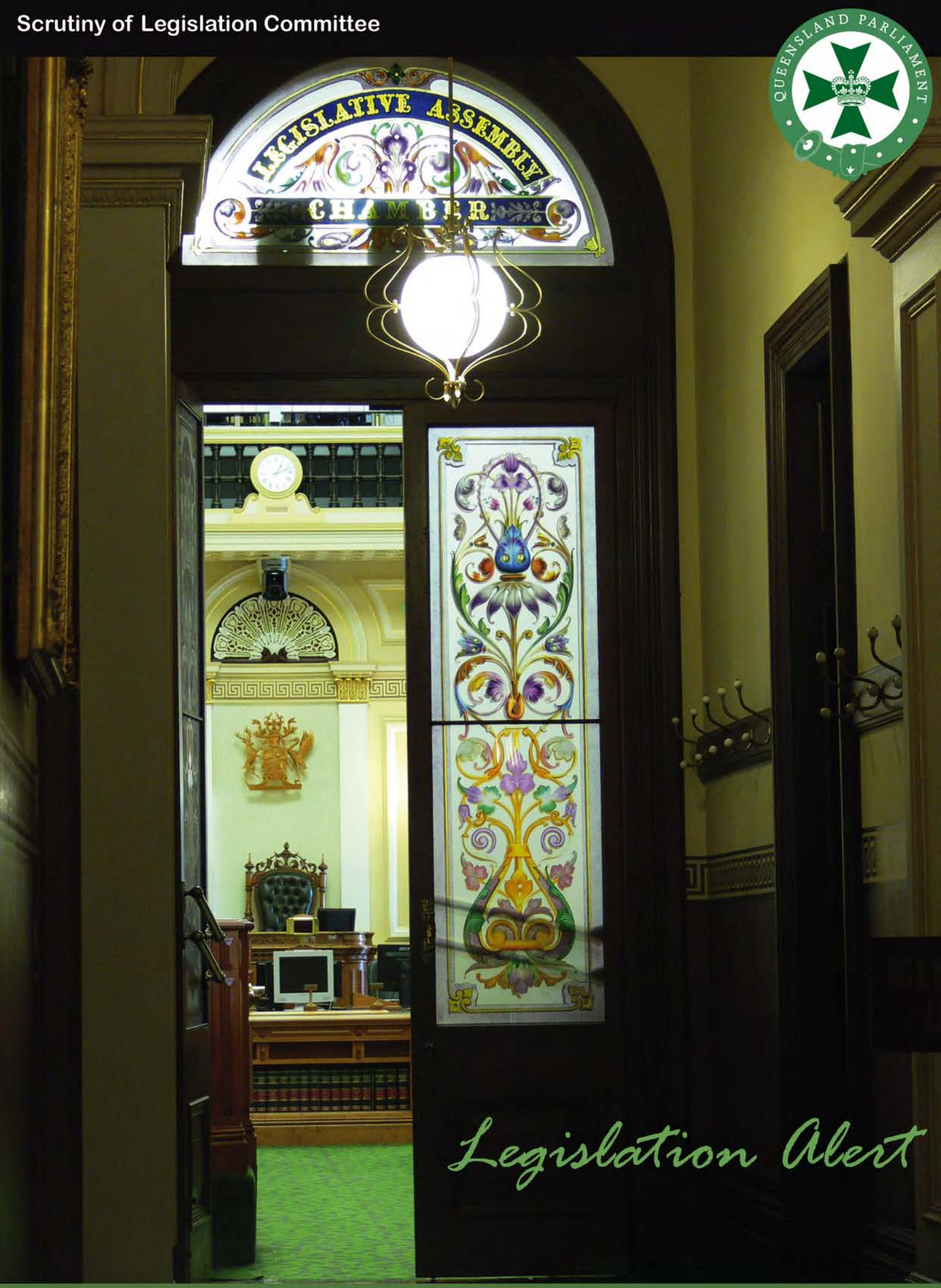


# Legislation Alert

Tabled 18 May 2010 - Issue No 06 of 2010

# 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*:

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

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

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

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

## REPORT

### Structure

This report follows committee examination of:

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

### Availability of submissions received

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

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

# PART 1 – BILLS EXAMINED

## 1. BUILDING AND OTHER LEGISLATION AMENDMENT BILL 2010

**Date introduced:** 15 April 2010

**Responsible minister:** Hon S Hinchliffe MP

**Portfolio responsibility:** Minister for Infrastructure and Planning

### 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 10** creating new offences under the *Building Act 1975*;
   - **clause 10** (new sections 246AS, 246AT and 246FE) which may affect information privacy rights;
   - **clause 10** (new section 246CY) empowering the Pool Safety Council to take disciplinary action against pool safety inspectors;
   - **clause 10** (new section 246AE) conferring powers to enter pool sites without consent or warrant;
   - **clause 10** (new sections 246CP and 246DS) which may be statutory modifications of the privilege against self-incrimination; and
   - **clause 10** (new section 246ET) protecting members of the Pool Safety Council from civil liability for certain acts or omissions.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clauses 10 and 15** which may delegate legislative power without providing the opportunity for adequate scrutiny of the Legislative Assembly; and
   - **clause 25** which may authorise the amendment of an Act other than by another Act.

### BACKGROUND

3. The bill is to reform further swimming pool safety laws and to amend the powers of the Governor in Council regarding the sale of 'Ekka' land and the Urban Land Development Authority regarding development approvals.

### LEGISLATIVE PURPOSE

4. The bill is intended to amend the (explanatory notes, 1-2):
   - *Building Act 1975* to –
     - establish a framework for the swimming pool inspector licensing system;
     - create an independent body, the Pool Safety Council, to oversee the operation of the swimming pool safety inspector licensing system;
     - allow trained and licensed swimming pool safety inspectors to conduct pool safety inspections and issue pool safety certificates if all prescribed requirements are met;
     - provide an approval process for swimming pool safety inspector training courses and the regulation of training for pool safety inspectors;
     - establish a State-based swimming pool register; and
     - amend the "ban the banners" provisions of the Act to remove or modify some prohibitions relating to covenants, body corporate by-laws and the like which impose certain building restrictions.
   - *Urban Land Development Act 2007* and *Land Title Act 1994*; and
   - *Royal National Agricultural and Industrial Association of Queensland Act 1971* regarding the Governor in Council's power to approve of the sale of land.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

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

6. **Clause 10** has the potential to affect rights and liberties of individuals in that it would create new offences under the *Building Act*. The offences and maximum penalties are set out below.

| Clause | New section | Offence | Proposed maximum penalty |
|---|---|---|---|
| 10 | 246AC(5) | Owner given nonconformity notice may only ask certain persons to reinspect pool for giving of pool safety certificate | 50 penalty units ($5 000) |
| | 246AD(2) | Pool safety inspector must keep certain records for 5 years | 20 penalty units ($2 000) |
| | 246AJ(4) | Pool safety inspectors must assign identification number to pool safety certificate | 50 penalty units ($5 000) |
| | 246AP(2) | Building certifier must give notice of regulated pool to chief executive | 20 penalty units ($2 000) |
| | 246AR(2) | Owner must give notice of existing regulated pool to chief executive | 20 penalty units ($2 000) |
| | 246AU | Person must not perform pool safety inspection functions without licence | 165 penalty units ($16 500) |
| | 246AV | Pool safety inspector must not perform pool safety inspection functions without prescribed professional indemnity insurance | 100 penalty units ($10 000) |
| | 246AW(1) | Pool safety inspector may only give pool safety certificate in certain circumstances | 165 penalty units ($16 500) |
| | 246AW(2) | Pool safety inspector may only give pool nonconformity notice in certain circumstances | 165 penalty units ($16 500) |
| | 246CD(3) | Pool safety inspector must return surrendered licence to Pool Safety Council within 10 business days after surrender | 10 penalty units ($100) |
| | 246CF | Pool safety inspector must give notice of change of address, cancellation or suspension of similar licence or certain conviction | If the offence relates to:<br>(a) change of address—1 penalty units ($100); or<br>(b) cancellation, surrender or conviction for certain offence—40 penalty units ($4 000) |
| | 246CP(4) | Pool safety inspector must comply with Pool Safety Council requirement to produce documents | 50 penalty units ($5 000) |
| | 246CW(1) | Person must not state anything false or misleading in relation to Pool Safety Council investigation or audit | 165 penalty units ($16 500) |
| | 246CX(1) | Person must not give a document containing false or misleading information in relation to Pool Safety Council investigation or audit | 165 penalty units ($16 500) |
| | 246DS(5) | Eligible course provider must comply with Pool Safety Council requirement to give information or produce a document | 50 penalty units ($5 000) |
| | 246DZ | Person must not falsely claim to be eligible course provider | 80 penalty units ($8 000) |

| Clause | New section | Offence | Proposed maximum penalty |
|---|---|---|---|
| | 246EA | Person must not falsely claim to be conducting approved training course | 80 penalty units ($8 000) |
| | 246EB | Person who is not eligible course provider must not issue, or claim to be able to issue, certificate of competency | 80 penalty units ($8 000) |
| | 246FF(1) | Member of Pool Safety Council must disclose criminal history changes to Minister | 100 penalty units ($10 000) |

7. **Clause 10** may affect privacy rights of individuals.

8. New section 246AT of the *Building Act* would require the chief executive to make available for inspection and give a copy of the regulated pools register in certain circumstances to anyone. New section 246AT would further provide that the chief executive may publish a copy of the regulated pools register on the department's website.

9. New section 246AS would mandate the particulars the regulated pools register must contain including 'any other matter prescribed by regulation'. Whilst the matters the register would have to contain provided for in new section 246AS do not include personal information about an individual, new section 246AS would impose no limitation on the matters prescribed under a regulation.

10. New section 246FE(1) would allow the minister to ask the commissioner of the police service for a written report about a person's criminal history and a brief description of the circumstances of the conviction or charge mentioned in the person's criminal history. However, if the request related to a prospective member, the minister might make the request only if the prospective member of the Pool Safety Council had given written consent for the request (new section 246FE(2)).

11. The explanatory notes do not provide information about whether new sections 246AS, 246AT and 246FE have sufficient regard to the rights and liberties and individuals.

**Delegation of administrative power**

12. 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.

13. **Clause 10** may allow the delegation of administrative power other than in appropriate cases and to appropriate persons.

14. Clause 10 would insert new chapter 8, part 7 of the *Building Act*. New section 246CO would require the Pool Safety Council to conduct an investigation into a complaint in certain circumstances. Although there is no provision that would directly empower the Pool Safety Council to conduct an audit, the power would be implied as under, for example, section 246CP.

15. New section 246CY would require the Pool Safety Council deciding that a ground for disciplinary action against a pool safety inspector is established to do one or more of the things mentioned in section 246CY(4). These include requiring the pool safety inspector to pay an amount the equivalent of not more than 60 penalty units ($6 000) or suspending the pool safety inspector for no longer than 1 year.

16. The committee notes a decision of the Pool Safety Council under new section 246CY(4) would be subject to review under the *Building Act*.

17. Under new section 246CY(5), if the Pool Safety Council is satisfied it would be reasonable to suspend a pool safety inspector for more than one year or cancel a pool safety inspector's licence, the Pool Safety Council must apply to the Queensland Civil and Administrative Tribunal to start a disciplinary proceeding against the inspector.

18. The committee notes that the explanatory notes indicate (at 7):

*PSC a body established under the Bill. Its functions include the licensing of individuals as pool safety inspectors and the taking of disciplinary action against pool safety inspectors. Its members consist of an officer of the department and a representative of the Local Government Association of Queensland. The Minister may appoint other members. If a ground for disciplinary action is established against a pool safety inspector, PSC may take a range of actions, including suspending the inspector's licence for a period of not more than 1 year and requiring the inspector to pay to PSC an amount equivalent to not more than 60 penalty units (i.e. $6000). It should be*

*noted that, if PSC considers that the inspector's licence should be suspended for more than 1 year or cancelled, PSC must apply to QCAT to start a disciplinary proceeding against the inspector.*

*These powers are analogous to those that the licensing body under the Plumbing and Drainage Act 2002 can exercise when taking disciplinary action against plumbers and drainers. It could be considered that a body that is authorised to take actions that have such serious consequences for pool safety inspectors should be required to include members with legal qualifications or experience in disciplinary matters. It is not considered that PSC should be required to include a member with legal qualifications or the requisite disciplinary experience though these are matters that the Minister may take into account in exercising the discretion to appoint members to PSC. Provision is made in the Bill for the appointment of a registrar, other officers and other appropriately qualified persons to assist PSC to perform its functions. Where PSC requires legal and other assistance to carry out its disciplinary functions this assistance is available under the provisions of the Bill from suitably qualified advisers.*

**Power to enter premises**

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

20. **Clause 10** would confer powers to enter pool sites without consent or warrant.

21. New section 246AE of the *Building Act* would confer an employee or agent of a local government with powers to enter a pool site without consent or a warrant. 'Pool site' would be defined in an amendment of schedule 2 (clause 20) as 'a place where a regulated pool is situated'. As the 'place' would not be defined under the legislation, new section 246AE may confer power to enter a dwelling.

22. The explanatory notes outline (at 8) the intended operation of new section 246AE and indicate justification for any breach of fundamental legislative principles:

*The Bill allows authorised officers of local governments to enter properties, other than dwellings, at all reasonable times to inspect swimming pools. The power of entry is limited in that it does not allow entry to dwellings. It is intended that entry would be exercised to inspect pools that are located in the yard area adjacent to a dwelling. Similarly to the entry powers, under section 144 of the* Local Government Act 2009*, officers entering a property are required to inform occupiers and produce identification. The power of entry is restricted so that officers can not deal with unrelated issues at the same time. The expansion of the entry powers is necessary for the safety of children and the power is limited to what is necessary for swimming pool safety.*

23. The committee notes the safeguards in relation to non-entry of dwellings and the things the employee and agent must do, for example, identify themselves, provided for in new section 246AE. However, the provision is silent about, for example, safeguards relating to:

- times of entry;
- use of force;
- compensation for any damage sustained to property because of the entry or inspection; and
- post-entry notification to residents of entry without consent.

**Protection against self-incrimination**

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

25. **Clause 10** (new sections 246CP and 246DS of the *Building Act*) may override common law and statutory protections of the right to silence.

26. New section 246CP would empower the Pool Safety Council to require a pool safety inspector to produce a document to the Pool Safety Council or one of its investigators. Under the new section, failure to comply would be an offence unless the pool safety inspector had a reasonable excuse.

27. Similarly, new section 246DS would empower the Pool Safety Council to require an eligible course provider to give information or produce a document to the Pool Safety Council if the Pool Safety Council was conducting an audit of the eligible course provider. Again, failure to comply would create liability to an offence.

28. The explanatory notes do not address the consistency of new sections 246CP and 246DS with fundamental legislative principles.

**Immunity from proceeding or prosecution**

29. 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.

30. **Clause 10** (new section 246ET of the *Building Act*) would protect members of the Pool Safety Council from civil liability for acts done or omissions made honestly and without negligence. Under new section 246ET, liability would instead attach to the State.

31. The committee generally observes, in respect of provisions such as new section 246ET, that one of the principles underlying a parliamentary democracy based on the rule of law is that all people should be equal before the law. However, the committee notes that the provision provides for liability to attach to the State and that for the immunity to be conferred, a member of the Pool Safety Council would have to have acted honestly and without negligence.

32. In this context, the explanatory state (at 8):

> *The Bill protects members of PSC from civil liability for acts done or omissions made honestly and without negligence. Where the immunity prevents a civil liability attaching to a member that liability attaches to the State. The immunity is reasonable as it is limited to acts done, or omissions made, honestly and without negligence. Further, in the event that the immunity applies, a claimant has a civil action against the State.*

## Sufficient regard to the institution of Parliament

**Parliamentary scrutiny of delegated power**

33. Section 4(4)(b) of *the Legislative Standards Act* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

34. **Clauses 10 and 15** (inserting new sections 246AE and 258 of the *Building Act*, respectively) may delegate legislative power not subject to adequate scrutiny by the Legislative Assembly.

35. **Clause 10** (new section 246EC of the *Building Act*) would empower the chief executive to issue training course guidelines to help eligible course providers apply to Pool Safety Council for approval of a training course.

36. Although the power to issue training course guidelines is delegated to the chief executive, the guidelines are not subject to the tabling and disallowance procedures of part 6 of the *Statutory Instruments Act 1992*.

37. The explanatory notes (at 7) address the consistency of clause 10 with fundamental legislative principles:

> *The proposed amendments include a new class of safety inspectors for pools, licensed by the pool safety council (PSC). To be appointed, one must have completed an approved course. It is proposed to include a power for the chief executive to make guidelines dealing with the required content of training courses and approval of courses. Depending on how the amendments are drafted, the guidelines may be legislative in effect. It is arguable the subject-matter of the guidelines should be included in subordinate legislation or stated in subordinate legislation.*
>
> *Similar to other guidelines in the BA, these guidelines are intended to be administrative in nature. Accordingly it is not considered necessary to require that they be approved by regulation.*

38. Clause 15 would amend section 258 of the *Building Act* by extending the chief executive's power to make guidelines about ways of complying with the pool safety standards. Clause 10, new section 231D, defines the 'pool safety standard' as part MP3.4 of the Queensland Development Code and any other standard prescribed under a regulation for ensuring the safety of persons using a regulated pool.

39. Clause 10 of the bill would insert new section 246BF in the *Building Act*. New section 246BF would require a pool safety inspector to have regard to guidelines made under section 258 of the Act in performing a pool safety inspection function. The consequence for failing to comply with new section 246BF is a ground for disciplinary action under the Act.

40. Under section 259 of the Act, the chief executive must make any guidelines under section 258 available for inspection and purchase. Accordingly, the delegation of power to make guidelines not subject to the tabling and disallowance procedures of part 6 of the *Statutory Instruments Act 1992* may be inconsistent with fundamental legislative principles. It may be contrasted with new sections 246AE and 258 which would require tabling of a code of conduct for pool safety inspectors.

41. The explanatory notes do not address the issue of consistency with fundamental legislative principles in the context of clause 15.

**Amendment of Act other than by another Act**

42. 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.

43. **Clause 10** may allow an Act to be amended by regulation.

44. New section 231D of the *Building Act* provides a definition of 'pool safety standard' and states it is Queensland Development Code, part MP3.4 and any other standard prescribed under a regulation for ensuring the safety of persons using a regulated pool. Section 231D(2) gives examples of what a prescribed standard may provide 'without limiting subsection (1)'.

45. 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. The committee has defined an 'Henry VIII clause' to mean a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.

46. 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.

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

48. In this context, the provision does not appear to fall within any categories of accepted provisions. Nor do the explanatory notes provide information regarding the appropriateness of the delegation of legislative power.

49. **Clause 25** may authorise the amendment of an Act other than by another Act.

50. Currently, section 13 of the *Royal National Agricultural and Industrial Association of Queensland Act* provides that:

- the Association may, in its discretion, at the direction of the Council of the Association and subject to section 13 and the objects and rules of the Association, sell, mortgage, encumber lease or agree to lease land vested in the Association (section 13(1)); and
- a purported sale of land vested in the Association will be void unless the approval of the Governor in Council was obtained before the sale.

51. Clause 25 would amend section 13 by replacing subsection (2) with new subsections (2) to (2C) and inserting a new section 13(5). The explanatory notes provide (at 62) the following information regarding the proposed provisions:

*The amended section 13(2) provides that the RNA may not sell land vested in the RNA without the Governor in Council's prior approval.*

*The insertion of new section 13(2A) provides that the Governor in Council may attach conditions to an approval given under section 13(2) (for example, relating the sale to a particular project, purpose or timeframe, or specifying sale arrangements).*

*The insertion of new section 13(2B) will retain the existing intent that a sale of land vested in the RNA is void, unless it is in accordance with section 13(2).*

*New section 13(2C) provides that section 13(2) does not preclude the RNA from entering into agreements or transactions that are conditional on obtaining the Governor in Council's approval under section 13(2).*

*New section 13(5) inserts a definition for 'sell' to clarify the intent of the amendments.*

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

52. The explanatory notes further state (at 62) that:

> *This section removes the requirement of the Governor in Council to approve a purported sale of land and replaces it with the power to approve the Royal National Agricultural and Industrial Association of Queensland (RNA) selling land, and for the Governor in Council to attach conditions on any such approval.*

53. The nature of the power to be conferred on the Governor in Council, including the power to attach conditions to any such approval, may amount to an authorisation to amend the *Royal National Agricultural and Industrial Association of Queensland Act* other than by another Act.

54. The explanatory notes did not examine the consistency of clause 25 with fundamental legislative principles.

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

55. 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.

56. Section 23 of the *Legislative Standards Act* 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)).

57. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and, with the exception of one minor aspect, contain the information required by section 23.

## 2. CHILD PROTECTION (MORE STRINGENT OFFENDER REPORTING) AMENDMENT BILL 2010

**Date introduced:** 14 April 2010

**Responsible member:** Mr VG Johnson MP

**Portfolio responsibility:** Shadow Minister for Police and Corrective Services

**Nature of bill:** Private member's bill

### ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 5** imposing greater reporting requirements on a 'reportable offender';
   - **clause 7(1)** amending the maximum penalty for an offence relating to failure to report;
   - **clause 7(2)** suggesting a sentence of imprisonment be considered instead of a non-custodial sentence; and
   - **clause 8** which may affect rights of individuals to privacy.

### BACKGROUND

2. The legislation would impose greater reporting requirements on people on the Sex Offender register and authorise police to release information if reporting obligations are not met.

### LEGISLATIVE PURPOSE

3. The purpose of the bill is to (explanatory notes, 1):

   *… strengthen reporting requirements of sex offenders and also give the police the power to name missing sex offenders on the register, so that they can be located.*

4. The bill would amend the *Child Protection (Offender Reporting) Act 2004*.

### APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

#### Sufficient regard to rights and liberties of individuals

**Rights and liberties**

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

6. **Clause 5** may affect rights and liberties of individuals as it would impose greater reporting requirements on a 'reportable offender' (defined in section 5 of the Act).

7. Clause 5 would amend section 18 which requires a reportable offender to report his or her personal details to the police commissioner each year. Clause 5 would omit existing section 18(1) and (2), replacing them with provisions which would require a reportable offender to report his or her personal details to the commissioner every:
   - month for one year or until the end of the offender's reporting period, if found guilty of an offence against section 50(1) (new section 18(2A)); or
   - otherwise, every three months (new section 18(1)).

8. The explanatory notes state (at 2) that:

   *The amendments have been drafted using Fundamental Legislative Principles.*

9. Further, in his second reading speech, Mr Johnson stated that:[2]

*The protection of vulnerable members of our community in Queensland, especially children, should be a priority. It is clear from what is happening in Queensland, that the current reporting requirements do not do enough to ensure the safety of Queenslanders.*

10. **Clause 7(1)** would amend an offence in section 50, as identified below.

| Section amended | Offence | Existing maximum penalty | Proposed maximum penalty |
|---|---|---|---|
| 50(1) | Failure to comply with reporting obligations | 150 penalty units ($15 000) or two years' imprisonment | • five years' imprisonment if reporting obligations in 18(1) or (2A);<br>• otherwise, 150 penalty units or two years' imprisonment |

11. The explanatory notes state (at 2):

*This clause inserts a new offence for an offender who fails to report in more than 3 months after their required time. This significant time delay would be considered more serious, is taken to have committed a crime and as such a new penalty is applied.*

12. **Clause 7(2)** may affect rights and liberties of individuals as it would suggest a sentence of imprisonment be considered instead of a non-custodial sentence.

13. New section 50(4) would state that, in sentencing a reportable offender who has been found guilty on a prior occasion of an offence against section 50(1), a court should consider imposing a sentence of imprisonment instead of any other sentence.

14. The explanatory notes do not specifically address the consistency of clause 7(2) with fundamental legislative principles.

15. **Clause 8** may affect rights of individuals to privacy. It would insert a new section 70A, to apply if a reportable offender failed to report within three months after a required reporting date. Under new section 70A, the police commissioner must publish on the Queensland Police Service website the following personal information about a reportable offender:

- his or her name;
- his or her image;
- statements that he or she is –
  - alleged to have committed an offence of failing to comply with reporting obligations; and
  - wanted for questioning about the alleged offence.

16. In his second reading speech, Mr Johnson indicated clause 8 would be justified since:[3]

*Under the current legislation, police who alert the public of the details of sex offenders missing from the register are guilty of committing an offence. The insertion of a new section 70A to the act will restore common sense. Police should be allowed to alert the public if those on the register cannot be located, and this Bill will allow them to do so.*

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

17. 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

[2] The Hon V Johnson MP, Shadow Minister for Police and Corrective Services, Second Reading Speech, *Record of Proceedings (Hansard)*, 14 April 2010, 1345-6.

[3] The Hon V Johnson MP, Shadow Minister for Police and Corrective Services, Second Reading Speech, *Record of Proceedings (Hansard)*, 14 April 2010, 1346.

certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

18. 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. CITY OF BRISBANE BILL 2010

**Date introduced:** 15 April 2010

**Responsible minister:** Hon D Boyle MP

**Portfolio responsibility:** Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships

### 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 64, 70 and 73** which may affect rights and liberties of individuals regarding property;
   - **clauses 147-50** which may affect rights to stand for election and participate in the electoral process;
   - **clauses 109, 198 and 309** which may affect rights to privacy;
   - **a large number of clauses** which would create approximately 63 new offences;
   - **clauses 4, 11 and 237** which may make rights and liberties, or obligations dependent on administrative power which is not sufficiently defined;
   - **clauses 23, 40(7), 61, 87(5), 107, 173(10), 209, 221, 280 and 334** which may make rights and liberties, or obligations dependent on administrative power which is not subject to appropriate review;
   - **clause 194** allowing the delegation of administrative power to a person whose qualifications for appointment as an authorised person were prescribed by regulation;
   - **clause 56(3)** requiring a person to prove specified matters in his or her defence;
   - **clauses 70(3), 73, 110, 117-8, 120, 123 and 127-30** conferring powers of entry other than with a warrant or consent;
   - **clauses 58, 108, 110, 112, 137, 140 and 295** modifying protections against self-incrimination;
   - **clause 211** conferring immunity from civil liability upon administrators acting honestly and without negligence; and
   - **clauses 70 and 85** which may provide for the compulsory acquisition of property only with fair compensation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clauses 22, 29(1) and 95** which may allow the delegation of legislative power in inappropriate cases; and
   - **clause 69(5)** which may allow amendment of an Act by subordinate legislation.
3. The committee invites the minister to provide further information regarding whether identified provisions would make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review

### BACKGROUND

4. The legislation would provide a system of local government in the City of Brisbane. It follows:
   - reviews of the *Local Government Act 1993* and the *City of Brisbane Act 1924*; and
   - enactment of the *Local Government Act 2009*, to commence on 1 July 2010.

### LEGISLATIVE PURPOSE

5. The purpose of the bill is to provide for (clause 3(1)):
   (a) the way in which the Brisbane City Council is constituted and the unique nature and extent of its responsibilities and powers; and
   (b) a system of local government in Brisbane that is accountable, effective, efficient and sustainable.

6. Clause 247 would repeal the:

   - *Australian Estates Company Limited, Hastings Street, New Farm, Viaduct Authorization Act 1962*;
   - *Brisbane City Council Business and Procedure Act 1939*;
   - *City of Brisbane Act 1924*;
   - *Local Government (Chinatown and The Valley Malls) Act 1984*; and
   - *Local Government (Queen Street Mall) Act 1981*.

7. The bill would amend the:

   - *Electrical Safety Act 2002*;
   - *Information Privacy Act 2009*;
   - *Local Government Act 2009*;
   - *Right to Information Act 2009*;
   - *Workplace Health and Safety Act 1995*.

8. Further, it would affect minor and consequential amendments to the 20 Acts identified in schedule 1.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

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

10. **Clauses 64, 70 and 73** may affect rights and liberties of individuals regarding property.

11. Clause 64(1) would allow the council to acquire land to widen a road. The council must provide an owner of relevant land with a notice of intention to acquire land and, once it has done so, the owner must not erect any structure on the land without the council's permission (clause 64(5)).

12. Clause 70(1) would allow the council to acquire land that adjoins a road for use as a footpath, but the acquisition may be subject to a reservation in favour of the owner of the land (clause 70(2)).

13. Clause 73 would confer the council with power to use private land to make a temporary road if it would be impractical to close the actual road temporarily.

14. **Clauses 147-51** may affect rights to stand for election and participate in the electoral process.

15. Under clause 147, a person would be qualified to be a counsellor if he or she:

   - resided in Brisbane;
   - was, under the *Electoral Act 1901* (Cth), an enrolled elector for an electoral district in Brisbane; and
   - was not disqualified under clauses 148—51.

16. Clauses 148-51 state that a person is disqualified from being a councillor if he or she:

   - has been convicted of an offence identified in clause 148;
   - is a prisoner (clause 149);
   - is a member of a government (a Parliament of the Commonwealth or a State or a local government of another State) or becomes a candidate for election as a member of the Legislative Assembly (clause 150); and
   - is a 'bankrupt' as defined in clause 151(2).

17. The explanatory notes do not provide information about the consistency of these provisions with fundamental legislative principles. However, in respect of clause 148, the following information is provided (at 47-8; see also 48):

   *Competent representation accords with community expectations and public interest. The criteria contained in this clause are based on those applying to members of the Queensland Parliament under the* Parliament of Queensland Act 2001.

   *The integrity offences, referred to in clause 148(5), which disqualify a person from being a councillor, are:*

   - *release of information that is confidential to the council (clause 168);*

- *voting on a material personal interest matter (clause 169);*
- *non-disclosure of a conflict of interest or non-compliance with a direction to leave the meeting when a conflict of interest matter is being discussed or voted on (clause 170);*
- *threatening, intimidating or harassing a person because that person reported a material personal interest or conflict of interest (clause 171(3));*
- *giving false or misleading information to a person stated (clause 210);*
- *giving false or misleading information to the Electoral Commission (Criminal Code, section 98B);*
- *influencing the vote of a person by intimidation or violence at an election or referendum (Criminal Code, section 98E); and*
- *voting in the name of another person or voting more than once (Criminal Code, section 98G(a) and (b)).*

18. The committee notes, however, that the proposed provisions are stated to be 'based on' the *Parliament of Queensland Act* provisions which are not in exactly the same terms.

19. **Clauses 109, 198 and 309** may affect rights of individuals to privacy.

20. Clause 109 would allow the publication of information showing that a council or councillor was not performing responsibilities properly or was not complying with local government related laws. The chief executive of the department may provide the information to the minister (clause 109(2)) and the minister may publish information in a newspaper circulating generally in Brisbane or direct the council to publish the information on its website (clause 109(5)).

21. The chief executive officer, under clause 198, would be able to request the police commissioner to provide the criminal history of an 'authorised person' (holding office under clause 194).

22. Clause 309 (new sections 204A to 204C) also relates to an authorised person's criminal history. It would amend the *Local Government Act* to:

- require an authorised person to disclose changes in his or her criminal history (new section 204A);
- allow a chief executive officer to request the police commissioner to provide the criminal history of an authorised person (new section 204B); and
- provide for the use that may be made of an authorised person's criminal history (new section 240C).

23. The explanatory notes do not provide information about whether clauses 109, 198 and 309 have sufficient regard to rights and liberties of individuals.

24. **A large number of clauses** would create approximately 63 new offences. The maximum penalties for the offences would range from:

- 8 penalty units ($800 for failure to give reasonable help to an authorised person who has entered a property (clause 120(4)); to
- 500 penalty units ($50 000) or five years' imprisonment for a number of offences (such as improper conduct by a council employee (clauses 191 and 192) and 1000 penalty units ($100 000, for putting trade waste or a prohibited substance into a stormwater drain (clause 83)).

**Administrative power**

25. 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.

26. **Clauses 4, 11 and 237** may make rights and liberties, or obligations dependent on administrative power which is not sufficiently defined.

27. Clause 4 would require:

- anyone performing a responsibility under the legislation to do so in accordance with the local government principles (defined in clause 4(2)); and
- any action taken under the legislation to be taken in a way that—
  - is consistent with the local government principles; and
  - provides results consistent with the local government principles, in as far as the results are within the control of the person who is taking the action.

28. The explanatory notes indicate (at 6) that effect of clause 4 is to provide a 'principles-based framework', but suggest that nevertheless administrative power is sufficiently defined:

*This Bill provides a principles-based framework for decision making and governance. It gives the BCC flexibility to decide processes based on administrative circumstances, as long as those processes are rational, justifiable and transparent. Anyone performing a responsibility under this Bill must consider the application of the local government principles. The principles apply to the processes carried out under the Bill as well as the results of those processes.*

*Principles-based legislation allows practitioners to focus on outcomes and develop their own operational procedures and processes. It does not mean that the Bill will be less enforceable. Principles-based legislation achieves higher levels of compliance. By requiring entities to comply with the spirit rather than the letter of the law, they must come to terms with the reasons behind the law.*

*Principles replace the detailed prescription of roles and responsibilities and highlight the absolute essentials of an excellently performing local government that citizens expect and deserve. The principles are at one and the same time, aspirational, inspirational, practical and demanding.*

29. Clause 11(1) and (2) state:

(1) The council has the power to do anything that is necessary or convenient for the good rule and local government of Brisbane.

Note—
Also, see section 237 for more information about powers.

(2) However, the council can only do something that the State can validly do.

30. In respect of clause 11, the explanatory notes state (at 7):

*Clause 11 empowers the council to do anything that is necessary or convenient to provide good governance and deliver high quality services to Brisbane. This broad power complements the local government principles. That is, the council may do anything within its power in line with the local government principles.*

*As the council's power is drawn from the State, the council can only do something the State can legally do...*

*A general competence power is included in clause 11 which ensures that those with responsibilities under the Bill have the powers to carry them out.*

*In addition, when the council is able to exercise a power outside Brisbane, it is no different to its exercise within Brisbane.*

31. Clause 237 states that the council has the power to do anything that is necessary or convenient for performing responsibilities conferred under a local government related law. The explanatory notes say (at 69):

*This clause clarifies that an entity that is required or empowered to perform a responsibility under this Bill, or other local government legislation, may do anything necessary or convenient to enable the performance of those responsibilities. In addition, if the entity is not an individual, clause 237 sets out that those powers include all the powers of an individual.*

32. Accordingly, the proposed administrative powers of the council are defined by clauses 4, 11 and 237 in general and very wide terms.

33. In its report on the then Local Government Bill 2009, the committee drew the attention of the Parliament to similar provisions conferring administrative power on local governments in general and very wide terms (see: *Legislation Alert* 02/09 at 56-7 and 65-7; and for the correspondence received from the minister regarding the committee's report, see *Legislation Alert* 04/09 at 25). The committee draws attention to those considerations once more.

34. **Clauses 23, 40(7), 87(5), 107, 173(10), 209 and 221** may make rights and liberties, or obligations, dependent on administrative power which is not subject to appropriate review.

35. Clause 221(1) states that, if a provision of the legislation declares a decision to be not subject to appeal, it means that the decision:

- cannot be appealed against, challenged, reviewed, quashed, set aside, or called into question in any way, including under the *Judicial Review Act 1991*; and
- is not subject to any writ or order of a court on any ground.

36. The other proposed provisions identify decisions declared to be not subject to appeal. They are decisions of:

- a 'change commission' under chapter 2, part 4, division 2 regarding changing a Brisbane area or representation (clause 23);

- the minister under clause 40 regarding the suspension or revocation of particular local laws (clause 40(7));
- the council under clause 87(3) to acquire prescribed land (clause 87(5));
- the minister under chapter 5, part 1 regarding remedial action to improve the performance or compliance of a council or a councillor (clause 107);
- identified persons, where decisions are taken under chapter 6, part 2, division 6 regarding dealing with complaints about the conduct and performance of councillors (clause 173(10)); and
- the grants commission (a body created under the *Local Government Act*) or the minister under chapter 7, part 4 regarding the allocation of Commonwealth funding.

37. Where legislation purports to oust the inherent and statutory jurisdiction of the Supreme Court to review the legality of decisions and actions, the committee considers carefully whether the legislation has sufficient regard to individual rights and liberties or obligations. Generally, the committee adopts the view that privative clauses should rarely be contemplated and even more rarely enacted. They represent a parliamentary attempt to deny the courts a central function of their judicial role, preventing courts from pronouncing on the lawfulness of administrative action.

38. The committee notes the parliamentary supremacy is subject to constitutional limitations, one of which is that:[4]

*A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.*

39. However, beyond these limitations, the Parliament is able to enact a privative clause to immunise an administrative decision from review. In given circumstances, the Parliament may determine that removal of rights to access courts and tribunals is justified by significant legislative objectives.

40. In this context, the explanatory notes state (at 67):

*Clause 221 exempts particular decisions under this Bill from appeal in any way.*

*The decisions taken under this Bill that are not subject to appeal are decisions made by the State against the council or councillors. The exemption of these decisions from appeal reflects the relationship between the State and local governments in section 70(2) of the Queensland Constitution.*

41. **Clauses 61 and 280** also may make rights and liberties, or obligations, dependent on administrative power which is not subject to appropriate review.

42. Clause 61 relates to corporate entities created under the legislation. Clause 61(4) provides that the *Judicial Review Act* would not apply to a decision of a corporate entity made in carrying out its:

- commercial activities; or
- community service obligations.

43. Clause 61(5) provides that the *Ombudsman Act 2001* would not apply to:

- the making of a recommendation to the shareholder of a corporate entity;
- a decision about a corporate entity's commercial policy; or
- a corporate entity for its competitive commercial activities.

44. The committee notes that clause 64 provides for the *Crime and Misconduct Act 2001*, the *Statutory Bodies Financial Arrangements Act 1982* and the *Auditor-General Act 2009* to apply to a corporate entity.

45. Clause 280 would insert a new section 58A into the *Local Government Act* to make similar provision in that Act.

46. For these proposed provisions, as the explanatory notes do not include information regarding the appropriateness of administrative review.

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[4] *Kirk v Industrial Relations Commission* [2010] HCA 1 at [55] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

47. **Clause 334** may make rights and liberties, or obligations, dependent on administrative power which is not subject to the *Right to Information Act*.

48. It would amend the *Right to Information Act* to amend the schedule which identifies a list of information that is exempt information. It would allow access to a document to be refused to the extent it comprised exempt information under sections 46(3)(a) and 47 of the *Right to Information Act*.

49. New section 4A would refer to Brisbane City Council Establishment and Coordination Committee information brought into existence for the consideration of the committee or if disclosed would reveal any consideration of the committee or would otherwise prejudice the confidentiality of committee considerations or operations. This information will be exempt for 10 years after its relevant date. The exemption does not apply to information officially published by decision of the BCC.

50. The explanatory notes state (at 86):

> *Without limiting the types of exempt information, the clause lists documents which are taken to be documents comprised exclusively of exempt information, such as committee submissions and briefing notes. A report of factual or statistical information attached to a listed document will be exempt information only if its disclosure would reveal any consideration of the committee or would otherwise prejudice the confidentiality of committee considerations or operations or if it has been brought into existence for the consideration of the committee.*

51. New section 4B refers to information brought into existence in the course of a local government's budgetary processes. This information would be exempt for 10 years after the date it was brought into existence.

52. In respect of these provisions, the explanatory notes state (at 86-7):

> *The exemption does not apply to information officially published by decision of the local government.*

53. The explanatory notes do not address specifically the consistency of clause 334 with fundamental legislative principles.

54. The minister is invited to provide information regarding whether the identified provisions under the 'Administrative review' heading would make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

**Delegation of administrative power**

55. 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.

56. **Clause 194** would allow the delegation of administrative power to a person whose qualifications for appointment as an authorised person were prescribed by regulation.

57. Clause 194 would allow the chief executive officer to appoint a qualified person to be an authorised person. A regulation may prescribe requisite competencies (clause 194(2)(a)) and a type of person who may be authorised (clause 194(2)(b)).

58. The explanatory notes state (at 61-2):

> *Clause 194 describes the qualifications and conditions for an authorized person and provides a power for a regulation to prescribe further qualifications and conditions. The power to appoint authorised persons vests specifically with the CEO as the appointment of authorised persons is an operational issue.*

**Onus of proof**

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

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

61. **Clause 56(3)** would require a person to prove specified matters in his or her defence.

62. Clause 56(2) provides an offence of failing to prevent insolvent trading, with a maximum penalty of 100 penalty units ($10 000) or one year's imprisonment. If convicted of the offence, a person may be ordered to pay part of a corporate entity's debts (clause 56(4)). The defence in 56(3) would require a person to prove that when the debt was incurred:

- it was without the person's consent;

- the person did not have cause to suspect insolvency;
- the person took all reasonable steps to prevent the entity from incurring the debt; or
- as a director, the person did not take part in management at that time.

63. The explanatory notes state (at 22):

*Clause 56 imposes a duty on directors of corporate entities not to incur a debt on behalf of the entity where the entity is, or the director has reasonable grounds to suspect that it will become, insolvent. The GOCA and the Commonwealth Corporations Act 2001 (Cwlth Corporations Act) impose the same duty on directors of entities under their jurisdiction.*

**Power to enter premises**

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

65. **Clauses 70(3), 73, 110, 117-8, 120, 123 and 127-30** would confer powers on:

- the council to enter and make structural alterations to a structure, room or cellar, for acquiring land for use as a footpath (clause 70(3));
- a council employee or contractor to enter land (not premises) to make a temporary road (clause 73(3));
- an authorised person generally to enter a property, including private property, without a warrant and without force (clause 110(3) and (7));
- an authorised person to enter a property without consent at any reasonable time during the day, or at night upon the request of the occupier, to inspect the property or a record (clause 117);
- an authorised person to enter a property, other than a home on the property, without consent, at any reasonable time of the day or night under an approved inspection program (clause 118);
- an authorised person to be exercised after entering a property (clause 120);
- a person to enter a property to take remedial action (clause 123);
- a council worker, with reasonable written notice, to enter under a remedial notice (clause 127);
- a council worker, with reasonable written notice, to take materials (clause 128);
- a council worker, at reasonable times, to carry out repairs (clause 129); and
- a council worker, at any time, for urgent action (clause 130).

66. In relation to clauses 110 (at 36), 117-8 (at 39), 120 (at 40), 123 (at 41) and 127-30 (at 42-3), the explanatory notes contain information about legislative safeguards of individual rights and liberties. More generally, the explanatory notes say (at 3):

*Potential fundamental legislative principle issues arising from the State monitoring and enforcement powers are justified to enable the State to meet its constitutional responsibility for local government under the* Constitution of Queensland 2001.

**Protection against self-incrimination**

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

68. **Clauses 58, 108, 110, 112, 137, 140 and 295** would modify common law and statutory protections against self-incrimination.

69. The proposed provisions would require:

- a person to attend an examination –
  - and answer questions as directed by the court – he or she would not be excused from answering a question because the answer might tend to incriminate him or her or create liability to a penalty (clause 58(4)), although limited use may be made of the answer (clause 58(5)); and
  - produce a relevant document as directed by the court (clause 58(9));
- a council or councillor to provide information to allow the minister to monitor and evaluate compliance with local government related laws (clause 108);

- a person to provide an authorised person with the person's name and address when requested (clauses 110 and 112);
- a person to provide information or produce a document if requested by the department's chief executive or an authorised person during a department investigation (clause 137);
- a person to provide information or produce a document if requested by the chief executive officer or an authorised person during a council investigation (clause 140); and
- under the *Local Government Act* (as amended by clause 295) –
  - a person to assist a department investigation by providing information or a document (new section 148D); and
  - a person to assist a department investigation by providing information or a document (new section 148G).

70. In relation to clauses 58 (at 23), 108 (at 35), 110 (at 36), 112 (at 36), 137 (at 44), 140 (at 45) and 295 (at 80), the explanatory notes contain information about legislative safeguards of individual rights and liberties. As noted above, the explanatory notes also provide brief general information about consistency with fundamental legislative principles (at 3):

> *Potential fundamental legislative principle issues arising from the State monitoring and enforcement powers are justified to enable the State to meet its constitutional responsibility for local government under the* Constitution of Queensland 2001.

**Immunity from proceeding or prosecution**

71. 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.

72. **Clause 211** would confer immunity from civil liability upon administrators who act honestly and without negligence:

- a councillor (or head of the council) would not be civilly liable for an act done, or omission made, honestly and without negligence (clause 211(1)); and
- a State administrator or council administrator would not be civilly liable for an act done, or omission made, honestly and without negligence (clause 211(3)).

73. Rights and liberties of individuals include the right to the equal application of the law. However, the committee notes that immunity is conferred where people have acted honestly and without negligence and civil liability may attach instead to the State or the council (clause 211(3) and (4)).

**Compulsory acquisition of property**

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

75. **Clause 70** provides for the council to acquire land for use as a footpath. However, although clause 70(2) allows for reservations in favour of the owner of the land, clause 70 does not provide for the payment of compensation.

76. The explanatory notes do not address the consistency of clause 70 with section 4(3)(i) of the *Legislative Standards Act*.

77. **Clause 85** confers power to establish a mall in Brisbane, but clause 85(4) excludes rights to compensation. It states:

> A person is not entitled to compensation on account of injurious affection to any right or interest of a business, commercial or industrial nature because of the establishment, modification or closing of a mall by the council.

78. Again, the explanatory notes do not address the consistency of clause 85 with section 4(3)(i) of the *Legislative Standards Act*.

## Sufficient regard to the institution of Parliament

### Delegation of legislative power

79. 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.

80. **Clauses 22 and 95** may allow the delegation of legislative power in inappropriate cases.

81. First, under clause 21, a Local Government Change Commission would assess and determine an application for a local government boundary change. Where change is recommended, the commission must recommend to the minister that the Governor in Council implement the change (clause 21(7)).

82. Clause 22(1) would allow the Governor in Council to implement a recommendation of the change commission under a regulation. Clause 22(2) states that the regulation may provide for:

> … anything that is necessary or convenient to facilitate the implementation of the boundary change.

83. Examples are provided in clause 22(3):

- holding or postponing a council election; or
- the transfer of assets and liabilities between the council and another local government.

84. Second, clause 95 would raise a number of issues regarding the appropriate delegation of legislative power:

- under clause 95(1) and by way of a local law or a resolution, the council may fix a cost-recovery fee, and clause 95(8) would allow a cost-recovery fee to be fixed in this way 'even if the fee had been previously fixed by a local law'; and
- under 95(5), an application fee (defined by clause 95(2)) which would be one form of cost-recovery fee could include a tax –
  - in the circumstances and for a purpose prescribed under a regulation; and
  - if the council decides, by resolution, that the purpose of the tax benefits Brisbane.

85. Generally, the matters to be addressed by way of legislative power delegated under clauses 22 and 95 – the holding of council elections, transfer of assets between local governments and the imposition of taxes – may be matters more appropriately contained in legislation passed by the Parliament. Similarly, it may be more appropriate for the council to amend a local law by way of another local law, rather than by resolution.

86. However, in respect of clause 22, the explanatory notes do not identify (at 13) any inconsistency with fundamental legislative principles:

> *The Governor in Council implements the change under a regulation. The involvement of the Governor in Council reflects the importance of the constitution of Brisbane wards and representation. Clause 22 exempts the council from particular State taxes as a result of the implementation of a boundary change.*

87. And, in respect of clause 95, the explanatory notes state (at 30):

> *The council may charge a fee in a number of circumstances and within certain limits. Fixing the fee by local law or by resolution makes it public.*

88. **Clause 29(1)** may inappropriately delegate legislative power also.

89. It would provide the council with the power to make a local law:

> The council may make and enforce any local law that is necessary or convenient for the good rule and local government of Brisbane.

90. Clause 29(2) provides a number of limits on the law-making power of the council (for example, regarding offences). Clause 27(2) defines a 'local law' as a law made by the council. Clause 28 states that if there is an inconsistency between a local law and a law made by the State, the law made by the State prevails to the extent of the inconsistency.

91. As for the administrative power conferred on the council by clauses 4, 11 and 237, the delegation of legislative power under clause 29(1) is in very general and wide terms. The explanatory notes state (at 15):

*Clause 29 provides the council with a head of power to make a local law that is necessary and convenient for the good rule and local government of Brisbane. The power is intended to be broad enough for the council to make local laws that are relevant to its context, necessary for the management of the City of Brisbane and enforceable by the council.*

92. In its report on the then Local Government Bill 2009, the committee drew the attention of the Parliament to a similar delegation of legislative power in broad terms (see: *Legislation Alert* 02/09 at 56-7 and 65-8; and for the correspondence received from the minister regarding the committee's report, see *Legislation Alert* 04/09 at 25). The committee notes the relevance of those considerations to clause 29.

**Amendment of Act other than by another Act**

93. 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.

94. **Clause 69(5)** may allow amendment of an Act by subordinate legislation. It states:

The provisions of the *Acquisition of Land Act 1967* about the making, hearing and deciding of claims for compensation for land taken under that Act apply, with any necessary changes and any changes prescribed under a regulation, to claims for compensation under this section.

95. 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.[5] 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.

96. 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.

97. Clause 69(5) does not appear to fall within one of categories considered excusable by the committee, nor do the explanatory notes provide information about whether it would represent an appropriate delegation of administrative power.

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

98. 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;

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

- 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.

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

100. 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.

Extent to which consultation carried out

101. Under the 'Consultation' heading, the explanatory notes state (at 4):

*The Office of the Queensland Parliamentary Counsel has been briefed on the reforms and supports the legislative proposal.*

102. The functions of the Office of the Queensland Parliamentary Counsel are stated in section 7 of the *Legislative Standards Act.* They include to 'draft all government Bills' and, in performing this function, to provide advice to ministers and government entities on:

- alternative ways of achieving policy objectives; and
- the application of fundamental legislative principles.

103. The functions of the office do not include the supporting of legislative proposals. Accordingly, the statement on page 4 of the explanatory notes may be inappropriate.

Consistency with fundamental legislative principles

104. Under the heading 'Rights and liberties', the committee has noted that the explanatory notes did not provide information about the consistency of a number of proposed provisions with fundamental legislative principles.

105. While, on page 3 of the explanatory notes, there is a statement regarding consistency of the bill with fundamental legislative principles, a number of inconsistencies are not identified. Further, although the statement does appear to identify some inconsistencies with fundamental legislative principles, it is difficult to determine the relevant examples or sections from the *Legislative Standards Act* from the information provided. Nor is the statement in plain English. Accordingly, the statement may be of limited assistance to the consideration of the bill by the Parliament and the people of Queensland.

## 4. CIVIL AND CRIMINAL JURISDICTION REFORM AND MODERNISATION AMENDMENT BILL 2010

**Date introduced:** 23 March 2010

**Responsible minister:** Hon C R Dick MP

**Portfolio responsibility:** Attorney General and Minister for Industrial Relations

### 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 17-8 and 62** allowing for the summary disposition of indictable offences;
   - **clauses 51 and 104** limiting rights of parties to civil proceedings;
   - **clause 76** extending the limitation period of the commencement of prosecutions for certain simple offences;
   - **clauses 87-8** restricting the right of a defendant to require a person to attend to give oral evidence and be cross-examined at committal;
   - **clause 89** allowing clerks of the court to conduct registry committals;
   - **clause 116** allowing the public trustee to pay into consolidated revenue amounts in the unclaimed moneys fund;
   - **clauses 24 and 78** allowing judges and justices to give pre-trial and pre-hearing directions which would be subject to limited review;
   - **clause 89** providing for the conduct of registry committals by the clerk of the court;
   - **clause 42** allowing for an application for a disclosure obligation direction to be determined in the absence of parties and without oral submissions;
   - **clause 73** allowing a magistrate to transfer to the clerk of the court management of a charge which is to proceed by way of *ex officio* indictment;
   - **clause 25** providing that a person would not be excused from filing an affidavit or giving evidence on the ground that the answer may tend to incriminate the person;
   - **clauses 38, 45, 55, 60, 64, 92, 105, 108, 133 and 155** giving retrospective operation to amendments to legislation effecting changes to criminal procedure and jurisdiction; and
   - **clause 127** giving retrospective operation to a clarifying provision inserted into the *Queensland Civil and Administrative Tribunal Act.*

### BACKGROUND

2. The bill is the first of a two-stage implementation of recommendations made following a review of the operation of the civil and criminal jurisdictions in Queensland conducted by the Hon Martin Moynihan AO QC.[6]

### LEGISLATIVE PURPOSE

3. The bill is intended to (explanatory notes, 1):
   - expand the jurisdiction of Magistrates Courts to determine indictable offences in the Criminal Code and *Drugs Misuse Act 1986*;
   - increase the District Court's jurisdiction regarding general criminal offences to those with a maximum penalty of 20 years or less;

[6] Hon Moynihan's report and the Queensland Government response are available at: http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-civil-and-criminal-justice-system-in-queensland.

- increase the monetary limit for civil disputes in the District Court ($750 000) and Magistrates Court ($150000);
- provide the courts with specific powers to address failures to comply with disclosure obligations in criminal cases;
- streamline the committal process and the management of matters in the Magistrates Courts proceeding by way of *ex-officio* indictment;
- improve the operation of Queensland courts; and
- effect miscellaneous amendments to the justice legislation.

4. Therefore, the bill would amend the:

- *Bail Act 1980*;
- *Body Corporate and Community Management Act 1997*;
- Queensland Criminal Code;
- Queensland Criminal Practice Rules 1999;
- *District Court of Queensland Act 1967*;
- *Drug Court Act 2000*;
- *Drug Misuse Act 1986*;
- *Evidence Act 1977*;
- *Financial Accountability Act 2009*;
- *Justices Act 1886*;
- *Magistrates Act 1991*;
- *Magistrates Courts Act 1921*;
- *Penalties and Sentences Act 1992*;
- *Police Service Administration Act 1990*;
- *Property Law Act 1974*;
- *Public Trustee Act 1978*;
- *Queensland Civil and Administrative Tribunal Act 2009*;
- *State Penalties Enforcement Act 1999*;
- *Supreme Court of Queensland Act 1991*;
- *Uniform Civil Procedure Rules 1999*;
- *Worker's Compensation and Rehabilitation Act 2003*; and
- *Youth Justice Act 1992*.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

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

6. **Clauses 17-8 and 62** would allow for the summary disposition of indictable offences.

7. Currently, sections 552A and 552B of the Criminal Code provide for indictable offences to be dealt with summarily in the Magistrates Court (that is, without trial by jury). Clause 17 would replace these sections and insert new sections 552BA and 552BB to provide for:

- charges that must be heard and decided summarily on the election of the prosecution (new section 552A);
- charges that must be heard and decided summarily unless the defendant elects for jury trial (new section 552B);
- charges of indictable offences that must be heard and decided summarily (new section 552BA); and

- excluded offences (new section 552B).

8. New sections 552A and 552B largely replicate the existing provisions, with amendments to accommodate the new sections 552BA and 552BB. The intended operation of these new sections is described in the explanatory notes at 19-20.

9. New section 552BA would create a new category of indictable offences that must be heard and determined summarily. Neither prosecution nor defence could request that the matter be tried before a jury. It would apply to 'relevant offences', defined to mean:

   - all offences for which a defendant is liable to a maximum penalty of three years or less; and
   - offences in Part 6 (Offences relating to property) unless the offence is:
     - already covered in the first point;
     - an offence against chapter 42A (Secret commissions); or
     - an excluded offence under the new section 552BB.

10. New section 552BB would define the term 'excluded offence' for the purposes of section 552BA. An offence falling within the definition must be determined on indictment in accordance with section 3 of the Criminal Code.

11. Detailed information regarding the intended operation of new sections 552BA and 552BB is found at pages 20-2 of the explanatory notes.

12. Clause 18 would insert a new section 552D(2) providing that a Magistrate, on application by the defendant, may determine that a charge under the new 552BA must not be heard and decided summarily if satisfied that there are exceptional circumstances for doing so. The Magistrate would abstain from jurisdiction in relation to the charge. The proceeding for the charge would then be conducted as a committal proceeding.

13. Clause 62 would insert new section 14 of the *Drugs Misuse Act*. Clause 14(1) would allow charges for an offence against section 9 of that Act (regarding possession of a dangerous drug) to be dealt with summarily at the election of the prosecution:

   - where the offender would be liable to [no] more than 15 years' imprisonment;[7] and
   - provided no commercial purpose was alleged by the prosecution.

14. Clause 14(2) would provide that a person convicted in summary proceedings under the new section would be liable to no more than three years' imprisonment.

15. The explanatory notes indicate (at 3-4) that clauses 17-8 and 62 have sufficient regard to rights and liberties of individuals:

   *The reforms in the Bill will provide that a number of indictable offences in the Criminal Code must be dealt with summarily. The amendments will also expand the possession of dangerous drug offences under the Drugs Misuse Act 1986 that are subject to a prosecution election for summary disposition.*

   *The reforms have the effect of increasing the number of indictable offences heard and determined summarily. This may result in reduced access to a trial by jury for defendants. However, in practice, only a small number of matters committed to the Supreme or District Court actually result in a trial by jury (refer to pages 59-60 of the report).*

   *Under section 552D of the Criminal Code, as amended by the Bill, defendants will also have the ability to take a matter before a jury if, on application to a magistrate, the magistrate is satisfied there are exceptional circumstances that mean that the matter should not be dealt with summarily and therefore should be committed. The current restriction in section 552D of the Criminal Code will also be retained. This provision states that magistrates must abstain from dealing summarily with an offence if satisfied that because of the nature or seriousness of the offence or any other relevant consideration the defendant may not be adequately punished. Under section 552H of the Criminal Code, generally magistrates only have jurisdiction to impose a maximum penalty of 3 years imprisonment for indictable offences. Further, section 552J of the Criminal Code (as amended by the Bill) provides that if a person is summarily convicted or sentenced under the new provisions, the grounds on which the person may appeal include that the Magistrates Court erred by deciding the conviction or sentence summarily.*

[7] The bill and explanatory notes do not include the word 'no', but this may be the intended effect of the proposed provision.

*The amendments expanding summary disposition under the Drugs Misuse Act 1986 in the Bill will only apply if the prosecution does not allege a commercial purpose. Also, section 118 of the Drugs Misuse Act 1986 will continue to apply. This section provides that if a magistrate forms the opinion that the charge ought to be prosecuted on indictment, the magistrate must abstain from determining the charge summarily and shall instead deal with the proceedings as proceedings with a view to the committal of the defendant for trial or sentence.*

*The reforms in relation to the summary disposition of indictable offences are intended to promote the more expeditious disposal of charges. This will provide benefits to a wide range of persons, including the defendants, witnesses, victims and the community generally.*

16. **Clauses 51 and 104** would limit rights of parties to civil proceedings.

17. Clause 51 would limit rights to have a matter heard and determined by a jury. It would amend section 75 of the *District Court of Queensland Act*, replacing references to $10 000 with references to the Magistrates Court jurisdictional limit. The amendment is to ensure that section 75 aligns with the Magistrates Court jurisdictional limit.

18. Clause 104 would limit appeals from judgments or orders in the Magistrates Court. It would amend section 45(1) and (2) of the *Magistrates Court Act*, replacing references to $5000 as the monetary limit on appeals with the term 'minor civil dispute limit'. A definition of 'minor civil dispute limit' would be inserted to indicate that it means the prescribed limit applying to minor civil disputes under the *Queensland Civil and Administrative Tribunal Act 2009*.

19. The explanatory notes state (at 10-1) that clauses 51 and 104 would be consistent with fundamental legislative principles.

20. **Clause 76** would extend the limitation period of the commencement of prosecutions for certain simple offences.

21. Section 52(2) of the *Justices Act* would, following amendment by clause 76, allow a complaint for a simple or regulatory offence to be made within two years (rather than the current one year) where the proceeding originally started as an indictable offence but it has been or will be discontinued. Its intended operation is described in the explanatory notes (at 34):

*This new subsection would apply, for example, in a case where the original charge against a defendant was prosecuted under section 75 of the Criminal Code (*Threatening violence*) however following referral to the Office of the Director of Public Prosecutions it is recommended that a charge under section 6 (*Public Nuisance*) of the* Summary Offences Act 2005 *is more appropriate.*

22. In addition, the explanatory notes state (at 9-10) that sufficient regard would be had to rights and liberties of individuals:

*The Scrutiny of Legislation Committee has expressed the view that the administrative power to start a prosecution or proceeding under legislation should be responsive to the general principle that there must be an end to liability to prosecution or proceedings at some reasonable point [AD 2003/7, p. 8].*

*Section 52 of the* Justices Act 1886 *currently provides that in the case of a simple offence or breach of duty, unless there is some other time limit, a complaint must be made within one year from the time when the matter of complaint arose. A* simple offence *is defined in section 4 of the Act to mean any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise.*

*The Bill contains an amendment to the* Justices Act 1886 *to clarify that, despite the definition of* simple offence *in section 4 of the Act, the time limit in section 52 does not apply to certain indictable offences dealt with summarily. For example, section 552F of the Criminal Code provides that if a Magistrates Court hears and decides a charge summarily, the Magistrates Court has jurisdiction regardless of the time that has elapsed from the time when the matter of complaint of the charge arose.*

*An amendment is also made to provide that the time limit is extended to two years for simple and regulatory offences where a proceeding originally started as an indictable offence under the Criminal Code or* Drugs Misuse Act 1986*.*

*In his report Mr Moynihan recommended that the time limit for all summary matters provided by section 52 of the* Justices Act 1886 *be increased to two years from the date the complaint arose. While it is not considered appropriate to implement this recommendation for all summary and regulatory offences, the amendments reflect that there are some limited circumstances, such as where a charge is reduced on referral by the Director of Public Prosecutions, where a longer time limit is justified. The current time limit may mean that a person is charged with an indictable offence (which is not subject to any time limit) because the time limit for a more suitable simple offence has expired. This amendment will facilitate the handling of matters summarily rather than the Director of Public Prosecutions having to take inappropriate charges to the District or Supreme Court or having to discontinue prosecutions.*

23. **Clauses 87-8** would restrict the right of a defendant to require a person to attend to give oral evidence and be cross-examined at committal.

24. First, clause 87 would expand the use of tendered statements in lieu of oral testimony in committal proceedings. It would amend section 110A of the *Justices Act* to provide that a justice:

    - may admit as evidence a written statement of a witness tendered by the defence without requiring the witness to appear to give evidence or make a statement (section 110A(2)); and
    - must admit as evidence a written statement of a witness tendered to them by the prosecution and must not require the witness to appear unless the prosecution is required to produce witness because of a direction issued under new section 83A(5AA) (in order to give oral evidence or be available for cross-examination) (new section 110A(3), and see also new section 110B (clause 88)).

25. Second, clause 88 would insert new section 110C which would limit cross-examination. New section 110C would provide that where a magistrate gives a direction under the new section 83A(5AA), cross-examination should be limited to the reasons for which consent was granted under section 110B unless there are substantial reasons why, in the interests of justice, the cross-examination should be allowed. If a witness were cross-examined by the defence, the prosecution would be able to re-examine the witness.

26. The explanatory notes state (at 38-9):

    *This new provision is not intended to affect any other laws relating to the examination of witnesses, such as the provisions in the* Evidence Act 1977 *dealing with cross-examination of protected witnesses.*

27. In relation to the consistency of clauses 87-8 with fundamental legislative principles, detailed information is provided in the explanatory notes about safeguards of rights of defendants (at 4-7).

28. **Clause 89** would also restrict rights of defendants regarding committals, allowing clerks of the court to conduct registry committals. These would be committals 'on the papers', or administrative committals.

29. Clause 89 would insert a new part 5, division 7A (Registry committals) into *the Justices Act*. The provisions in new division 7A would:

    - allow a committal to be conducted by a clerk of the court if no prosecution witnesses were to be called to give evidence or for cross-examination and provided certain conditions are met, such as that –
        - the defendant was legally represented and not in custody (or in breach of bail); and
        - written notice about specified matters was provided by the defendant's lawyer (new section 114);
    - prescribe the procedure for clerk of court for registry committals (new section 115);
    - apply existing divisions 5 to 7 to registry committals (new section 116); and
    - allow registry committals to be held for indictable offences under other Acts (new section 117).

30. The explanatory notes again provide detailed information about relevant safeguards of rights of defendants (at 7-8).

31. **Clause 116** would allow the public trustee to pay into consolidated revenue amounts in the unclaimed moneys fund which had been credited to the fund six years or more before.

32. New section 25(2) of the *Public Trustee Act* would require the public trustee to pay all amounts that have been in the unclaimed moneys fund for six years or more to the consolidated fund.

33. The explanatory notes state (at 13-4) that clause 116 is justified:

    *This amendment, which may have insufficient regard to the rights and liberties of individuals, is required due to operational reasons. It is reasonable to presume that a person who has not made a claim in 25 years will more than likely never make a claim. Furthermore, the removal of the person's name from the public register will not prevent the person from later claiming the money.*

**Administrative power**

34. 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.

35. **Clauses 24 and 78** would allow judges and justices to give pre-trial and pre-hearing directions which would be subject to limited review.

36. Clause 24 would amend section 590AA of the Criminal Code to allow a judge to make a pre-trial direction regarding disclosure obligations and times for compliance with requirements as to advance notice of representation.

37. Clause 78 would amend section 83A of the *Justices Act*, allowing a magistrate to give specified directions at a directions hearing.

38. The explanatory notes state (at 8-9) that clauses 24 and 78 would allow appropriate review of the relevant administrative decisions:

> *A direction or ruling under section 590AA of the Criminal Code and section 83A of the Justices Act 1886 is binding unless the judicial officer presiding at the trial or pre-trial hearing, for special reason, gives leave to re-open the direction or ruling. A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. However, section 668A of the Criminal Code (Reference of pre-trial direction or ruling by Attorney-General) permits the Attorney-General to refer to the Court of Appeal a point of law arising in relation to a direction or ruling under section 590AA.*
>
> *These existing restrictions on appeal rights about directions are considered justified given that decisions made under these sections are of an interim and procedural nature.*

39. **Clause 89** would insert new part 5, division 7A into the *Justices Act* to provide for the conduct of registry committals by the clerk of the court. For the purpose of registry committals, new section 115 would confer the clerk of the court with the relevant administrative powers currently exercised by justices.

40. The explanatory notes state, in this regard (at 39):

> *This section includes a specific provision which provides that the functions of a clerk of the court in a registry committal do not include considering or deciding the evidentiary test or any bail functions or powers. A registry committal is also to be conducted on the papers and accordingly there is no requirement for any party to appear before the clerk of the court. A registry committal is also to be conducted by the clerk on the basis of the indictable charge or charges submitted by the prosecution and agreed to by the defendant's lawyer. For this reason, the clerk of the court has the same powers and authority as a magistrate to withdraw and amend charges.*

**Natural justice**

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

42. **Clause 42** (new section 43E) would allow for an application for a disclosure obligation direction to be determined in the absence of parties and without oral submissions being made.

43. Clause 42 would insert new chapter 9A into the Criminal Practice Rules. The new chapter would contain procedures relating to applications by a party for a disclosure obligation direction for the purposes of pre-trial directions hearings. New section 43E would allow the court to dispose of an application for a disclosure obligation direction without having the parties attend before the court and make oral submissions at a hearing unless one of the parties has indicated that it wishes this to occur.

44. The explanatory notes indicate (at 8) that sufficient regard would be had to rights and liberties of individuals:

> *To facilitate the speedy and cost effective resolution of direction hearings about non-compliance with disclosure obligations, amendments are included in the Bill to the* Criminal Practice Rules 1999 *allowing the court to dispose of an application for a direction without requiring the parties to attend before the court (i.e. on the papers). However, to ensure natural justice, this provision is subject to a requirement that allows an oral hearing where a party requests it.*

**Delegation of administrative power**

45. 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.

46. **Clause 73** would allow a magistrate to transfer to the clerk of the court management of a charge which was to proceed by way of *ex officio* indictment.

47. Under new section 23EB(2), where the parties agreed that an indictable offence was to proceed by way of *ex-officio* indictment in the District or Supreme Court, a magistrate could transfer review of a charge for the matter to the Magistrates Court registry. However, new section 23EB(1) states that a

charge may only be referred under this new section if the defendant is legally represented and is not in custody or in breach of bail.

48. New section 23EB(3) sets out the functions of the clerk of the court. In addition, and similar to section 652 of the Criminal Code which provides for transmission of summary offences to the District and Supreme Court, new section 23EB(3) would provide that once the ex-officio indictment had been finally disposed of, the registrar of the relevant court must, within one calendar month, notify the result of the decision to the clerk of the relevant Magistrates Courts. No further appearance would be required in that court by any party to the proceeding. New section 23EB(3) also contains provision for the clerk to refer the charge back to the court to ensure that the hearing of the charge is not unnecessarily delayed and if requested by a party.

49. The explanatory notes provide information (at 8) demonstrating that the proposed arrangements would be appropriate:

> *The Bill also adopts Mr Moynihan's recommendation that the management of ex officio indictments in the Magistrates Courts should be transferred to the registry and the process aligned with the process for administrative committals by the registry. The Attorney-General and the Director of Public Prosecutions (DPP) have discretion to present an indictment without committal (called an "ex officio indictment") under section 561 of the Criminal Code. In the case of the DPP this may occur for example, where there is a clear indication of a plea of guilty, where an accused is prepared to plead guilty to charges different from the original charges, or where a magistrate did not commit but the DPP decides to proceed. The report states that presentation by the Attorney-General is rare.*
>
> *Mr Moynihan noted that, currently, a matter proceeding by way of ex officio indictment continues to be listed in the Magistrates Court until it is dealt with in the Supreme or District Court. This means that it needs to be managed through repeated "callovers" in the Magistrates Court, sometimes for months, even though no action can or will be taken in that court. These court events in the Magistrates Court require ongoing appearances by the parties and court time until the matter is resolved in the higher court.*

**Protection against self-incrimination**

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

51. **Clause 25** would modify common law and statutory protections against self-incrimination.

52. It would insert a new section 590AAA of the Criminal Code, regarding non-compliance with a direction about disclosure. New section 590AAA(1) would provide that, if a person failed to comply with a direction about disclosure given under section 590AA(2)(ba), the court may require that the directed person file an affidavit or give evidence in court explaining the failure to comply.

53. New section 590AAA(6) would provide that a directed person would not be excused from filing an affidavit or giving evidence on the ground that the answer may tend to incriminate the person. However, new section 590AAA(7) would provide that the affidavit or evidence about non-compliance could not be used in any criminal or contempt proceeding, subject to specified purposes.

54. The explanatory notes state (at 23-4):

> *This subsection will not prevent the use of any evidence that may be subsequently disclosed in compliance with the direction. These provisions removing the privilege against self-incrimination are limited to failing to comply with the direction about disclosure and are not intended to affect compellability or other aspects of privilege more broadly. For example, while this section may have some limited application to an accused given the disclosure obligations under chapter division 4 in chapter 62, it is not intended to override the operation of section 8(1) of the* Evidence Act 1977 *which provides that a person who is charged with a criminal offence is not compellable to give evidence on behalf of the defence.*

55. Further, the explanatory notes provide lengthy and detailed information to indicate (at 11-3) appropriate protection against self-incrimination.

**Retrospective operation**

56. 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.

57. **Clauses 38, 45, 55, 60, 64, 92, 105, 108, 133 and 155** would give retrospective operation to amendments to legislation changing criminal procedure and jurisdiction.

58. The explanatory notes indicate (at 14-5), however, that sufficient regard would be had to rights and liberties of individuals:

*Section 11 of the Criminal Code ensures that where an existing offence is changed or a new offence created, a person cannot be punished for an act unless the act was committed after the law making it an offence came into force.*

*Changes to criminal procedure and jurisdiction in the Bill will have retrospective effect, in that they will apply regardless of when the offence was committed. However, this will not adversely affect the rights or liberties of the accused and is consistent with the common law. In the absence of any indication to the contrary, a "procedural" statute is to be construed as retrospective, that is, it can apply to past events. The High Court considered the issue of "procedural" statutes in* Rodway v The Queen *(1990) 169 CLR 515, where it held that:*

> "... ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial. The principle is sometimes succinctly, if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in Maxwell v Murphy, that no one has a vested right in any form of procedure. It is a principle which has been well established for many years . . ."

*In* Rodway*, the High Court was considering the abolition of the corroboration warning and held that the abolition applied regardless of the fact that the rule was in place at the time the offence was committed. In other words, despite the fact that the warning was required to be given at the time the offence was committed, it did not have to be given at the trial and the accused had not been deprived of a substantive right.*

*However, in order to provide certainty to the courts, legal profession and other interested persons, the Bill contains transitional provisions to ensure that, in most cases, only prosecutions started after the Act commences will be subject to the new provisions.*

59. **Clause 127** would give retrospective operation to a clarifying provision inserted into the *Queensland Civil and Administrative Tribunal Act* (explanatory notes, 15):

*The Bill amends section 50 of the* Queensland Civil and Administrative Tribunal Act 2009 *to clarify the costs that can be claimed in an application to the Queensland Civil and Administrative Tribunal (QCAT) for default judgment in a proceeding to recover a debt or liquidated demand of money up to the amount of $25,000 (known as a minor debt claim and part of QCAT's minor civil dispute jurisdiction). It also provides that section 50, as amended, is always taken to have applied to a non-legal costs default judgment decision for a minor civil dispute as if the amendment had commenced on 1 December 2009, that is, from commencement of the* Queensland Civil and Administrative Tribunal Act 2009 *and QCAT's operations. This will validate such decisions made since that time.*

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

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

61. The committee accepts that retrospective legislation may be necessary in some circumstances to clarify the law. Clause 127 would extend the retrospectivity, providing that it 'is taken always to have applied during the transitional period'. However, justification is provided in the explanatory notes (at 15):

*This amendment breaches the fundamental legislative principle that legislation should not adversely affect rights and liberties retrospectively (section 4(3)(g)* Legislative Standards Act 1992*). The amendment is necessary to clarify an internal inconsistency within the Act in relation to what amounts may be ordered in a judgment in default. The approach adopted by the amendments is to continue the law and practice that existed for minor debts before the Magistrates Court by not permitting legal costs to be awarded against the respondent. This is consistent with the intention to retain the low cost jurisdiction for minor debt claims before QCAT.*

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

62. 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)).

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

## 5. DAYLIGHT SAVING FOR SOUTH EAST QUEENSLAND REFERENDUM BILL 2010

**Date introduced:** 14 April 2010

**Responsible member:** Mr P Wellington MP

**Nature of bill:** Private member's bill

### ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 11** (new section 11 of the *Standard Time Act 1894*) which may, in effect, allow a number of Acts to be amended by regulation.

### BACKGROUND

2. The legislation would provide for a referendum on the question of daylight saving in South East Queensland and, in the event of majority support, would implement daylight saving in that region of Queensland.

### LEGISLATIVE PURPOSE

3. The objectives of the bill are (explanatory notes, 1):

   *To provide that a part of south-east Queensland, consisting of the cities of Brisbane, Ipswich, Logan, Gold Coast and Redland and the regions of Moreton Bay, Scenic Rim and Sunshine Coast ("the south-east Queensland daylight saving time region") will observe daylight saving time ("DST") from early October till early April each year --- but only if the majority of the electors of the whole State of Queensland approve the proposal at a referendum.*

4. The bill would amend the *Standard Time Act 1894*.

### APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

#### Sufficient regard to the institution of Parliament

**Amendment of Act other than by another Act**

5. 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.

6. **Clause 11** would insert a new section 11 into the *Standard Time Act* which may, in effect, allow a number of Acts to be amended by regulation.

7. The new section 11(1) would allow the Governor in Council to make a regulation regarding the:

   - trading hours of any organisation (these are regulated by the *Trading (Allowable Hours) Act 1990*);
   - hours of work of an employee (regulated under the *Industrial Relations Act 1999*);
   - trading hours of any person licensed under the *Liquor Act 1992*;
   - school hours (regulated under the *Education (General Provisions) Act 2006*); and
   - 'any other matters that are, in the opinion of the Governor in Council, necessary to be declared to moderate the effect of daylight saving time' (new section 11(1)(e)).

8. New section 11(4) would then state:

   A regulation made under subsection (1) has effect according to its tenor despite any written law or other law, or any award or agreement, or any order or ruling of any court, tribunal, commission or body.

9. 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.[8] 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.

10. 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.

11. The relevant provision of the bill may fall within the second of the categories of Henry VIII provisions considered excusable by the committee. The explanatory notes also suggest (at 2) that clause 11 would represent an appropriate delegation of administrative power:

*Proposed new s 11 of the amended Act gives delegated power to the Governor in Council, to make changes to matters that are currently regulated under other Acts. It could therefore be seen as a kind of "Henry VIII clause", but, as explained in the Notes on Provisions it is a very mild one with a limited purpose.*

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

12. 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)).

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

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

## 6. RACING AND OTHER LEGISLATION AMENDMENT BILL 2010

**Date introduced:** 13 April 2010

**Responsible minister:** Hon P 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 17** which may affect rights of individuals to privacy;
   - **clause 23** which may affect employment-related rights of employees of control bodies;
   - **clause 22** which would alter requirements as to proof in administrative proceedings; and
   - **clause 23** which would provide for compulsory acquisition of property without fair compensation.
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 23** which would state that the minister must give Racing Queensland Limited a control body approval; and
   - **clauses 31 and 34** which may not, respectively, delegate legislative power in an appropriate case and/or contain only matter appropriate to subordinate legislation.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
   - **clauses 12 and 23** which may have insufficient regard to rights and liberties of individuals currently appointed as members of the Queensland Country Racing Committee or as a chairperson of a country racing association;
   - **clause 23** which may affect rights and liberties of individuals;
   - **clauses 6-9, 12-6 and 18-20 and 23** which would effect significant amendments regarding the conferral of administrative power under the legislation and may make rights and liberties, or obligations, dependent on administrative power which is not sufficiently defined or subject to appropriate review; and
   - **clause 23** which would retrospectively authorise a director of control bodies to give consent to the cancellation of the approval held by the control body of which he or she was director.

### BACKGROUND

4. The bill would effect various reforms to racing legislation, centralising administrative power regarding thoroughbred, harness and greyhound racing.

### LEGISLATIVE PURPOSE

5. The policy objectives of the bill are to amend the (explanatory notes, 1):
   - *Racing Act 2002* to –
     - establish one control body for the three codes of racing (thoroughbred, harness and greyhound);
     - ensure that the control body has the necessary powers to manage the three codes of racing;
     - abolish entities established under the Act that can be established administratively by the control body;
     - provide stability and reduce the administrative burden and costs to a control body; and
     - clarify provisions relating to taking and dealing with samples from licensed animals for analysis;
   - *Wagering Act 1998* and the *Gaming Machine Act 1991* to enable the payment of monies out of the Community Investment Fund to fund a scheme for providing capital works for the racing industry;

- Racing Regulation 2003 to make necessary consequential amendments; and
- Wagering Regulation 1999 to prescribe the percentage of wagering tax to be paid into the Community Investment Fund.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

6. 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.*

7. **Clauses 12 and 23** (new section 441) may have insufficient regard to rights and liberties of individuals currently appointed as members of the Queensland Country Racing Committee or as a chairperson of a country racing association.

8. Clause 12 would omit chapter 2, part 5 of the *Racing Act*. The provisions to be omitted include:

   - sections 66-68B providing for the appointment and term of office of members of the Queensland Country Racing Committee; and
   - sections 69-77 regarding country racing associations, including section 71 regarding the chairperson of a country racing association.

9. New section 441 would provide that on commencement of the amending bill, the Queensland Country Racing Committee and the country racing associations would be dissolved.

10. The explanatory notes make it clear (at 13-4) that, upon dissolution, the members would 'go out of office' and:

    *No compensation is payable to a member as a result of the dissolution of the entities or by reason of the members going out of office.*

11. More generally, in respect of clause 12, the explanatory notes state (at 2-3):

    *The Bill omits provisions that establish country racing associations and the Queensland Country Racing Committee. These entities are unique to the thoroughbred code and have an advisory role, providing advice and recommendations to the current thoroughbred control body on non-TABQ racing matters. In the context of an amalgamated control body, it is inconsistent to have non-TABQ entities for only one code of racing established by legislation. The new control body will have the power to establish advisory committees for non-TAB racing.*

12. However, the explanatory notes do not provide specific information as to whether clauses 12 and 23 have sufficient regard to rights and liberties of individuals. Further, the explanatory notes state that industry consultation regarding the legislation was confined to the chairs and chief executive officers of control bodies. The minister is invited to provide information to assist examination of the proposed provisions.

13. **Clause 17** may affect individual rights to privacy. It would amend section 100 to require a control body to publish details of all decisions of an appeal committee on the control body's website.

14. The following justification is provided in the explanatory notes (at 9):

    *The purpose of this requirement is to improve transparency in decision-making.*

15. **Clause 23** (new sections 428-9, 431-2 and 442) may affect rights and liberties of individuals. These provisions would be transitional provisions for the *Racing and Other Legislation Amendment Act 2010*.

16. These proposed provisions would:

    - cancel the control body approvals held by existing control bodies at midnight on 30 June 2010 and require the minister to give Racing Queensland Limited a control body approval for the thoroughbred, harness and greyhound codes of racing from 1 July 2010 (new section 428);
    - from 1 July 2010 –
      - vest all assets and liabilities of existing control bodies in the new control body;
      - provide for any agreement or arrangement in force between an existing control body and another entity to become an agreement or arrangement between the new control body and the entity;

- transfer all property held by an existing control body on trust or subject to conditions to the new control body subject to the same trusts or conditions (new section 429(1));

- require the registrar of titles or other person responsible for keeping a register of dealings in property to record the vesting of property in the new control body if requested (new section 429(2));
- exclude new sections 429 and 430 from requirements of the *Corporations Act 2001* (Cth) (by deeming them to be 'Corporations legislation displacement provisions for section 5G of that Act), including the provisions of the *Corporations Act* regarding the winding up of corporations (new section 431);
- deem employees of the former control bodies to be employees of the new control body (new section 432); and
- state that no compensation would be payable to any person for the cancellation of a control body approval or the vesting or divesting of assets and liabilities or rights and obligations or for 'anything else done' under the transitional provisions (new section 442).

17. In respect of new sections 432 and 442, the committee notes that neither employees nor organisations representing employees appear to have been consulted about the legislation.

18. The explanatory notes state (at 12) that employees of control bodies would 'have all rights of employment, accrued or existing, immediately before the commencement'. More directly, it is also stated that the provisions are consistent generally with fundamental legislative principles (at 5):

> *The Bill provides for the transfer of all employees of the three control bodies to the amalgamated control body. Employees with a total remuneration of up to $100,000 per annum must be employed on terms and conditions of employment at least equivalent to those applying before the amalgamation, for a period of at least two years (390 of a total of 409 employees). Therefore, 96% of employees will not be disadvantaged with some provided greater certainty of employment than they currently have. Those employees who do not wish to be employed by the new control body and those employees with a total remuneration of up to $100,000 who are surplus to requirements will be offered redundancy packages by the new control body. The employees are not public servants.*

19. However, the explanatory notes do not provide information about whether the proposed provisions would have sufficient regard to rights and liberties of individuals other than employees of control bodies. In this context, it is noted, for example, that but for new section 430 (discussed below under the heading, Retrospective operation), compensation might be payable to members of control bodies. Again, the committee notes that consultation appears to have been limited to the chairs and chief executive officers of control bodies.

20. The committee invites the minister to provide further information to assist examination of the proposed provisions.

**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. **Clauses 6-9, 12-16 and 18-20 and 23** may make rights and liberties, or obligations, dependent on administrative powers which would be exercisable by one body only and given less definition and limitation.

23. The proposed provisions would effect the following changes to the administrative powers conferred by the legislation:

- clause 23 (new section 428) would cancel separate control body approvals for three codes of racing (currently granted to Queensland Racing Limited, Greyhounds Queensland Limited and Queensland Harness Racing Limited) and would require the minister to grant approval to one new body, Racing Queensland Limited;
- clause 9 (inserting a new section 34A) would state that, in making a decision under the Act, the new control body must make a decision that 'is in the best interest of all the codes of racing for which the control body holds an approval while having regard to the interests of each individual code';
- clause 6 would replace section 28 which limits the period for which an approval has effect to six years – under the new section 28 the approval would continue until cancelled (although new section 28(2) provides that the approval would not have effect during any suspension period);

- clause 7 would amend section 33 regarding the functions of the control body – currently, the functions are confined to the functions 'stated in this Act', but clause 7 would remove that limitation, conferring on the control body –
  - all powers necessary for performing its function; and
  - all other powers necessary for discharging the obligations imposed on the control body under the Act;
- clauses 8 and 13-6 (relevant amendments in clause 8 would be to section 34(1)(a), (b) and (f)) would remove requirements for administrative powers exercisable by the control body to be in accordance with published control body policies;
- clause 8 (amendments to section 34(1)(f)(ii) and (g)) would allow a control body to impose conditions considered by it to be appropriate on an amount –
  - distributed to a licensed club for a purpose relating to the operations of the club; and
  - allocated for venue development and other infrastructure relevant to a racing code;
- clauses 8 and 12 (new section 34(1)(j)) would allow the control body to establish committees or other entities responsible for providing advice to, and carrying out administrative functions for, the control body in relation to 'non-TABQ races' (clause 12 would omit chapter 2, part 5 which currently provides for these functions to be performed by country racing associations and the Queensland Country Racing Committee); and
- clauses 18-20 would confer on the control body administrative power regarding assets of non-proprietary entities (defined in schedule 3 as a club with a constitution that both provides for the application of all of the club's profits and other income to the promotion of the club's objects and prohibits the payment of dividends to the members of the club):
  - clause 18 would provide a definition of 'deal with' –

    ***deal with***, an asset, includes grant a right in relation to the asset, mortgage, lend, lease or register a charge over the asset, but does not include dispose of the asset;

  - clause 20 (inserting a new section 113AA) would state that a non-proprietary entity may 'deal with' its assets only in accordance with a policy or written approval of the control body; and
  - clause 19 (amending section 113) would allow the control body to impose conditions considered appropriate on any approval of disposal of assets, including –

    a condition requiring a stated portion of the proceeds of the disposal of the asset to be paid to the control body for use by the control body for the benefit of its code of racing.

24. The committee notes clauses 6-9, 12-6 and 18-20 and 23 would effect significant amendments regarding the conferral of administrative power under the legislation. The explanatory notes do not provide information as to whether the proposed provisions have sufficient regard to rights and liberties of individuals.

25. In a general context, some justification is provided for a number of the proposed provisions, as outlined below. First, in relation to clause 23 and the conferral of administrative power on one control body, the explanatory notes provide the following information (at 2):

    *The current multiple control body structure results in duplication of effort and prevents coordinated decision-making in the best interests of the entire Queensland racing industry.*

    *The establishment of one control body for the thoroughbred, harness and greyhound codes of racing is expected to provide a unified commercial focus that will facilitate more effective decision-making and the commercial development of the Queensland racing industry as a whole. The one control body model is expected to significantly reduce control body administrative overheads and drive efficiencies.*

    *The Bill will facilitate the establishment of one control body by transferring the staff, assets, liabilities and responsibilities of the current thoroughbred, harness and greyhound control bodies to one control body, Racing Queensland Limited.*

26. Regarding clause 6, justification for the unlimited extension of the approval period is provided in the explanatory notes (at 3):

    *The expiration of a control body approval every six years results in unnecessary costs and an administrative burden to control bodies. The granting of an approval for an indefinite period rather than for a period of six years will provide stability, avoid unnecessary costs and reduce the administrative burden for control bodies.*

27. The following general information relates to administrative powers conferred on the control body (explanatory notes, 3):

*To ensure that a control body has the necessary powers to manage the codes of racing for which it is responsible, a number of amendments clarify existing powers of a control body and put it beyond doubt that the control body has certain powers necessary to effectively operate in a highly competitive wagering environment.*

28. In relation to clause 8 (new section 34(1)(j)), the explanatory notes provide (at 2-3) the following information regarding the proposed transfer of the administrative powers regarding 'non-TABQ races' (as defined by clause 8) from country racing associations and the Queensland Country Racing Committee to the control body:

*The Bill omits provisions that establish country racing associations and the Queensland Country Racing Committee. These entities are unique to the thoroughbred code and have an advisory role, providing advice and recommendations to the current thoroughbred control body on non-TABQ racing matters. In the context of an amalgamated control body, it is inconsistent to have non-TABQ entities for only one code of racing established by legislation. The new control body will have the power to establish advisory committees for non-TAB racing.*

29. Regarding clause 20, the explanatory notes state (at 3):

*A race club will be required to obtain the approval of its control body to deal with its assets. This amendment puts it beyond doubt that a control body has the power to make policies and give directions in relation to how a club is to deal with its assets, including its real property and intellectual property rights.*

30. For clause 19, the following information is provided (explanatory notes, 10):

*Clause 19 inserts a new subsection 5 in section 113 which clarifies that a control body has the power to impose conditions on an approval it grants to a non-proprietary entity to dispose of an interest in real property under section 113(4)(b). A condition may include requiring a stated portion of the proceeds of the disposal of the asset to be paid to the control body for use by the control body for the benefit of its code of racing. The basis of the amendment is that the State has transferred the freehold title to a number of pieces of land upon which racecourses are located to the race clubs that were the tenants at the venue. Also, over many years, public money and control body money has been invested in improvements to freehold land owned by race clubs. The amendment ensures that the proceeds of the sale of race club land provides the best economic benefit to the Queensland racing industry.*

31. The committee invites the minister to provide information to assist examination of whether the proposed provisions make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

**Onus of proof**

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

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

34. **Clause 22** (amendment of section 352A) would be an evidentiary provision which would alter requirements as to proof.

35. The committee notes, however, that relevant provisions appear to relate to administrative, not criminal, proceedings. Further, the explanatory notes suggest (at 6) sufficient regard for rights and liberties of individuals:

*An amendment to section 352A provides that evidence of an accredited analyst or accredited veterinary surgeon, of an accredited facility, that the method of taking and dealing with the thing for analysis was in substantial compliance with the requirements of section 143(3) is evidence of that fact and, in the absence of evidence to the contrary, conclusive evidence of that fact. This amendment may infringe fundamental legislative principles, however, the provision does not shift the onus of proof from the control body, and does not 'swear the issue', in that section 352A(3) deals with whether or not substantial compliance has occurred, not whether the ultimate decision being appealed should be upheld or not. Also, the provision gives the other party the opportunity to adduce any evidence to contradict the evidence of the accredited analyst or accredited veterinary surgeon. This amendment only applies if the other party is not able to adduce any evidence to the contrary.*

**Retrospective operation**

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

37. **Clause 23** (new section 430) would retrospectively authorise a director of control bodies to give consent to the cancellation of the approval held by the control body of which he or she was director.

38. New section 430 would state that each control body's constitution would be taken to have included, and to have always included, a provision allowing a director to agree to the:

- cancellation of the approval so that it might be given to one control body for all codes of racing;
- divesting of the assets and liabilities of the control body and their vesting in a new control body; and
- for no compensation to be payable to the control body, its members or directors.

39. 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.

40. In this regard, the explanatory notes provide information (at 5-6) to suggest justification for any breach of fundamental legislative principles:

*The Bill will transfer the assets and liabilities of the current control bodies to the new control body without compensation. However, as the assets are to be transferred to a new control body which replaces the three current control bodies, and will have the same functions and powers, it is considered that the legislation does have regard to fundamental legislative principles.*

41. However, the information provided in the explanatory notes does not address the two matters generally examined by the committee. In this context, the committee notes that new section 430(c) contemplates that, but for new section 430, compensation may have been payable to 'the former control body or its members or directors' for action taken under the legislation. Accordingly, the committee invites the minister to provide further information.

**Compulsory acquisition of property**

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

43. **Clause 23** (new sections 429 and 442) would provide for compulsory acquisition of property without fair compensation.

44. New section 429 would require the registrar of titles or other person responsible for keeping a register of dealings in property to record the vesting of property in the new control body if requested. However, new section 442 would provide that no compensation would be payable to any person for the cancellation of a control body approval or the vesting or divesting of assets and liabilities or rights and obligations or for anything else done under the transitional provisions for the amending bill.

45. The Australian Constitution guarantees in section 51(xxxi) that Commonwealth acquisitions of property of all kinds must be on just terms. While the States are not subject to that constitutional restriction, the *Acquisition of Land Act 1967* (Qld) outlines conditions (for example, procedures and compensation) for the compulsory acquisition or resumption of interests in land.

46. There is also a rule of statutory interpretation that legislation is presumed not to remove property rights without adequate compensation.

47. In this context, the committee examines proposed legislation for sufficient regard to the rights and liberties of individuals by providing for the compulsory acquisition of property only with fair compensation, under section 4(3)(i) of the *Legislative Standards Act*. In the past, the Parliament has enacted legislation precluding a fair compensation requirement in circumstances identified in, for example, the *Criminal Proceeds Confiscation Act 2002*.

48. The explanatory notes suggest (at 5-6) sufficient regard to rights and liberties of individuals:

*The Bill will transfer the assets and liabilities of the current control bodies to the new control body without compensation. However, as the assets are to be transferred to a new control body which replaces the three current control bodies, and will have the same functions and powers, it is considered that the legislation does have regard to fundamental legislative principles.*

## Sufficient regard to the institution of Parliament

### Institution of Parliament

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

50. **Clause 23** (new section 428) would state that the minister must give Racing Queensland Limited a control body approval for the thoroughbred, harness and greyhound codes of racing from 1 July 2010 and may impose conditions on the approval.

51. However, section 24 also provides for the way in which the minister is to consider and decide an approval application. Section 24(2) requires consideration of certain matters and section 24(3) states that the application must not be granted unless the minister is satisfied of specified matters.

52. Accordingly, existing provisions of the Act delegate to the minister administrative discretion regarding approval of a control body but new section 428 would remove that discretion, mandating that approval be given to a specified body.

53. The committee notes that the amending legislation is clearly intended to establish one control body; for example, clause 4 would amend section 7 to state that the main purposes of chapter 2 are to be achieved by one control body and the explanatory notes identify the intention (such as on pages 1, 2 and 4). Further, the effect of the amending legislation would be to give the control body approval for all time (see clause 6). Accordingly, legislation which both provides the minister with a discretion and then directs the exercise of the discretion may not have sufficient regard to the institution of Parliament.

### Delegation of legislative power

54. 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.

55. Section 4(5)(c) of the *Legislative Standards Act* provides that whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation contains only matter appropriate to subordinate legislation.

56. **Clauses 31 and 34** may not, respectively, delegate legislative power in an appropriate case and/or contain only matter appropriate to subordinate legislation.

57. Section 169 states:

> **Application of wagering tax**
>
> (1) Each month, the Minister must pay into the community investment fund established under the *Gaming Machine Act 1991*, section 314(1), a percentage of all amounts received by the chief executive by way of wagering tax for the previous month.
>
> (2) The amounts paid into the community investment fund are administered receipts under the *Financial Accountability Act 2009*.
>
> (3) The percentage mentioned in subsection (1) is the percentage prescribed under a regulation.

58. Clause 31 would replace sections 169(1) and (3) of the *Wagering Act* to provide:

> (1) Each month, the Minister must pay into the community investment fund—
>
> (a) a percentage, prescribed under a regulation, of all amounts received by the chief executive as wagering tax for the previous month; and
>
> (b) for the period from 1 July 2010 until 30 June 2014, a further percentage, prescribed under a regulation, of all amounts received by the chief executive as wagering tax for the previous month.
>
> Note—
> See the Gaming Machine Act 1991, section 322(5A).
>
> (3) In this section—
>
> ***community investment fund*** means the fund established under the *Gaming Machine Act 1991*, section 314(1).

59. Clause 34 would then replace section 9 of the Wagering Regulation 1999. Currently, it states that, for section 169(3), the percentage of wagering tax for the community investment fund is 8.5%. Following amendment by clause 34, section 9 of the regulation would prescribe:

- 8.5% as the percentage for section 169(1)(a); and
- 45.75% as the percentage for section 169(1)(b).

60. For section 169(1)(b), the magnitude of the percentage of wagering tax to be paid into the community investment fund may be a matter more appropriately contained in legislation rather than subordinate legislation. It may be inappropriate for legislation to delegate legislative power allowing such a large percentage to be allocated by way of regulation.

61. In respect of clauses 31 and 34, the explanatory notes state (at 15):

*Under s169(1)(b) a percentage of wagering tax will be paid into the Community Investment Fund. The percentage will be 45.75%, prescribed in a regulation, of wagering tax paid to the chief executive under Part 9, Division 2 of the Wagering Act. The amount is equivalent to 50% of wagering tax paid to the chief executive, after 8.5% is paid into the Community Investment Fund under s169(1)(a) of the Wagering Act.*

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

62. 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.

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

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

Consistency with fundamental legislative principles

65. Under the heading Rights and liberties, the committee noted that the explanatory notes did not provide information about the consistency of a number of proposed provisions with fundamental legislative principles. The committee has invited the minister to provide this information.

## 7. SOUTH-EAST QUEENSLAND WATER (DISTRIBUTION AND RETAIL RESTRUCTURING) AND OTHER LEGISLATION AMENDMENT BILL 2010

**Date introduced:** 13 April 2010

**Responsible minister:** Hon S Robertson MP

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

### ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 9, 20, 21, 101, 124, 126 and 141** creating new offences;
   - **clause 16** which may affect rights and liberties of individuals who are parties to infrastructure agreements;
   - **clause 40** which would abrogate a statutory right;
   - **clause 155** which may make rights and liberties, or obligations dependent on administrative power that is not sufficiently defined or subject to appropriate review; and
   - **clauses 9 and 160** which would confer trade waste officers with power to enter certain premises without consent or warrant.

### BACKGROUND

2. The legislation would introduce standards for customer service in the water sector and ensure water distribution infrastructure is in accordance with the South East Queensland Regional Plan.

### LEGISLATIVE PURPOSE

3. The bill is intended to amend the (explanatory notes, 1-2):
   - *South-East Queensland Water (Distribution and Retail Restructuring) Act* to enable council owned distributor-retailers to deliver water and wastewater services within South East Queensland from 1 July 2010;
   - *Environmental Protection Act 1994* to improve the environmental management of water produced while exploring or extracting coal seam gas;
   - amend the *Water Act 2000* to:
     - facilitate transfer of category 2 water authorities to an alternative form;
     - provide for continued operation of resource operations plans after the release of new water resource plans following a 10 year review; and
     - allow grid contracts and enable the Queensland Competition Authority to undertake functions in accordance with amendments to the South East Queenland Water Market Rules;
     - enable continued management of water restrictions and associated water efficiency programs;
   - *Water Supply (Safety and Reliability) Act 2008* to:
     - enhance the regulation of drinking water and recycled water; and
     - improve safety, reduce regulatory burden and improve the effectiveness of compliance and enforcement actions regarding dams.

4. The bill would also amend the:
   - *Community Ambulance Cover Act 2003*;
   - Plumbing and Drainage Act 2002 and Standard Plumbing and Drainage Regulation 2003;
   - *Public Service Act 2008*;
   - Sustainable Planning Act 2009 and Sustainable Planning Regulation 2009; and
   - *Transport Infrastructure Act 1994*.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

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

6. **Clauses 9, 20, 21, 101, 124, 126 and 141** would have the potential to affect rights and liberties of individuals in that they would create new offences or amend existing offences. The proposed offences and maximum penalties are set out below.

| Clause | New section | Offence | Proposed maximum penalty |
|---|---|---|---|
| *South-East Queensland Water (Distribution and Retail Restructuring) Act* | | | |
| 9 | 53DA | Person must give trade waste officer help in exercising certain powers of entry under s53CZ(1) unless person has reasonable excuse | 200 penalty units ($20 000) |
| | 53DC | Person must comply with trade waste officer's requirement to state person's name and address unless person has reasonable excuse | 35 penalty units ($3 500) |
| | 53DD | Person must comply with trade waste officer's requirement to give evidence of person's name or address unless person has reasonable excuse | 35 penalty units ($3 500) |
| | 53DL | Approval holder given trade waste compliance notice must comply with notice unless holder has reasonable excuse | 100 penalty units ($10 000) |
| 20 | 94A | Distributor-retailer must not contravene customer water and wastewater code without reasonable excuse | 1665 penalty units ($166 500) |
| 21 | 99AF | Distributor-retailer must not contravene provision of chapter 4, part 4 without reasonable excuse | 1665 penalty units ($166 500) |
| | 99AX | Person must tell distributor-retailer, or give distributor-retailer notice, that person has become owner of premises, in certain circumstances, unless person has reasonable excuse | 1 penalty unit ($100) |
| *Water Act* | | | |
| 101 | 360ZDDG(2) | Each party to grid contract must ensure rules administrator is given copy of contract, or amended contract, within 7 business days after making or amending contract | 200 penalty units ($20 000) |
| | 360ZDDG(4) | Party to contract given rectification notice must comply with notice unless party has reasonable excuse | 200 penalty units ($20 000) |
| | 360ZDDI | Grid service provider must supply declared water service only to water grid manager and only in accordance with negotiated grid contract or default grid contract | 1665 penalty units ($166 500) |
| | 360ZDDJ | Grid customer must be supplied with water from declared water service only from water grid manager and only in accordance with negotiated grid contract or default grid contract | 1665 penalty units ($166 500) |
| 124 | 102(2) and 102A(2) | Drinking water service provider must immediately inform regulator of certain matters unless provider has reasonable excuse | 1665 penalty units ($166 500) |

| Clause | New section | Offence | Proposed maximum penalty |
|---|---|---|---|
| | 102(3) and 102A(3) | Drinking water service provider must give regulator notice of certain matters as soon as practicable unless provider has a reasonable excuse | 200 penalty units ($20 000) |
| 126 | 125 | Certain water service providers must prepare drought management plan for and give copy of plan to regulator for registration | 200 penalty units ($20 000) |
| *Water Supply (Safety and Reliability) Act* | | | |
| 137 | 193(1) Amendment | Person must not discharge trade waste into sewerage service provider's infrastructure without sewerage service provider's approval | 1665 penalty units ($166 500) |
| 141 | s 270(2) and 271(2) Amendment | Alerting entity must immediately inform particular person of noncompliance and circumstances giving rise to noncompliance unless entity has a reasonable excuse | 1665 penalty units ($166 500) |
| | s 270(4) and 271(4) Amendment | Responsible entity for noncompliance must give regulator notice of certain matters unless the entity has a reasonable excuse | 200 penalty units ($20 000) |
| 141 | 273(3) Replacement | Relevant entity must give copy of annual report to regulator within 120 business days after end of financial year | 500 penalty units ($50 000) |
| 146 | s333(4) Replacement | Recycled water provider or other declared entity must comply with requirement to give scheme manager information reasonably required to comply with scheme manager's obligations under Act unless provider or entity has a reasonable excuse | 200 penalty units ($20 000) |
| 149 | s 343(1A), (1B) and (1C) Replacement | Owner of certain dam must have dam failure impact assessed in certain circumstances | 1665 penalty units ($166 500) |

7. The explanatory notes (at 13) address consistency of some of the proposed offences with fundamental legislative principles and provide an assessment of the appropriateness of the level of the penalties:

*The Bill inserts a number of new offence provisions. These are as follows:*

- *Under new section 102A, a drinking water service provider must notify the regulator of a "prescribed incident" that may affect water quality. Similarly, under new section 271 replaced by the Bill, a scheme manager, recycled water provider, or other declared entity must notify the regulator of a "prescribed incident". It is an offence to not comply without a reasonable excuse; a maximum penalty of 1665 penalty units has been prescribed. This penalty is considered appropriate given the potential for adverse impacts on public health from failure of an entity to notify the regulator and/or take appropriate action. The penalty is also consistent with existing offences for non-compliance with reporting of water quality breaches.*
- *Under section 125 it is now an offence for a relevant water service provider to not comply with the requirement to prepare a drought management plan; this replaces the current practice of naming non-compliant service providers in Parliament. A maximum penalty of 200 penalty units has been prescribed. This penalty is comparable to other offence provisions in the Water Supply Act of a similar nature, such as non-compliance with requirements for system leakage management plans.*
- *Under new section 333, a scheme manager for a multiple entity recycled water scheme may by notice require a recycled water provider or other declared entity to provide information the scheme manager needs to perform its functions under the Water Supply Act. An offence applies for non-compliance without a reasonable excuse with a maximum penalty of 200 penalty units. This penalty is comparable to other offence provisions in the Water Supply Act of a similar nature requiring particular entities to give information to the regulator.*
- *Under amendments to section 343, owners of dams who propose to incrementally increase the size of the dam above threshold criteria must ensure a failure impact assessment is completed for the dam. An offence with a maximum penalty of 1665 penalty units is prescribed. This penalty is comparable to the existing penalty for non-compliance with failure impact assessment requirements under section 343.*

8. **Clause 16** may affect rights and liberties of individuals who are parties to infrastructure agreements.

9. It would replace chapter 3, part 3, division 2, subdivision 3 of the *South-East Queensland Water (Distribution and Retail Restructuring) Act* regarding infrastructure agreements. The explanatory notes describe the nature of these agreements (at 42):

   *Infrastructure agreements are a mechanism under the* Sustainable Planning Act 2009 *(SPA) and former planning legislation, relating to the supply of infrastructure in association with an approval for development or an infrastructure charges notice. See definition of 'infrastructure agreements' in schedule 3 (dictionary). Agreements between the developer and the entity responsible for the supply of infrastructure (in this case the local government responsible for providing water infrastructure) provides for arrangements to be established about matters such as the nature and timing of infrastructure to be constructed, and the amount and timing of money to be paid as a contribution to, or share of, infrastructure services.*

10. New chapter 3, part 3, division 2, subdivision 3 (new sections 77 to 77H) would set up rules for determining respective rights and liabilities attributable to the local government and distributor-retailer. The intended operation of the subdivision is detailed in the explanatory notes (at 42-3) and, in the context of consistency with fundamental legislative principles (at 10):

    *Provisions amending the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 have been included that will change a large number of infrastructure agreements that contain provisions requiring the construction of water infrastructure in the distributor-retailers' geographic areas. These provisions have the effect of statutorily novating infrastructure agreements that only deal with water infrastructure, to the distributor-retailer.*

    *Other provisions also deal with infrastructure agreements that concern water infrastructure and other types of infrastructure. In respect of these types of infrastructure agreements which are called "bundled infrastructure agreements" the provisions enable the distributor-retailer to assume the rights and liabilities of the participating local governments in respect of some terms of the infrastructure agreements where these relate solely to water infrastructure or works.. Provision is also made for mixed rights and liabilities (where a specific part of a right or liability is not attributable to water infrastructure) to be only enforceable, by or against a participating local government. Where this occurs the distributor-retailers and local governments are required to negotiate in good faith about how they share rights and liabilities, and associated costs.*

11. In addition, the explanatory notes provide (at 10) justification for the new provisions:

    *These provisions are necessary because of the large volume of infrastructure agreements involved and the difficulty that would be entailed in trying to address the complexity of "splitting" rights and liabilities arising under bundled infrastructure agreements, in a transfer scheme. A specific provision is included that makes clear that these provisions do not create a greater right or impose any greater liability upon other parties to the agreement, that is, those parties other than a distributor-retailer or a SEQ local government, for example a developer or bank.*

12. **Clause 40** would abrogate a statutory right.

13. New section 661 of the *Environmental Protection Act* would be a transitional provision imposing a prohibition on constructing a coal seam gas evaporation dam in certain circumstances under a coal seam gas environmental authority in force immediately before the provision would commence.

14. The explanatory notes acknowledge (at 11) a potential inconsistency with fundamental legislative principles but indicate the proposed provision is justified:

    *…that the action is necessary to address the adverse environmental impacts using evaporation dams and there is no other reasonable alternative. Failure to act could adversely affect the rights of others, including the underlying tenure holder, particularly due to the large amounts of salt and other contaminants that are left after the water is evaporated. Where there is no feasible alternative to manage CSG water, the environmental authority holder may provide evidence to the Department of Environmental and Resource Management to retain their existing rights. Affected parties will still retain their primary right of access to the gas resource. Accordingly, the impacts of this provision are limited to requiring operators to propose an alternative form of water treatment, such as onsite water treatment, which would allow the produced water to be used for other purposes.*

**Administrative power**

15. 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.

16. **Clause 155** may make rights and liberties, or obligations, dependent on administrative power that is sufficiently defined or subject to appropriate review.

17. New section 357A(2) of the *Water Supply (Safety and Reliability) Act* would provide that if a person had been given a notice to provide information under sections 353(2) and 356(3) (to assist assessment of safety conditions to apply to a dam) and had not complied with the requirements of the

notice, the chief executive might engage a person to give the information requested by the chief executive. Any expense the chief executive incurred when engaging a person to gather the information could be recovered from the dam owner as a debt (new section 357A(4)).

18. In relation to whether the provision is consistent with fundamental legislative principles, the explanatory notes state (at 12):

*The new provisions are intended to improve safety by improving the effectiveness of compliance with the regulatory framework. The information requested by the dam safety regulator is critical to being able to determine an appropriate safety management regime for a particular dam. While there may be considerable expense imposed on dam owners by the exercise of this discretionary power, the Act has always contained the power to require dam owners to commission the preparation of comprehensive reports about the construction and operation of a dam and its state of repair.*

**Power to enter premises**

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

20. **Clauses 9 and 160** would confer powers to enter certain premises without consent or warrant.

21. Clause 9 (inserting new chapter 2C, part 2 (new sections 53CM to 53CX) of the *South-East Queensland Water (Distribution and Retail Restructuring)*) would confer on trade waste officers powers of entry to a place generally. The powers would be conferred to allow officers to take trade waste compliance action or to undertake an approved inspection program. New sections 53CY to 53DA would also confer on trade waste officers powers after entry.

22. Safeguards in the legislation would include that:

- 'place' would specifically exclude any part of the place where a person resides; and
- specified safeguards relating to powers after entry (new sections 53DF to 53DI).

23. The explanatory notes (at 9) indicate consistency with fundamental legislative principles:

*The Bill provides for the appointment of an authorised officer as a trade waste officer. A trade waste officer is to help the distributor-retailer consider and decide trade waste approval applications, monitor and enforce compliance and take trade waste compliance action where necessary.*

*The Board of a distributor-retailer may approve an inspection program which will allow a trade waste officer to inspect all places or places of a particular type within the distributor-retailer's geographic area. The inspection program can not be more than 6 months or another period prescribed under a regulation. Public notice of the inspection program is to be provided in a relevant newspaper and on the distributor-retailer's website.*

*To perform their functions, a trade waste officer may in some instances enter a place without the occupier's consent and without a warrant. However, these powers of entry do not apply to a residential dwelling. Trade waste officers will also be able to require a person to give their name and address. These powers largely reflect the existing powers of local governments that perform similar functions and will only be exercised in circumstances where a trade waste officer reasonably believes a person may be committing a trade waste offence. The usual safeguards such as display of identity cards, requirements to give notice to and to warn an occupier and rights of compensation for any damage caused will apply.*

24. **Clause 160** would insert new section 359A of the *Water Supply (Safety and Reliability) Act*) to empower the chief executive or an authorised officer under the Act to enter a place without a warrant and using the force necessary and reasonable in the circumstances.

25. The explanatory notes identify (at 12) safeguards included in the legislation and indicate that the proposed provision would be justified:

*The Bill inserts new powers for the dam safety regulator under the Water Supply Act (section 359A) to take direct action or authorise an authorised officer to take steps to address a risk of a dam failing if the circumstances warrant and to recover any reasonable costs incurred in taking the steps. Under the new provisions, the regulator or authorised officer may enter premises without a warrant and exercise existing powers of an authorised officer under the Act, for example, search and seize documents. Legislation may offend fundamental legislative principles if it does not have sufficient regard to the rights and liberties of individuals; this can depend on whether the legislation confers powers to enter premises, and search and seize documents or other property, only with a warrant. However, the power to enter premises does not include any part of premises that is used as a residence. The provisions are considered justified in the circumstances in order to protect individuals and the general public from the consequences of a dam failing or to minimise the impacts of a failure if it occurs. The provisions seek to balance the need to protect public health and protect the interests of individuals.*

**Protection against self-incrimination**

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

27. **Clauses 124 and 141** are identified in the explanatory notes as raising a possible inconsistency with section 4(3)(f) (at 43) and information is provided in justification of any inconsistency (at 11). The clauses would amend the *Water Supply (Safety and Reliability) Act*).

28. However, the committee does not regard section 4(3)(f) of the *Legislative Standards Act* to be relevant to clauses 124 and 141. Section 4(3)(f) requires sufficient regard to rights and liberties of individuals. The committee gives the word 'individual' the meaning ascribed in section 36 of the *Acts Interpretation Act 1954*, 'a natural person'.

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

29. 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.

30. Section 23 of the *Legislative Standards Act* 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)).

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

## 8. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL (NO. 2) 2010

**Date introduced:** 15 April 2010

**Responsible minister:** Hon RG Nolan MP

**Portfolio responsibility:** Minister for Transport

### ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 69** affecting rights and liberties of individuals with interests in land not owned or leased by QR Limited but where rail transport infrastructure had been constructed or installed;
   - **clause 77** overriding common law rights which may be held by individuals;
   - **clause 92** which may affect rights of individuals to privacy, requiring disclosure of personal information to the port lessor or the port lessor's delegate;
   - **clause 178** which may affect rights to safety;
   - **clause 192** which may appear to affect rights and liberties regarding property interests;
   - **clauses 178, 211, 230, 257 and 265** creating new offences;
   - **clauses 177 and 224-7** amending existing offence provisions;
   - **clauses 43 and 77** excluding avenues of judicial review available under the *Judicial Review Act*;
   - **clause 193 and schedule** which may make rights and liberties, or obligations, dependent on administrative power which may not be subject to appropriate review;
   - **clauses 198 and 202** conferring the minister with discretionary powers to extend land declarations;
   - **clause 211** allowing the chief executive to give directions about works carried out on private land and to register a notice to prospective purchasers of the proximity of land to transport infrastructure and of related obligations;
   - **part 6** conferring authorised officers with greater powers to direct ships;
   - **part 7** conferring shipping inspectors with greater powers to direct masters of ships;
   - **part 18** allowing administrative powers conferred on a government entity to be delegated to a private sector entity;
   - **clause 257** requiring a person to prove certain matters in his or her defence;
   - **clause 122** conferring authorised officers and others with immunity from civil liability; and
   - **clauses 113, 178, 198 and 202** which may be inconsistent with the requirement that legislation provide for the compulsory acquisition of property only with fair compensation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **part 9** which is to implement nationally consistent legislation;
   - **clause 178** would provide for exclusion from a requirement for the minister to table a document; and
   - **clauses 74, 83, 86, 113, 122 and 172** which may allow amendment of an Act other than by another Act.
3. The committee invites the Minister to provide further information regarding the consistency of **clause 178** with fundamental legislative principles, including whether the decision of the minister would be subject to appropriate review.

### BACKGROUND

4. The bill is to amend 25 Acts and 12 regulations relating to transport.

## LEGISLATIVE PURPOSE

5. The bill is intended to:[9]

- facilitate the development of infrastructure to deal with the challenges of a growing population and, in particular, a clear legislative framework for the Gold Coast Rapid Transit project;
- strengthen protection of the marine environment by providing tougher powers to Maritime Safety Queensland and, in particular, increased penalties for marine pollution;
- create a robust port planning regime for the future, maintain Queensland Rail as a passenger focused government owned corporation and establish QR National as a Queensland based company; and
- improve the clarity and effectiveness of requirements in transport legislation.

6. Accordingly, the bill would amend the:

- *Adult Proof of Age Card Act 2008*;
- *Anti-Discrimination Act 1991*;
- *Coastal Protection and Management Act 1995*;
- Coastal Protection and Management Regulation 2003;
- Criminal Code;
- *Electrical Safety Act 2002*;
- Electrical Safety Regulation 2002;
- *Electricity Act 1994*;
- Environmental Protection Regulation 2008;
- Explosives Regulation 2003;
- *Judicial Review Act 1991*;
- *Land Act 1994*;
- *Maritime Safety Queensland Act 2002*;
- *Mineral Resources Act 1989*;
- Nature Conservation (Wildlife Management) Regulation 2006;
- *Right to Information Act 2009*;
- *South Bank Corporation Act 1989*;
- *Sustainable Planning Act 2009*;
- *Transport Infrastructure Act 1994*;
- *Transport Legislation Amendment Act 2007*;
- Transport Infrastructure (Ports) Regulation 2005;
- Transport Infrastructure (Rail) Regulation 2006;
- *Transport (New Queensland Driver Licensing) Amendment Act 2008*;
- *Transport Operations (Marine Pollution) Act 1995*;
- Transport Operations (Marine Pollution) Regulation 2008;
- *Transport Operations (Marine Safety) Act 1994*;
- Transport Operations (Marine Safety) Regulation 2004;
- *Transport Operations (Passenger Transport) Act 1994*;
- Transport Operations (Passenger Transport) Regulation 2005;
- *Transport Operations (Road Use Management) Act 1995*;
- *Transport Operations (TransLink Transit Authority) Act 2008*;
- *Transport Planning and Coordination Act 1994*;
- Transport Planning and Coordination Regulation 2005;

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9 The Hon R Nolan MP, Minister for Transport, Second Reading Speech, *Record of Proceedings (Hansard)*, 15 April 2010, 1466-7.

- *Transport Security (Counter-Terrorism) Act 2008*;
- *Transport (South Bank Corporation Area Land) Act 1999*;
- *Urban Land Development Authority Act 2007*; and
- Workplace Health and Safety Regulation 2008.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

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

8. **Clause 69** would affect rights and liberties of individuals with interests in land not owned or leased by QR Limited but where rail transport infrastructure had been constructed or installed.

9. Clause 69 would insert new section 244A of the *Transport Infrastructure Act*. The intended operation of the new section is described in the explanatory notes (at 29-30):

   *QR Limited has rail transport infrastructure on land that it does not own or lease. This infrastructure (which was constructed before 1995) may remain on the land by virtue of section 244 of the Transport Infrastructure Act 1994. Further, section 244 allows QR Limited to alter that infrastructure, manage the railway using that infrastructure and operate (or authorise a railway operator to operate) rolling stock using that infrastructure. The section also confirms that land owners do not have an interest in the rail infrastructure merely because it is fixed to their land. Since the commencement of that section, QR Limited has augmented, duplicated and replaced rail transport infrastructure of this kind. New section 244A effectively preserves the benefit of section 244 in relation to the rail infrastructure comprised in such augmentations, duplications and replacements where this has occurred since the commencement of section 244.*

   *Much of this rail infrastructure was constructed pursuant to informal arrangements. As a result there are, for example, gaps in the tenure for rail corridor land over watercourses and roads. This new section will permit the existing rail infrastructure to remain on the land (despite the lack of tenure) and permit the owner of the rail infrastructure to enter upon the land for the purposes of managing the railway, without the need for a grant of a licence or other land tenure. In particular, the owner of the rail infrastructure will not require a licence from local governments in relation to such rail infrastructure on local government roads.*

10. Further, the explanatory notes indicate (at 30) that sufficient regard would be had to rights and liberties of individuals:

    *This new section is considered necessary to preserve the status quo with the existing rail infrastructure. The new section 244A provides Queensland Rail and QR National with a statutory right in relation to existing rail infrastructure as currently exists in the name of QR Limited. However, Queensland Rail and QR National will need to enter the appropriate access arrangements or secure tenure through the normal commercial processes for any new rail infrastructure.*

11. **Clause 77** would override common law rights which may be held by individuals.

12. Clause 77 would insert a new chapter 19 of the *Transport Infrastructure Act* containing transitional provisions relating to QR National and its bodies corporate. New section 561 would provide that no member of the QR National group would be a common carrier in relation to contracts entered into by them before the commencement of new section 561, unless the contract stated otherwise.

13. The explanatory notes provide (at 30) justification for any breach of fundamental legislative principles:

    *This transitional arrangement is justified, as it preserves existing contractual rights which were agreed upon in reliance on that exemption. Without this statutory preservation, the discontinuation of this exemption in relation to existing contracts would alter third parties' contractual rights.*

14. **Clause 92** may affect rights of individuals to privacy as it may require disclosure of personal information to the port lessor or the port lessor's delegate.

15. Under new section 282AA of the *Transport Infrastructure Act*, the port lessor may display or publish a port notice requiring a person or class of person to produce information relevant to the provision of port services, the calculation of port charges, the provision, use or preservation of port facilities, the operation, safety, security or efficiency of the port and information requested by a Commonwealth or State entity.

16. The explanatory notes state (at 33) that sufficient regard would be had to rights and liberties of individuals:

*Under the* Transport Infrastructure Act 1994*, port authorities (including POBC) may obtain information from port users associated with Port of Brisbane. Given the nature of the port business and the various users of the ports services and facilities (for example, ship owners and masters, cargo owners and forwarders and their agents), it is necessary to continue this arrangement to allow that the port lessor and its delegate (the port operator) to obtain information from its port users to ensure the security, safety and efficient operations of the port. In addition, the port lessor will require information from port users to satisfy the requirements of State and Commonwealth agencies (e.g. information relating to maritime security).*

*The Bill permits the port lessor and its delegate to require a person to produce information relevant to the management, security, safety and efficient operations of the port. Such information includes, but is not limited to, information relating to the description of vessels, vehicles, goods and commodities entering or located in the port area and data about the movement of vessels, vehicles or passengers, movement and storage of goods and commodities and efficiency of operations.*

17. **Clause 178** may affect rights to safety.

18. New chapter 10, part 4, division 4A, subdivision 3 of the *Transport Infrastructure Act* would establish the framework for managing the interface between light rail, light rail land, light rail infrastructure and surrounding areas. The explanatory notes identify (at 37) a possible inconsistency with fundamental legislative principles:

*The State has a responsibility under transport legislation for safety of persons and the maintenance of structural and operational integrity of all transport infrastructure and public transport networks. Within the urban footprint, transport infrastructure is becoming increasingly complex. In the case of the GCRT project there will be interactions with other transport modes (for example, roads, buses and active transport) and active interfaces with other land uses (for example, a major commercial or retail development).*

19. However, it is suggested that sufficient regard would be had to rights and liberties of individuals (explanatory notes, 37):

*The new Part 4A, Division 4A, subdivision 3 does not impact on existing safety, maintenance or liability obligations of the parties, but instead, establishes a framework within which these obligations can be effectively managed and coordinated. The amendments are designed to ensure these interactions are undertaken in a manner that ensures the safety, structural and operational integrity of transport infrastructure.*

*Additionally, it is important to note that before an interface management area may be declared, the chief executive is required to undertake consultation with all parties (and provides the opportunity for submissions) that the chief executive reasonably believes may be impacted by the declaration of an interface management area.*

20. **Clause 192** appears to affect rights and liberties of individuals regarding property interests.

21. It would insert a new section 33(5) of the *Transport Infrastructure Act* to provide that an approval for road works might be given only where a permitted road access location was in force under section 62(1) (Management of access between individual properties and State-controlled roads) in relation to the road access works. The explanatory notes indicate (at 37-8) that the purpose of the proposed provision is to clarify rights:

*The proposed new section 33(5) appears to restrict the circumstances in which an approval may be given for road access works and could be considered a breach of the fundamental principle that legislation have sufficient regard to an individual's 'rights and liberties'. However, the Transport Infrastructure Act 1994 does not clearly delineate the scope of road access works approvals (provided under section 50 of the* Transport Infrastructure Act 1994*) and road works approvals (provided under section 33 of the* Transport Infrastructure Act 1994*). As a consequence there is overlap and complexity in the application and approval process, which has resulted in the inconsistent application of these provisions across the State.*

*This amendment will make it easier for applicants (usually property owners) to apply for vehicle property access to state controlled roads and provides permanent vehicular property access that runs with the land. In contrast an application approved under section 50 does not run with the land and each new property owner has to reapply for the road access to the state controlled road.*

22. **Clauses 178, 211, 230, 257 and 265** would create new offences, with 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 |
|---|---|---|---|
| *Transport Infrastructure Act 1994* | | | |
| 178 | 377N(6) | Failure to provide information to chief executive as required under subsection (5) in relation to refusal to enter into light rail interface arrangement. | 60 penalty units ($6000) |
| 178 | 377O(5) | Failure to comply with direction given under subsection 2(b) in relation to implementation of arrangements decided by chief executive. | 200 penalty units ($20 000) |
| 211 | 476B(1) | Carrying out of works that would threaten or likely to threaten the integrity of transport infrastructure without the chief executive's approval. | 100 penalty units ($10 000) |
| 211 | 476B(3) | Failure to stop carrying out works at the direction of chief executive as outlined in subsection (2). | 100 penalty units ($10 000) |
| 211 | 476B(5) | Failure of land owner to alter, demolish or take away works constructed contrary to 476B(1) or 476B(2) at the direction of the chief executive. | 100 penalty units ($10 000) |
| *Transport Operations (Marine Pollution) Act 1995* | | | |
| 230 | 86A(4) | Contravention of notice under subsection 2(a) in relation to discharge or likely discharge of pollutant without reasonable excuse. | 200 penalty units ($20 000) |
| 230 | 86A(5) | Contravention of notice under subsection 2(b) in relation to discharge or likely discharge of pollutant without reasonable excuse. | 200 penalty units ($20 000) |
| 230 | 86A(8) | Contravention of notice under subsection 7(b) in relation to discharge or likely discharge of pollutant without reasonable excuse. | 200 penalty units ($20 000) |
| *Transport Operations (Road Use Management) Act 1995* | | | |
| 257 | 39R | Contravention of improvement notice issued under 39Q. | 80 penalty units ($8000) |
| 265 | 164E | Contravention of supervisory intervention order issued under 164B. | 100 penalty units ($10 000) |

23. In relation to clause 178, the explanatory notes provide (at 37) the following information:

*The significant penalty provisions, which are consistent with the* Transport Rail Safety Act 2010*, reinforce the serious safety implications associated with complex transport interfaces with other land uses. The proposed amendments establish an appropriate dispute resolution process, and it is intended that the enforcement of penalties will be used as a last resort.*

*The proposed interface management regime is based on existing legislation, including provisions within the* Rail Safety Act 2010*.*

24. For clause 211, the explanatory notes state (at 99 and 39-40):

*The penalty provisions are based on the existing heavy rail provisions in section 168 of the Act.*

[New section 476B] *imposes an obligation on a person not to carry out works on land if the works threaten, or are likely to threaten, the safety or operational integrity of transport infrastructure (excluding heavy rail). A breach of this obligation can incur a maximum of 100 penalty units ($10,000).*

*Enables the chief executive to give a written direction to stop alter or not to start the works if the chief executive reasonably believes the works threaten or are likely to threaten, the safety or operational integrity of transport infrastructure. A failure to comply with the direction without reasonable excuse can incur a maximum penalty of 100 penalty units ($10,000).*

*The chief executive can require an owner of the land to alter, demolish or take away the works and failure to comply with the requirement unless the person has a reasonable excuse can incur a maximum penalty of 100 penalty units ($10,000).*

*The chief executive may alter demolish or take way the works and the recover the costs of doing so as a debt payable.*

*Due to the increasing need to build transport infrastructure within the existing urban landscape there are increased risks that transport infrastructure can be threatened or damaged by works or activities conducted on nearby land. These activities may not be limited to physical construction or associated works, but could include activities that interfere with the operation of technology, for example the Go-Card ticketing system. It is critical that the chief executive is able to manage these risks to protect the states high investment in infrastructure but also importantly to ensure the safety and operational integrity of all transport infrastructures and the network. Examples of works that are relevant are excavation, construction, demolition, alteration or disturbance of existing improvements, excessive loading, vibration and interferences with technology based systems.*

*New section 476 provides for compensation for the owner or occupier of the land for any loss or damage or taking or using materials.*

25. Similarly, information is provided regarding the offences to be inserted in the *Transport Operations (Road Use Management) Act* (explanatory notes, 47):

*The Bill incorporates two new offences. The penalty for contravening an improvement notice is $8,000 (80 penalty units) and the penalty for contravening a requirement of a supervisory intervention order is $10,000 (100 penalty units). The penalties are proportionate to the offences and are consistent with penalties set for similar offences in the Act.*

*The penalty for a contravention of a supervisory intervention order is identical to the penalty in the national model legislation. However, the penalty for the contravention of an improvement notice is less than the penalty recommended in the national legislation. The national legislation penalty for the breach of an improvement notice is identical to the penalty for the contravention of a supervisory intervention order. The Bill adopts a lower penalty for a contravention of an improvement notice as this offence is not as serious as the contravention of a supervisory intervention order which is made by a court.*

26. **Clauses 177 and 224-7** would amend existing offence provisions, as identified in the table below.

| Clause | Section amended | Offence | Maximum penalty |
|---|---|---|---|
| *Transport Infrastructure Act 1994* | | | |
| 177 | 377 | Offence reworded (inclusion of light rail land and light rail transport infrastructure works site as area capable of trespass). | 40 penalty units ($4000) (as for existing offence) |
| *Transport Operations (Marine Pollution) Act 1995* | | | |
| 224 | 26(1) | Increase of maximum penalty for an individual and corporation in breach of 26(1) | For an individual – 5000 penalty units ($500 000)<br>For a corporation – 100000 penalty units ($1 000 000) |
| 225 | 27(2) | Increase of maximum penalty for an individual and corporation in breach of 27(1). | For an individual – 5000 penalty units ($500 000)<br>For a corporation – 100000 penalty units ($1 000 000) |
| 226 | 35(1) | Increase of maximum penalty for an individual and corporation in breach of 35(1). | For an individual – 5000 penalty units ($500 000)<br>For a corporation – 100000 penalty units ($1 000 000) |
| 227 | 42(1) | Increase of maximum penalty for an individual and corporation in breach of 42(1). | For an individual – 5000 penalty units ($500 000)<br>For a corporation – 100000 penalty units ($1 000 000) |

27. In relation to the amendments to the *Transport Operations (Marine Pollution) Act*, the explanatory notes provide the following information:

*The justification for higher penalties is that Queensland's marine environment is of significant economic, environmental and cultural importance and the effects of ship sourced pollution can be severe. The majority of incidents that are prosecuted are a result of negligence or deliberate actions on the part of a polluter. As with all pollution offences, any penalty imposed by a court is not necessarily the maximum but takes into account the severity and circumstances of the discharge.*

*It is considered appropriate to establish high penalties to discourage ships from attempting to avoid compliance with the Transport Operations (Marine Pollution) Act 1995. This is consistent with the international principle of the "polluter pays", the community's expectation for zero tolerance of marine pollution and the high penalties for marine pollution offences imposed by all other Australian jurisdictions.*

*The fundamental legislative principle that requires observance of the rights and liberties of individuals may be affected by the proposed increase in penalty, particularly when coupled with the reverse onus of proof that is associated with the strict liability nature of the discharge offences in the Transport Operations (Marine Pollution) Act 1995.*

*In answer to this, it should be observed that none of the discharge offences carry a term of imprisonment and so the liberty of individuals is never under threat. Further, the public policy behind the Transport Operations (Marine Pollution) Act 1995, to prevent discharges of pollutants from ships, is extremely important. As was seen in the Pacific Adventurer incident, community tolerance for large-scale discharges of pollutants from ships is extremely low and the penalty for even accidental pollution should be correspondingly severe and be at least as great as is available in other Australian jurisdictions.*

**Administrative power**

28. 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.

29. **Clauses 43 and 77** would exclude avenues of judicial review available under the *Judicial Review Act*.

30. Clause 43 would insert new section 18C of the Judicial Review Act to provide that the Act would not apply to a decision of the State or a relevant entity (the port lessor, a port lessee or a port manager) made in carrying out its functions or powers under part 3A (Liability for, and recovery of, charges and expenses), chapter 8 of the *Transport Infrastructure Act*.

31. The explanatory notes do not address the consistency of clause 43 with fundamental legislative principles.

32. Clause 77 would state that review under the *Judicial Review Act* would not be available in respect of a decision of a member of the QR Group during a specified period.

33. New section 560 of the *Transport Infrastructure Act* would provide that the Judicial Review Act did not apply to a decision of a member of the QR National Group where that decision was made during the period from the commencement of the chapter (on assent) until QR National ceases to be government owned.

34. The explanatory notes indicate (at 34) that new section 560 is justified as it is to preserve, in relation to the relevant parts of QR Limited's business, the position of QR Limited as a government owned corporation:

*The* Judicial Review Act 1991 *exempts commercial activities and community service obligations of QR Limited and POBC, as GOCs, from judicial review. To maintain the status quo, the commercial activities and community service obligations of Queensland Rail (as a rail GOC) will continue to be exempt from judicial review.*

*In relation to Port of Brisbane, the State, the port lessor, port lessee and port operator will be exempt from the* Judicial Review Act 1991 *in respect of decisions in relation to liability for, and recovery of, charges and expenses. Decisions relating to liability for, and recovery of, charges and expenses are commercial matters and not appropriate for judicial review.*

35. **Clause 193 and the schedule** may make rights and liberties, or obligations, dependent on administrative power which may not be subject to appropriate review.

36. Schedule (*Transport Infrastructure Act*, section 1) would amend section 49 of the *Transport Infrastructure Act* to remove approvals about road access from the appeal process provided in the *Sustainable Planning Act*. Clause 193 would insert new section 49A of the *Transport Infrastructure Act* to clarify the existing power of the chief executive as a referral agency under the *Sustainable Planning Act* to condition development applications. The proposed operation of sections 49 and 49A is described in the explanatory notes (at 38-9) which also indicate that sufficient regard would be had to rights and liberties of individuals:

*The amendment to section 49 and the insertion of a new section 49A may be considered not to have a sufficient regard to the rights and liberties of individuals (the Legislative Standards Act 1992, section 4(3)(g)). These amendments clarify the appeal and enforcement provisions for vehicular property access on state-controlled roads where an application is subject to the Transport Infrastructure Act 1994 as well as the development approval process under the Sustainable Planning Act 2009, to provide that the Transport Infrastructure Act 1994*

*will only apply to approvals that are made and assessed under the Act, and not to approvals made and assessed under the Sustainable Planning Act 2009.*

*Currently, applications to allow a driveway direct access to a state controlled road are made under the Transport Infrastructure Act 1994 (section 49) and must comply with relevant notification and appeal processes under that Act. However some applications made under section 49 may also be part of a development approval process under the Sustainable Planning Act 2009. In these instances the appeal and enforcement provisions of the Transport Infrastructure Act 1994 and the Sustainable Planning Act 2009 apply. The two different appeal processes have caused confusion for property owners and developers.*

*The amendments to section 49 and the insertion of a new section 49A will make it clear that the notification and appeal processes under the Transport Infrastructure Act 1994 will only apply to decisions about access that are made and assessed under the Infrastructure Act and not to approvals made and assessed under the Sustainable Planning Act 2009. Approvals made and assessed under the Sustainable Planning Act 2009 will continue to be subject to the appeal processes of that Act.*

37. **Clauses 198 and 202** (to amend the *Transport Infrastructure Act*) may also be inconsistent with the requirement in section 4(3)(a) of the *Legislative Standards Act*. They would confer the minister with discretionary powers to extend land declarations.

38. Amendments to sections 84A and 105H would extend the categories of land that might be the subject of a land declaration. They would also simplify administrative processes relating to the creation of the relevant leases for the State toll road corridor land. In particular, the amendments would allow the minister to declare that a stated interest in land declared to be State toll road corridor land would continue in relation to the State toll road corridor land (new sections 84A(6) and 105H(9)).

39. The explanatory notes provide (at 49) justification for any breach of fundamental legislative principles:

*Proposed subsections 84A(6) and 105H(9) also raise fundamental legislative principle considerations on the basis that they confer a discretionary power on the Minister to decide which interests are to continue. However, it is appropriate that the Minister be granted the power to consider the relevant interests on a case-by-case basis. This will allow the Minister to decide which interests are appropriate to be continued, such as those that are consistent with the ongoing operation of the land as State toll road corridor land or local government tollway corridor land. Examples of interests that are likely to be continued are easements and access rights which do not affect the safety or operational integrity of the land as State toll road corridor land or as local government tollway corridor land, respectively. As mentioned above, those persons with an interest that is not continued in the Minister's declaration will be entitled to claim compensation under the Acquisition of Land Act 1967.*

40. **Clause 211** would amend the *Transport Infrastructure Act* to allow the chief executive to:

- give directions about works carried out on private land; and
- register a notice to prospective purchasers of the proximity of land to transport infrastructure and of related obligations.

41. First, it would insert new section 476B(2) enabling the chief executive to give a written direction to stop, alter, or not to start works if the chief executive reasonably believes the works threaten or are likely to threaten, the safety or operational integrity of transport infrastructure or networks. New section 476B(6) would allow the chief executive to alter, demolish or take away the works and recover associated costs from the land owner. The explanatory notes state (at 39):

*It is considered that any breach of fundamental legislative principles is justified and adequate protection is provided to an individual's rights and liberties.*

*The amendment enables the department to protect busway, light rail and road infrastructure by enabling the chief executive to approve, stop or alter activities on land that may interfere with the safety or operational integrity transport infrastructure.*

42. Second, new section 476D would enable the chief executive to register a notice regarding transport infrastructure. Lengthy information and justification for the proposed provision are included in the explanatory notes (at 40-1).

43. **Part 6** would amend the *Transport Operations (Marine Pollution) Act* to confer authorised officers with greater powers to direct ships. The explanatory notes state (at 44):

*The amendment extends the powers of an authorised officer to direct ships, with defects or other instances of non-compliance with relevant legislative requirements that would, or would be likely to, pollute coastal waters, not to operate until the cause of the problem is rectified and the ship is assessed as no longer presenting a pollution risk.*

*The broadened powers of the authorised officers will be exercised in a manner consistent with the existing powers of the authorised officer under section 95, and of shipping inspectors under sections 171, 172 and 172A of the Transport Operations (Marine Pollution) Act 1995 which will allow authorised officers, if satisfied on reasonable*

*grounds that a discharge of pollutant has happened, or is likely to happen, to direct ships not to operate until the cause of the problem is rectified and the ship is assessed as no longer presenting a pollution risk.*

*Although the amendment potentially infringes fundamental legislative principles of the rights of liberties of individuals under section 4(2)(a) of the Legislative Standards Act 1992, the Department of Transport and Main Roads considers the amendment will protect Queensland's marine and coastal environment by minimising deliberate and negligent discharges of ship-sourced pollutants into coastal waters through the ability to act in a pre-emptive versus reactionary manner.*

44. **Part 7** would amend the *Transport Operations (Marine Safety) Act* to confer shipping inspectors with greater powers to direct masters of ships. The explanatory notes state (at 45):

*The amendment extends the powers of a shipping inspector to direct the master of a vessel with non compliant safety equipment to return to port or to the safety of waters for which the vessel's equipment is compliant.*

*The newly defined powers of the shipping inspector will be exercised in a manner consistent with the existing powers of the shipping inspector under sections 171, 172 and 172A of the Transport Operations (Marine Safety) Act 1994 which provide for the issuing of directions for a ship to be inspected or surveyed, or for a ship not to be operated for safety reasons. The inclusion of new subsections in section 172A enables shipping inspectors to give directions in relation to vessels that are specifically contravening safety equipment requirements to be directed to move to a safe place to ensure the safety of those on board.*

*To ensure the consistency of the application of this power, Maritime Safety Queensland will undertake the following actions as per standard procedures:*

- *the issue of Maritime Safety Queensland enforcement directives to all shipping inspectors in relation to this regulatory change;*
- *inclusion of the issue as an agenda item at quarterly meeting in all regions; and*
- *continued liaison with the regions (including Queensland Boating and Fisheries Patrol and Water Police) via the Senior Compliance Officer.*

*Although the amendment potentially infringes fundamental legislative principles of the rights of liberties of individuals in section 4(2)(a) of the Legislative Standards Act 1992, the Department of Transport and Main Roads considers the amendment promotes the protection and preservation of life at sea and as such takes precedence over the rights and liberties of individuals.*

**Delegation of administrative power**

45. 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.

46. **Part 18** would amend chapter 8 of the *Transport Infrastructure Act* to allow administrative powers conferred on a government entity to be delegated to a private sector entity.

47. The proposed arrangements, together with justification for any breach of fundamental legislative principles, are outlined in the explanatory notes (at 31):

*Under chapter 8 of the* Transport Infrastructure Act 1994*, POBC, as a port authority, may control activities by issue of a port notice within its port area and appoint authorised officers to give directions to persons in the port area, move contravening property and inspect documents, vessels, vehicles and goods. These powers are important for maintaining safety, security and efficient operation of the Port of Brisbane and (in the case of inspection) for enforcing port charges. Post divestment, the Port of Brisbane will be managed by a private sector entity, port lessee/operator. In recognition of the fact that the port lessee/operator will be a private sector entity, the control powers are proposed to be ultimately vested in the port lessor (a government entity) and delegated to the port lessee/operator.*

*However, the State will continue to be able to ensure that the powers that are made available under the Bill are exercised within appropriate guidelines. It is noted that this model was also adopted in the* Airport Assets (Restructuring and Disposal) Act 2008*.*

48. **Clause 113** would delegate functions of the chief executive of the department in which the Planning Act is administered to the Brisbane City Council.

49. New section 283ZZF(1) would allow delegation to the Brisbane City Council of 'relevant administrative functions' of the planning chief executive. New section 283ZZF(3) would define 'relevant administrative functions' as the functions under the *Sustainable Planning Act* for matters relating to the administration and enforcement of a development approval for development on Brisbane core port land.

50. The explanatory notes indicate (at 32) that clause 113 would have sufficient regard to rights and liberties of individuals:

> *The State has retained responsibility for oversight of the planning provisions. However, the Bill provides that the planning chief executive may delegate to a local government certain 'administrative functions' in relation to the administration and enforcement of development approvals under the* Sustainable Planning Act 2009*. In this instance, it is appropriate for legislation to permit administrative power to be delegated by the planning chief executive to a local government. While the usual delegation provision within Government would typically provide for delegation to specified 'appropriately qualified persons', in this instance, the delegation is provided to a local government itself. Local governments are experienced in planning administration such as issuing planning and development certificates. Accordingly, the local government, rather than a specifically delegated person, will be required to undertake this role. If a delegation of an administrative function is made under this clause, the delegation will be disclosed by means of a notice to the port lessee/operator and also a notice on the departmental website. This delegation power does not extend to deciding development applications.*

**Onus of proof**

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

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

53. **Clause 257** would require a person to prove certain matters in his or her defence.

54. New section 39R of the *Transport Operations (Road Use Management) Act* would create an offence of contravening an improvement notice. However, the explanatory notes provide (at 46) justification for the reversal of the onus of proof:

> *New section 39R provides that a person who acts in contravention of a requirement of an improvement notice commits an offence. The section also provides a defence to a person charged under this section. The defendant bears the onus of proof of establishing the defence on the balance of probabilities. However, this is appropriate as the information necessary to prove this defence is particularly within the defendant's knowledge, rather than the prosecution's knowledge and would be extremely difficult for the prosecution to prove. For example, it is much easier for the defendant to demonstrate how he or she remedied the alleged contravention of a heavy vehicle operating requirement since the defendant is the party who took the remedial action.*

**Protection against self-incrimination**

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

56. **Clause 231** is identified in the explanatory notes as raising a possible inconsistency with section 4(3)(f) (at 43) and information is provided in justification of any inconsistency (at 43-4). Clause 231 would amend section 104 of the *Transport Operations (Marine Pollution) Act.*

57. However, the committee does not regard section 4(3)(f) of the *Legislative Standards Act* to be relevant to clause 231. Section 4(3)(f) requires sufficient regard to rights and liberties of individuals. As the committee gives the word 'individual' the meaning ascribed in section 36 of the *Acts Interpretation Act 1954*, 'a natural person', it does not include corporations.

**Immunity from proceeding or prosecution**

58. 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.

59. **Clause 122** would amend the *Transport Infrastructure Act* to confer authorised officers and others with immunity from civil liability.

60. New section 289ZB would confer immunity from civil liability on:

- the port lessor for an act done, or omission made, by a person as an authorised officer (where the authorised officer has been appointed by a delegate of the port lessor) – liability would attach instead to the delegate;

- an authorised officer for an act done, or omission made, honestly and without negligence by the officer for a port operator – liability would attach instead to the delegate that appointed the officer; and
- an employee of the port lessor or person acting for the port lessor for an act done, or omission made, honestly and without negligence by the employee or person acting for the port lessor.

61. The new section would infringe rights of individuals for all to be equal before the law. However, the explanatory notes indicate (at 31-2) that the proposed provision is justified:

*… the authorised officers appointed by the port lessor or by the lessee/operator as delegate of the port lessor will be placed in the same position as current authorised officers of POBC. That is, section 6 of the Transport Infrastructure (Ports) Regulation 2005 exempts authorised officers and employees from civil liability for acts and omissions done honestly and without negligence for purposes related to the management and operation of the port. It is considered important that individual authorised officers appointed by the port lessor/lessee/operator, acting honestly and without negligence should be able to carry out their duties without concern for their private liability. Authorised officers will be fulfilling the important function of ensuring the safety and security of the port area, its users and invitees, and ensuring that the conduct of persons does not adversely affect the operation of the port. Further, the immunity granted to the authorised officers does not prevent a person affected by an act or omission of the authorised officers recovering against the port lessor/lessee/operator.*

**Compulsory acquisition of property**

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

63. **Clause 113** states that a person is not entitled to compensation in relation to a change to the Brisbane port Land Use Plan.

64. New section 283ZZA(2) confirms that a person is not entitled to claim compensation as a result of such a change (explanatory notes, 31):

*The Bill provides that a person is not entitled to compensation under the* Sustainable Planning Act 2009*, or any other law in relation to a change to a Brisbane port land use plan affecting the person's interest in any Brisbane core port land. There is no common law right to compensation if a land use plan (LUP) is amended. However, this clause is intended to put this issue beyond doubt. This clause is identical to the approach taken under the* Airport Assets (Restructuring and Disposal) Act 2008*.*

65. **Clause 178** (new section 377R of the *Transport Infrastructure Act*) would limit compensation for property interests affected by the infrastructure related to the Gold Coast Rapid Transit project.

66. New section 377R would establish a compensation framework for an easement or other interest in land, taken by the chief executive under part 4 of the *Transport Planning and Coordination Act 1994*, for overhead wiring for a light rail and damage caused by the attachment of the overhead wiring.

67. The explanatory notes indicate (at 36) sufficient regard to rights and liberties of individuals:

*Pursuant to proposed section 377R, the department is required to pay compensation under the* Acquisition of Land Act 1967 *for any compulsory acquisition of an easement for overhead wiring for a light rail. The compensation arrangements within section 377R also provide that the department must pay compensation for any damage caused by the attachment of overhead wiring for a light rail.*

*It is intended that the chief executive will only require the attachment of overhead wiring for a light rail where no other practical alternative exists, having regard to: the cost, design, functionality and safety matters in accordance with the objectives of the* Transport Infrastructure Act 1994*.*

68. **Clauses 198 and 202** (to amend the *Transport Infrastructure Act*) may also be inconsistent with the requirement that legislation provide for the compulsory acquisition of property only with fair compensation (explanatory notes, 48):

*The amendments to section 84A of the* Transport Infrastructure Act 1994 *expand the category of land that may be declared by the Minister to be State toll road corridor land. The effect of a declaration made under this section is provided for in new subsection (3B) of section 84C. It provides that the land is free from any interest or obligation not stated by the Minister to be continued. Similarly, the effect of a declaration of land under section 105H as local government tollway corridor land is that the land is free from any interest or obligation not stated by the Minister to be continued (see new section 105J(3A)).*

69. However, the explanatory notes indicate (at 48-9) that the legislation would have sufficient regard for rights and liberties of individuals:

*Firstly, the declaration under section 84A may only apply to non-freehold land on or within which road transport infrastructure or rail transport infrastructure is situated. Secondly, section 84A expressly allows the Minister to*

*declare stated interests to continue in relation to the State toll road corridor land (see new subsection (6) of section 84A). Similarly section 105H(9) allows the Minister to declare stated interests to continue in relation to the local government tollway corridor land. Finally, a person whose interest in the land has not been continued in the Minister's declaration will be entitled to claim compensation under the Acquisition of Land Act 1967 (see new section 84D in relation to State toll road corridor land and new section 105JA in relation to local government tollway corridor land). The principles incorporated into the Acquisition of Land Act 1967 contain a just way of determining eligibility for, and assessment of, compensation and it is appropriate that these principles apply in relation to the determination of compensation that is required to be paid in relation to declarations of land as State toll road corridor land or local government tollway corridor land.*

*The amendments also provide that no compensation is to be payable in relation to an interest under a services contract for the land. An example of a services contract is a contract for mowing or cleaning. This is to maintain consistency with the compensation principles that are provided for in the Acquisition of Land Act 1967. Specifically, section 12(5C) of that Act excludes a right to compensation in relation to an interest under a services contract for the land.*

70. **Clause 275** is to clarify compensation payable to a landowner where changes in the value of land results from the declaration of a prescribed transit node (explanatory notes, 42):

*The proposed replacement of section 28 of the Transport Planning and Coordination Act 1994 with a new section 28 (Matters affecting compensation payable) may raise a concern that the proposed legislation adversely affects the rights and liberties of persons or provide for fair compensation for the compulsory acquisition of property (Legislative Standards Act 1992, section 4(3)(i)).*

*When the department compulsorily acquires land for a transport purpose it must, in accordance with the provisions of the Acquisition of Land Act 1967, pay as part of the compensation to the owner the market value of the interest of the land. However it is well established in law that in calculating the market value of land any increase or decrease in the market value arising from the carrying out, or the proposal to carry out, the purpose for which the interest was acquired must be disregarded. This principle is reflected in section 20(2A) of the Acquisition of Land Act 1967.*

*The amendment reflects this principle by clarifying in the Transport Planning and Coordination Act 1994 that compensation payable to a landowner as a result of the compulsory acquisition of land does not consider any changes in the value of the land resulting from the declaration of a prescribed transit node.*

## Sufficient regard to the institution of Parliament

### Institution of Parliament

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

72. **Part 9** would amend the *Transport Operations (Road Use Management) Act* to implement nationally consistent legislation. The explanatory notes state (at 46) that the legislation has been drafted to have sufficient regard to the institution of Parliament:

*While these amendments are based on national model legislation, careful thought has been given to the impact of that legislation. The Bill has been drafted in a manner that incorporates Queensland drafting practices and minor modifications have also been made so that the provisions are consistent with existing Queensland legislation. In addition, the Bill provides a lower penalty for the breach of an improvement notice than the model legislation.*

*These reforms will be subject to consideration and scrutiny by the Queensland Parliament.*

73. **Clause 178** would provide for exclusion from a requirement for the minister to table a document.

74. It would insert a new section 377D of the *Transport Infrastructure Act* requiring the minister to table in the Legislative Assembly each light rail franchise agreement entered into under new section 377B and each amendment to a franchise agreement. However, new section 377D(2) would exempt from the tabling requirement a part of a light rail franchise agreement or amendment if:

- the person with whom the State had entered the agreement gave the minister a written notice claiming the part of the agreement or amendment should be treated as confidential on the grounds of commercial confidentiality; and
- the minister reasonably considered the part of the agreement or amendment would be –
  - exempt information under the *Right to Information Act*; or
  - information disclosure of which could reasonably be expected to cause a public interest harm as mentioned in the *Right to Information Act*, schedule 4, part 4, item 7.'.

75. The explanatory notes state (at 88):

*Section 377D exempts the tabling of information within a franchise agreement that is considered 'commercial-in-confidence'.*

76. The committee invites the minister to provide information about the consistency of clause 178 with fundamental legislative principles, including whether the decision of the minister would be subject to appropriate review.

**Amendment of Act other than by another Act**

77. 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.

78. **Clause 86** would allow a port agreement or an agreement between a 'relevant entity' to amend a requirement in the *Transport Infrastructure Act* requiring the payment of charges.

79. Under new section 279A(1), a relevant entity (the port lessor, a port lessee or a port manager) may impose charges in relation to port services and port facilities. However, new section 279A(2) would provide that subsection (1) would be subject to:

- any conditions or limitations on charges in any port agreement to which the relevant entity is a party; and
- any agreement between the relevant entity and a port user.

80. 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.[10] 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.

81. 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.

82. The relevant provision of the bill does not appear to fall within any of the categories considered excusable by the committee. However, the explanatory notes state that it would represent an appropriate delegation of administrative power (at 32-3):

*a power will be conferred on the port operator to impose port charges in relation to port services and facilities (including the channel) in relation to the Port of Brisbane.*

*As the capacity to charge is conferred by legislation, it is recognised that there may be circumstances when a person should be exempt from port charges. Currently, under section 281C of the* Transport Infrastructure Act 1994*, a regulation may provide for exemptions from the payment of port charges. Section 281C also allows a port authority to exempt a person from port charges. For the Port of Brisbane, the Bill will allow a regulation or a 'port agreement' made between the port operator and the State to exempt a person from port charges. As this matter is one that would ordinarily be dealt with administratively, it is appropriate content for a regulation or agreement. This proposal is consistent with the charging powers currently conferred on port authorities. It is also noted that the ability to exempt a person from port charges under a port agreement is limited to the Port of Brisbane.*

83. **Clauses 74, 83, 113, 122 and 172** would allow the *Transport Infrastructure Act* to be amended other than by another Act.

84. Clause 74 (new section 438B) would allow the Treasurer, by gazette notice, to exempt certain interests from a shareholding restriction which is to allow the State to retain a 25-40% shareholding in

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

QR National. The explanatory notes provide (at 34) justification for the proposed delegation of legislative power:

*The Bill permits the Treasurer, by gazette notice, to provide that particular relevant interests in shares will be disregarded for the purposes of the 15% shareholding cap. This provides a mechanism to modify the application of the shareholding cap. The Government has announced that it will retain a shareholding in QR National of 25-40%. The precise amount of the State's shareholding in QR National is yet to be determined and may not be known until the float date. The use of a gazette notice to exempt the State's shareholding from the shareholding cap is necessary because the State will initially have a 100% shareholding in QR National pre-float and a 25-40% shareholding post-float, these being shareholdings that would otherwise breach that cap.*

85. Clause 83 (amending section 274) would confer legislative power to define or amend port limits. Again, the explanatory notes indicate (at 34-5) that clause 83 would be consistent with fundamental legislative principles:

*Under the Bill, for the Port of Brisbane, a regulation may declare:*

*• an area to be or not to be part of the port area;*

*• the port limits; and*

*• facilities to be or not to be port facilities for the Port of Brisbane.*

*This regulation may contain information such as mapping coordinates and detailed asset descriptions, which are not appropriate to be included in an Act.*

*For the same reason, a regulation may also amend the port area of the Port of Brisbane as part of the restructure of POBC before divestment.*

86. Under clause 113 (new section 283J), the Treasurer could, by gazette notice, declare land to be 'Brisbane core port land' and other land to be 'balance port land'. The explanatory notes state (at 35-6):

*As part of the restructure of POBC, a gazette notice will –*

*• declare certain land to be Brisbane core port land;*

*• declare the first LUP for Brisbane core port land; and*

*• declare that certain balance port land will cease to be strategic port land under the* Transport Infrastructure Act 1994 *and (where applicable) become subject to the relevant local government planning scheme administration.*

*Given the extensive list of lots to be declared as Brisbane core port land or as balance port land, it is appropriate that this type of detail is not listed in an Act. A gazette notice is the appropriate mechanism for the above purposes as the planning scheme amendments and first Brisbane port LUP will include a series of maps and detailed text, which would be too detailed for legislation itself.*

*Also, gazettal is the more usual approach in relation to planning schemes, for example under section 118(1)(e) of the* Sustainable Planning Act 2009*. Furthermore, the gazette notices will reflect a negotiated outcome agreed upon by the relevant State departments and local governments. Both the planning scheme amendments and the first Brisbane port LUP are proposed to be derived from existing precinct planning under the current Port of Brisbane LUP 2007 which was the subject of normal public consultation under the Transport Infrastructure Act 1994.*

*A gazette notice provides the necessary flexibility to ensure that the above matters can be coordinated with the restructure and divestment of POBC and avoid any gaps in the legislative scheme.*

87. Clause 122 (new section 289Y) would confer the Treasurer with power to declare an entity to be the port lessor or port lessee of the Port of Brisbane (explanatory notes, 34):

*QR National, a port lessor and a port lessee will be declared by gazette notice. Once these entities have been identified by gazette notice, the relevant provisions of the Bill will be capable of applying in respect of them. Given that QR National, the port lessor and port lessee will not be established prior to the introduction of the Bill, these entities will be identified by gazette notice.*

88. Clause 122 (new section 289ZC) would delegate legislative power regarding the exemption of Brisbane core port land from compliance with local laws. Again, the explanatory notes indicate (at 36) that this would be an appropriate delegation:

*Currently, local laws apply to strategic port land of the Port of Brisbane. The Bill excludes certain local laws that are inconsistent with the functions and operations of the Port of Brisbane (such as in relation to traffic controls). The Bill also introduces a process for the exclusion of future local laws that are inconsistent with the functions and operation of the Port of Brisbane. Under the proposed provisions, a regulation may provide that a stated local law does not apply to the port. In this instance, the regulation does not amend the application of primary legislation or subordinate legislation.*

89. Clause 172 would insert new section 355A to allow the chief executive, for the State, to grant licences over light rail land and light rail transport infrastructure, whether or not located on light rail land, to third parties for various purposes.

90. New section 355A(6) and 355A(7) would state that, in the case of inconsistency between a local government's control of a road under the *Local Government Act 1993*, section 901 or the *Local Government Act 2009*, section 60 (other than for a matter mentioned in section 357 or 358) and a provision of a licence under subsection 355A(1), the provision of the licence would apply to the extent of the inconsistency.

91. The explanatory notes do not address the consistency of clause 172 with fundamental legislative principles.

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

92. 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.

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

94. 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

95. Chapter 4, part 9 would implement national model legislation. Information in this regard is included in the explanatory notes (at 13).

# PART 2 – SUBORDINATE LEGISLATION EXAMINED

## SUBORDINATE LEGISLATION TABLED: 24 MARCH TO 13 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 |
|---|---|---|---|---|---|---|
| 46 | Parliament of Queensland Amendment Regulation (No.1) 2010 | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 47 | Explosives Amendment Regulation (No.1) 2010 | RIS | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 48 | Building and Other Legislation Amendment Regulation (No.1) 2010 | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 49 | Urban Land Development Authority Amendment Regulation (No.1) 2010 | | 1/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 50 | Urban Land Development Authority (Vegetation Management) Amendment By-Law (No.1) 2010 | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 51 | Forestry and Nature Conservation Legislation Amendment Regulation (No.1) 2010 | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 52 | State Penalties Enforcement Amendment Regulation (No.3) 2010 | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 53 | Proclamation commencing remaining provisions | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 54 | Criminal History Screening Legislation Amendment Regulation (No.1) 2010 | | 26/03/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 55 | Local Government (Postponement) Regulation 2010 | | 1/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 56 | State Penalties Enforcement Amendment Regulation (No.4) 2010 | | 1/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 57 | Aboriginal Land Amendment Regulation (No.1) 2010 | | 9/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 58 | Greenhouse Gas Storage Regulation 2010 | | 9/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 59 | Stock Amendment Regulation (No.1) 2010 | | 9/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 60 | Planning and Environment Court Rules 2010 | | 9/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 61 | Proclamation commencing remaining provisions | | 9/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |
| 62 | Casino Gaming Amendment Rule (No.1) 2010 | | 9/04/2010 | 18/08/2010 | 13/04/2010 | 18/08/2010 |

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

## SUBORDINATE LEGISLATION UNDER CONSIDERATION

### 9. FAIR TRADING (TOY-LIKE NOVELTY CIGARETTE LIGHTER) ORDER 2010

**Date tabled:** 9 March 2010

**Disallowance procedures date:** 20 May 2010

**Responsible minister:** Hon P Lawlor MP

### ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

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

### LAWFULNESS

2. The purported order prohibiting the supply of a toy-like novelty cigarette lighter may have been made without compliance with a procedural requirement to be met prior to the making of such a statutory instrument.

3. Section 85 of the *Fair Trading Act 1989* empowers the minister to make orders prohibiting or restricting the supply of dangerous goods or services. However, before making an order, the minister must give written notice accompanied by a copy of the order to persons the minister considers have a substantial interest in the matter inviting submissions to show cause why the minister should not make the order.

4. If the minister receives any written submissions within the timeframe mentioned in section 85(4) of the Act, the minister must consider the submissions before the order is made.

5. Where an Act delegates legislative power but requires certain steps to be taken when the subordinate legislation is made, the courts usually require the prescribed procedure to be complied with exactly (see, for example, *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291).

6. As not explanatory notes were tabled regarding the subordinate legislation, the committee invites the minister to provide information about compliance with the procedural requirements under section 85 of the Act.

## 10. LAND SALES AMENDMENT REGULATION (NO. 1) 2010 SL 42

**Date tabled:** 23 March 2010

**Disallowance procedures date:** 4 July 2010

**Responsible minister:** Hon AP Fraser MP

### ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding the lawfulness of the Land Sales Amendment Regulation (No. 1) 2010.

### LAWFULNESS

2. Under section 28 of the *Land Sales Act 1984*, the Amendment Regulation extends the period mentioned in section 27 of the for giving a registrable instrument relating to the sale of a proposed lot, namely Milton site.

3. The Amendment Regulation prescribes the new period of 5 years and six months for the Milton site.

4. However, section 28 of the Act states:

> (2) For the application of section 27 to a purchase of the proposed lot, entered upon after the commencement of this section, the period of 31/2 years mentioned in section 27(1)(b) is taken to be the period prescribed under subsection (1).
>
> (3) However, subsection (2) applies only if the vendor or the vendor's agent gave to the purchaser, before the purchaser entered upon the purchase of the proposed lot, notice in the approved form stating the [extended] period.

5. As explanatory notes were not tabled, the minister is invited to provide information about the vendor's compliance with section 28(3).

## PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

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

**Date introduced:** 25 March 2010

**Responsible minister:** Hon PT Lucas MP

**Portfolio responsibility:** Deputy Premier and Minister for Health

**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

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.

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Paul Lucas MP

Queensland Government

Deputy Premier
Minister for Health

13 April 2010



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

Dear Mrs Miller,

Thank you for your letter dated 12 April 2010. I thank the Scrutiny of Legislation Committee for the report on the Health Legislation (Health Practitioner Regulation National Law) Amendment Bill 2010.

I note that the Committee has advised that, in general, the Explanatory Notes for the Bill provide adequate rationale and justification for any breach of fundamental legislative principles. However, I am aware that the Committee has sought further clarification about a number of matters and I will respond to these issues now.

The Committee raised its concern that clause 55 of the Bill may not be drafted in a sufficiently clear and precise way. Clause 55 inserts a new section 392A into the Health Practitioners (Professional Standards) Act to enable a state registration board – being a registration board for one of the professions not joining the National Scheme – to give notice and information about a registered health practitioner to 'an entity of the Commonwealth or a State'. The Committee is concerned about the lack of definition or limitation to this power.

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Clause 55 mirrors the equivalent power given to national boards under the National Law, whereby a National Board which reasonably believes a practitioner poses a risk to public health or patient safety may give written notice to a Commonwealth or State entity responsible for taking action in relation to the risk.

The reference to 'an entity of the Commonwealth or State' is intentionally broad enough to catch up all relevant entities which may be in a position to act to mitigate a serious potential risk to patient safety or public health. In particular, it catches up public sector health services employing registered health practitioners.

However, it is not accurate to simply read the term 'entity of the Commonwealth or State' in isolation. Rather, this term is further explicitly limited to those entities which the board 'considers may be required to take action in relation to the risk'. This means that any board considering releasing information under this provision must first be satisfied that the public authority to which release is contemplated has a legitimate role in responding to the risk.

Further, new section 392A is drafted so as to only allow release of information relevant to the risk which the board reasonably believes is posed by the health practitioner. This creates a clear limitation on the content of the information which may be disclosed, requiring any board contemplating disclosure to first be satisfied of the direct relevance of the information to the risk it is seeking to have addressed.

Persons performing functions under the Professional Standards Act are currently bound by a duty of confidentiality in relation to information acquired about a registrant. The existing exemptions to the duty of confidentiality are not broad enough to enable boards for state-registered health professions investigating the health or performance of registrants under the Act to alert health services and other relevant bodies in a timely manner of threats to public health or patient safety revealed by their investigations.

The proposed additional exemption provides an appropriate means for boards to ensure swift action can be taken to respond to serious risks which they identify. I am satisfied that new section 392A is sufficiently drafted to establish clear limits on the availability of this exemption.

Clauses 57 and 117 transfer the immunity conferred on officers arising from proceedings for acts done or omissions made under a state-based registration Act.

The Committee has noted that new section 405U of the Professional Standards Act does not attach a requirement that immunity is conferred only if an officer has acted honestly and without negligence.

With respect to the Committee, it is not necessary to provide this justification in relation to new section 405U. This new section does not create a new immunity from civil liability for persons performing statutory functions. Rather, it simply transfers existing liability for immunities created under either the Health Practitioners (Professional Standards) Act or a repealed health practitioner registration Act to the relevant body under the National Scheme.

In each case, the liability which is being transferred explicitly only arises in relation to acts done or omissions made honestly and without negligence.

It is therefore inaccurate to say that new section 405U does not require officers to have acted in good faith and without negligence in order to be immune from civil liability. To the contrary, the section continues in force existing immunities, all of which require the officer to have acted in good faith and without negligence.

The Committee notes that clause 121 would make rights and liberties, or obligations, dependent on administrative power which is insufficiently defined or not subject to appropriate review.

Clause 121 amends the QIMR Act to allow the chief executive of Queensland Health, rather than the Minister, to approve agreements and arrangements entered into by the QIMR.

The current approval arrangements potentially interfere with the QIMRs efficient operation and may impact on the timely ability for the QIMR to enter into agreements to fund cutting-edge research.

The QIMR Act allows the QIMR Council to enter into agreements and arrangements with other entities for the purposes of the Act but provides that all such agreements and arrangements are subject to approval by the Minister. This approval requirement can adversely affect the QIMR Council's timely negotiation and finalisation of agreements and arrangements.

To enhance the QIMR Council's effective operation, the Bill amends the QIMR Act to enable the approval function to be exercised by Queensland Health's Director-General instead of the Minister.

This provision is an interim arrangement pending the completion of the review of the QIMR Act, as part of which this issue will be further examined. In the meantime I am satisfied that the Judicial Review Act provides for adequate means for the independent review of decisions of the chief executive.

I hope that this information is of assistance to the Committee.

Regards.

Paul Lucas
**Deputy Premier**
**Minister for Health**

## 12. 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 |
| **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

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.

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

**Hon Andrew Fraser MP**
Member for Mount Coot-tha

Queensland Government

**Treasurer of Queensland**

TRX-12450



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

Dear Jo-Ann

Thank you for your letter of 12 April 2010 enclosing pages of the Committee's Legislation Alert No. 5 of 2010 relating to the *Land Tax 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

*Land Tax Bill 2010*

**Sufficient regard to rights and liberties of individuals**

*Clauses 22, 31(2), 42, 43 and 49*

The Committee's comments are noted. The above provisions provide the Commissioner of State Revenue with discretion to decide the following matters relevant to land tax liability: whether to assess land used for investment or commercial purposes that is owned by five or more co-owners as if held on trust; whether a person is an absentee because they do not ordinarily reside in Australia; whether a person is using land as his or her principal place of residence or for a substantial non-exempt purpose; and whether to extend the use requirement period that applies to vacant land owned by a charitable institution. However, as the Explanatory Notes point out, where appropriate the provisions specify criteria that are required to be considered by the Commissioner when exercising these discretions. Also, where possible, the criteria have been drafted in a clear and unambiguous way. Where a taxpayer is dissatisfied with the Commissioner's determination on any of these matters, 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.

The Committee's comments in relation to clause 81 are also noted. Although taxpayers' rights of review under the *Taxation Administration Act 2001* are restricted on certain grounds, the Bill notes how objections and appeals may still be made on those grounds.

**Delegation of administrative power**

*Clause 62*

The Commissioner's discretion to recover unpaid land tax from a mortgagee is a long standing revenue protection measure that currently exists under the *Land Tax Act 1915*. The Bill specifically allows the mortgagee to recover the amount from the taxpayer, which is usually done by adding the amount to the moneys secured under the mortgage.

**Retrospective operation**

*Clauses 34 and 50*

The Committee's comments on the potential retrospective operation of clauses 31(2) and 50, which allow the Commissioner to reassess the land tax liability for a previous period where the conditions for a concession or exemption are not met, are noted. Concessions and exemptions are granted in anticipation of compliance with the relevant conditions. The requirement to comply with these conditions is very clear in the legislation. As entitlement to the concession or exemption only exists if the conditions are met, reassessment is not considered retrospective. In fact, equity considerations require that the benefit of the concession or exemption be reassessed in the case of ineligible taxpayers.

**Clear meaning**

*Clause 10*

The Committee's comments are noted. The Bill imposes land tax on the owner of land, and contains an inclusive definition of "owner". However, as the Explanatory Notes point out, casting the definition of "owner" in exhaustive terms would raise the potential for avoidance through contrived structures. The definition reflects the current definition in the *Land Tax Act 1915* which has not been the subject of legal dispute.

**Delegation of legislative power**

*Public rulings*

The purpose of Public Rulings is to set out the Commissioner's interpretation of the laws that he administers. The rulings provide greater certainty for both taxpayers and tax administrators on the matters addressed in the ruling.

## 13. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2010

**Date introduced:** 10 March 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

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

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

**Hon Rachel Nolan MP**
Member for Ipswich

Our ref: MC48751

Your ref: B13.10

Queensland Government

**Minister for Transport**

05 MAY 2010

SCRUTINY OF
07 MAY 2010
LEGISLATION COMMITTEE
B13.10

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

Dear Jo-Ann

Thank you for your letter of 22 March 2010 about the Scrutiny of Legislation Committee's comments on the Transport and Other Legislation Amendment Bill 2010.

The Committee has noted that the Bill contains a number of potential breaches of fundamental legislative principles and has referred them to Parliament. The Committee has also identified material in the accompanying explanatory notes justifying potential breaches.

As you are aware, Parliament has now considered and passed the Bill.

I thank the Committee for its careful consideration of the legislation and for their comments.

Yours sincerely

Rachel Nolan

**RACHEL NOLAN MP**
**Minister for Transport**

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## PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

### 14. ENVIRONMENT AND RESOURCE MANAGEMENT AND OTHER LEGISLATION AMENDMENT REGULATION (NO. 1) 2010

**Date tabled:** 23 February 2010

**Disallowance date:** 20 May 2010

**Responsible minister:** Hon S Hinchliffe MP

### ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the amendment has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information about **section 14**.

2. In relation to whether the amendment has sufficient regard to the institution of Parliament, the committee invites the minister to provide information about **section 22**.

### CORRESPONDENCE RECEIVED FROM MINISTER

3. The committee thanks both ministers for the information provided.

4. The committee notes that neither minister, in correspondence received, appears to have addressed the section 22 issue about which further information was requested; namely, that an area of one or more local governments may be added to a river improvement area only if the local government has made a written request in those terms.

Hon Stirling Hinchliffe MP
Member for Stafford

Queensland Government

Minister for Infrastructure and Planning

Our ref: 10/15856

Your ref: SL13.10

19 APR 2010



SL 13.10

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

Dear Jo-Ann

Thank you for your letter of 31 March 2010 regarding the *Environment and Resource Management and Other Legislation Amendment Regulation (No. 1) 2010.*

I would point out that this matter does not fall within my portfolio responsibilities. Rather it falls within the portfolio responsibilities of the Honourable Desley Boyle MP, Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships.

I am aware that Minister Boyle has previously provided information in relation to your comments and attached is a copy for your information.

Yours sincerely

**Stirling Hinchliffe MP**
**Minister for Infrastructure and Planning**

Enc

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**Hon Desley Boyle MP**
Member for Cairns

Queensland Government

**Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships**

10/11837
LA/10/0797

18 MAR 2010

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

Dear Ms Miller

I refer to your letter of 11 March 2010 regarding the *Environment and Resource Management and Other Legislation Amendment Regulation (No. 1) 2010* (the Amendment Regulation).

I note that the Scrutiny of Legislation Committee has provided comment in relation to sections 14 and 22 of the Amendment Regulation.

On 25 June 2009, Governor in Council approved the making of the *Local Government (Areas) Amendment Regulation (No. 1) 2009* to implement the determination of the Local Government Electoral and Boundaries Review Commission to change the names of Dalby and Roma Regional Councils to Western Downs and Maranoa Regional Councils respectively. The changes commenced upon notification in the Government Gazette on 26 June 2009.

The Amendment Regulation amends the *Land Protection (Pest and Stock Route Management) Regulation 2003* and the *River Improvement Trust Regulation 1998* to consequentially change references to Dalby and/or Roma Councils to reflect the new Council names following the determination of the Local Government Electoral and Boundaries Review Commission.

Those agencies that administer the affected subordinate legislation were consulted on the proposed amendments and support the Amendment Regulation.

Should you require any further information in relation to this matter, please contact Ms Meg Frisby, Principal Advisor of my office on telephone number 3227 8819.

Yours sincerely

**Desley Boyle MP**
Minister for Local Government and
Aboriginal and Torres Strait Islander Partnerships
Member for Cairns

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## 15. 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.

### 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 Cameron Dick MP**
Member for Greenslopes

Queensland Government

**Attorney-General**
**and Minister for Industrial Relations**

In reply please quote: J/10/02207, 529343/1
Your reference: SL38.10

0 4 MAY 2010

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



SL 38.10

Dear Mrs Miller Jo-Ann,

**Re: Electrical Safety (Installation of Ceiling Insulation) Notice 2010 SL38.10**

Thank you for your letter dated 12 April 2010, enclosing the Scrutiny of Legislation Committee's (the Committee) examination of the *Electrical Safety (Installation of Ceiling Insulation) Notice 2010* (the Ministerial Notice).

I note the issues arising from the Committee's examination of the Ministerial Notice in relation to the application of fundamental legislative principles.

I believe the issues identified have been addressed and that the Ministerial Notice provides sufficient regard to the rights and liberties of individuals and the Ministerial Notice has been drafted to convey sufficient clarity of meaning.

To ensure ready access by a 'relevant person' to the applicable AS/NZS300:2007 (Wiring Rules) clause for compliance with section 5 of the Notice, the Department of Justice and Attorney-General (DJAG) negotiated with SAI Global, publisher of the Wiring Rules, for a licence allowing unlimited reproductions of clause 4.5.2.3 and associated figure 4.7 of the wiring rules. Accordingly, Wiring Rules content is available freely on DJAG's website along with a significant amount of other guidance material regarding the ceiling insulation issue.

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Following the commencement of the Ministerial Notice on 9 March 2010, DJAG distributed an electrical safety e-Alert explaining the requirements of the notice to over 2,200 insulation installers who operate in Queensland, as well as to more than 13,000 Electrical Safety Office subscribers and 6,000 Workplace Health and Safety Queensland subscribers. The e-Alert also contained a link to the Ministerial Notice and directed recipients to DJAG's website where further information is available, including the applicable wiring rules extract.

Although the meanings of 'final subcircuit', 'submains' and 'consumers mains' are not defined in the Ministerial Notice, these terms are readily understood by a licensed electrical contractor who is required to be engaged by the 'responsible person' in order for them to comply with sections 8 and 9 of the Ministerial Notice.

Additionally, DJAG recently negotiated with SAI Global for a licence allowing clauses 1.4.33, 1.4.88 and 1.4.89 (definitions of 'final subcircuit', 'submains' and 'consumers mains') to be made freely available to the obligation holders under the *Electrical Safety (Installation of Ceiling Insulation) Notice 2010*. Accordingly, these definitions will be available shortly on DJAG's website.

Advice and guidance material on operational risk assessments has been provided directly to all known insulation installers operating in Queensland and is also provided on DJAG's website.

I trust this information is of assistance and addresses the issues raised by the Committee.

I thank the members of the Committee for their assistance in reviewing the Ministerial Notice for compliance with the requirements of the *Legislative Standards Act 1992* and for their work in ensuring quality legislative outcomes for Queensland.

Yours sincerely

**Hon Cameron Dick MP**
**Attorney-General**
**and Minister for Industrial Relations**