 11A is limited to the following entities:

- subsections 11A(1) to (4) apply in relation to QR Limited and Port of Brisbane Corporation Limited; and
- subsection 11A(5) applies to declared entities under section 6 of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*.

Secondly, subsections 11A(1) to (4) will override the *Government Owned Corporations Act 1993* (GOC Act) and *Transport Infrastructure Act 1994* (TIA) in the manner described below.

- Port of Brisbane Corporation Limited (POBC) and QR Limited are declared to be Government Owned Corporations (GOCs) under section 5 of the *Government Owned Corporations Regulation 2004*. The new section 11A provides that a gazette notice may revoke the existing declarations of QR Limited and POBC as GOCs and replaces the need for a regulation to be made under section 167 of the GOC Act.
- Section 274A of the TIA provides that a regulation may declare a GOC as a port authority and revoke such a declaration. POBC is currently a port authority for the purposes of the TIA. Under the new section 11A, a gazette notice, rather than a regulation made under the TIA, may declare that POBC ceases to be a port authority for the purposes of the TIA.

Thirdly, the practical effect of subsections 11A(2), (4) and (5) is that certain third parties contractual rights will not be triggered by the restructure or divestment of the declared entities. For example, where a declared entity is no longer a GOC and ceases to be government owned as a result of a transfer of shares to a private sector entity, there will be a deeming of consent by third parties to the change of ownership and status of the declared entity.

Finally, it should be noted that gazette notices have previously been used to facilitate the restructure of various industries. For example, under section 100 of the *Airport Assets (Restructuring and Disposal) Act 2008*, a declaration of an airport lessor and airport lessee may be made by gazette notice. Another example is contained in section 67 of the *South East Queensland Water (Restructuring) Act 2007*. Under that section, the transfer of assets and liabilities from one entity to another may be effected by a gazette notice.

8. TRANSPORT (RAIL SAFETY) BILL 2010

Date introduced:	9 February 2010
Responsible minister:	Hon RG Nolan MP
Portfolio responsibility:	Minister for Transport
Date passed:	25 February 2010
Committee report on bill:	02/10 (at 23-35)
Date response received:	22 March 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

6. 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 31** providing that some defences in the Criminal Code would not apply to some offences in the legislation;
 - **clauses 76 and 179** conferring power to require individuals to undergo alcohol and drug testing;
 - **clauses 227-9, 258 and 346** which may affect rights and liberties of individuals, including the right to privacy;
 - **clause 257** extending the period within which proceedings for an offence may ordinarily be commenced;
 - **the large number of clauses** creating new offences, some with significant maximum penalties;
 - **clause 102** conferring administrative power which may not be sufficiently defined;
 - **clauses 183-5, 190-4 and 199** conferring rail safety officers with significant administrative powers;
 - **clauses 337-9** raising issues regarding the appropriateness of proposed delegations of administrative power;
 - **clauses 36-7, 186(2), 244-5, 252-6 and 257(3)** raising matters regarding the onus of proof;
 - **clauses 135, 137, 143, 145-53, 155-6 and 161** variously conferring rail safety officers with power to enter premises without consent or a warrant and post-entry powers;
 - **clauses 166-9, 171-2, 177-9, 181 and 217** overriding protections against self-incrimination; and
 - **clauses 209 and 260-3** conferring immunities from proceeding and/or prosecution.
7. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
 - **the bill generally** as it is to enact nationally consistent rail safety laws;
 - **clauses 94, 106 and 111** allowing the chief executive to extend time periods set by the legislation; and
 - **clauses 5, 10, 22, 258-9, 275 and 346 and schedule 3** authorising amendment of the Act by way of 'temporary regulations'.
8. The committee invites the minister to provide information regarding whether **clauses 222-5 and 231** may affect rights and liberties of individuals, including the right to a fair and just legal process.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

9. The committee thanks the minister for the information provided in her letter.
10. The committee makes no further comment regarding the bill.



Hon Rachel Nolan MP
Member for Ipswich

Our ref: MC47617

Your ref: B52.09



**Queensland
Government**

Minister for Transport

19 MAR 2010

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

TINY OF

22 MAR 2010

LEGISLATION COMMITTEE

B6.10

Dear Mrs Miller

Jo-Ann

Thank you for your letter of 22 February 2010 about the Scrutiny of Legislation Committee's comments on the Transport (Rail Safety) Bill 2010, which were included in Alert Digest No. 2 of 2010.

The Committee noted that the Bill contained a number of potential breaches of fundamental legislative principles. It has also identified material in the accompanying explanatory notes justifying the potential breaches.

I thank the Committee for its careful consideration of the legislation and for their comments. The issues raised by the Committee were canvassed during Parliamentary debate on 25 February 2010, in particular, during consideration in detail of the Bill.

Yours sincerely

RACHEL NOLAN MP
Minister for Transport

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PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION**9. NATURE CONSERVATION (PROTECTED AREAS) AMENDMENT REGULATION (NO.1)
2010 SL11.10**

Date tabled: 23 February 2010
Disallowance date: 20 May 2010
Responsible minister: Hon K Jones MP
Committee report on sub-leg: 03/10 (at 10)
Date response received: 24 March 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information about the lawfulness of the purported amendment regulation.

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 Kate Jones MP
Member for Ashgrove



Queensland
Government

Minister for Climate Change
and Sustainability

Our Ref: CTS 04346/10
Your Ref: SL11.10

23 MAR 2010

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

SCRUTINY OF
24 MAR 2010
LEGISLATION COMMITTEE

SL 11.10

Dear Mrs Miller

Thank you for your letter of 8 March 2010 concerning the Nature Conservation (Protected Areas) Amendment Regulation (No.1) 2010.

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

I am advised that the purported amendment to the regulation is lawful by virtue of section 33 (1)(c) of *the Nature Conservation Act 1992*, which enables the Governor in Council to change the boundaries of a protected area. Section 32 is not applicable in this instance as the protected area is not being revoked.

The area of land has decreased due to a recalculation of the area using current and more accurate survey data by way of survey plan SP224292. A survey plan is required as part of the process of granting Aboriginal Freehold within National Park (Cape York Peninsula Land Act) – NP(CYPAL).

As noted on Sheet 2 of SP224292, the boundary of these lands was originally determined on plan NPW365 from imagery [and technology] available at the time (1988) and was not specified as MHWS (mean high water springs). The current boundary has been determined from Cape York provisional satellite imagery. From this imagery, the MHWS (defined by where the vegetation meets the sand) can be readily determined in part. In other areas, the MHWS is blurred by mangroves. It should also be noted that the boundary descriptions of coral cays are wholly ambulatory in nature.

Thank you for bringing this matter to my attention. If any further information is required, please do not hesitate to contact Michael Dart of my office on telephone 3239 0844.

Yours sincerely


Kate Jones MP
Minister for Climate Change and Sustainability

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10. REVENUE LEGISLATION AMENDMENT REGULATION (NO.1) 2010 SL9.10

Date tabled: 23 February 2010
Disallowance date: 20 May 2010
Responsible minister: Hon A Fraser MP
Committee report on sub-leg: 03/10 (at 11)
Date response received: 23 March 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the legislation has sufficient regard to the rights and liberties of individuals, the committee invites the minister to provide information about the amendments made by **sections 6, 8 and 9**.

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 Andrew Fraser MP
Member for Mount Coot-tha



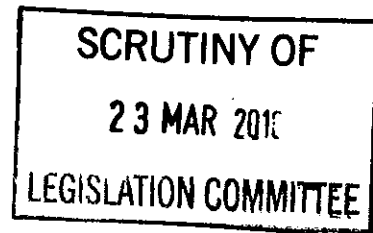
Queensland
Government

Treasurer of Queensland

TRX-12092

23 MAR 2010

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



SL 9.10

Rea Jo-Ann

Thank you for your letter of 8 March 2010 enclosing pages of the Committee's Legislation Alert No. 03 of 2010 relating to the *Revenue Legislation Amendment Regulation (No. 1) 2010 SL.9.10.*

My reply to the issues raised by the Committee is set out in the enclosed document.

I trust this information is of assistance.

Yours sincerely

ANDREW FRASER
Treasurer
Minister for Employment and Economic Development

Encl.

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RESPONSE TO SCRUTINY OF LEGISLATION COMMITTEE'S COMMENTS

Revenue Legislation Amendment Regulation (No. 1) 2010 SL.9.10.

Clause 6 - Amendment of sch 4 (Dictionary)

The clause updates the *Duties Regulation 2002* definition of a "high capacity regular public transport aircraft" as defined under the *Civil Aviation Regulation 1988* (Clth). Office of the Queensland Parliamentary Counsel has confirmed the definition is correct, however the Office of State Revenue will review the provision in relation to its clarity.

The definitions in clause 6 of "exposure level", "limit of liability declared", and "predominant location" include either the words "insurance contract" or "insurance year". The issue is raised as to whether the meaning of the terms "insurance contract" and "insurance year" in this context are clear. Both terms are in common usage in the insurance industry. The apportionment schedule replaced by clause 5 of the amendment regulation to which the definitions attach is used only by the insurance industry to apportion premiums between jurisdictions. The insurance industry through the Insurance Council of Australia sought the review of the apportionment schedule, was consulted throughout its development and raised no issues in relation to the definitions. It is considered the Insurance industry is fully conversant with the terms used in the definitions and therefore no ambiguity is created by their use.

