Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

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

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COMMITTEE RESPONSIBILITY

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

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

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

1. Examination of legislation

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

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

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

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

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

2. Monitoring the operation of statutory provisions

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

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

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

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

<table>
<tr><td rowspan="2">Rights and liberties of individuals</td><td colspan="2">Bills and subordinate legislation
make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review
are consistent with the principles of natural justice
don’t reverse the onus of proof in criminal proceedings without adequate justification
confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer
provide adequate protection against self-incrimination
does not adversely affect rights and liberties, or impose obligations, retrospectively
does not confer immunity from proceeding or prosecution without adequate justification
provide for the compulsory acquisition of property only with fair compensation
have sufficient regard to Aboriginal tradition and Island custom
are unambiguous and drafted in a sufficiently clear and precise way</td></tr>
<tr><td>Institution of Parliament</td><td>Bills
allow the delegation of legislative power only in appropriate cases and to appropriate persons
sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly
authorise the amendment of an Act only by another Act</td><td>Subordinate legislation
is within the power that allows the subordinate legislation to be made
is consistent with the policy objectives of the authorising law
contains only matter appropriate to subordinate legislation
amends statutory instruments only
allows the subdelegation of a power delegated by an Act only –
in appropriate cases to appropriate persons
if authorised by an Act.</td></tr>
</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. EDUCATION AND TRAINING LEGISLATION AMENDMENT BILL 2010

Date introduced: 18 May 2010

Responsible minister: Hon G Wilson MP

Portfolio responsibility: Minister for Education and Training

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** which may affect rights to privacy of personal information;
   - **clause 5** which may make individuals subject to a penalty; and
   - **clause 11** which would allow a school principal to exclude a student if satisfied that sufficient grounds existed.
2. The committee invites the minister to provide information about whether clause 11 is drafted in a sufficiently clear and precise way.

BACKGROUND

3. The bill would effect various reforms to education legislation, in particular, giving State school principals the power to exclude a student for a period of up to a year or permanently.

LEGISLATIVE PURPOSE

4. The bill is intended to amend the (explanatory notes, 1):
   - *Child Care Act 2002* to enable the recording, use and disclosure of unit record level data;
   - *Education (General Provisions) Act 2006* to give State school principals the power to exclude a student enrolled at the principal's school for a period of not more than one year or permanently; and
   - *Vocational Education, Training and Employment Act 2000* to achieve consistency with national arrangements.

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 privacy rights of individuals.

7. Clause 5 would insert in the *Child Care Act* new sections which would allow for the use and disclosure of 'URL data' in approved kindergarten programs. New section 170A defines 'URL data' which is, generally, data on individual children. It includes their name, date of birth, address and demographic information (such as Indigenous status, language background and whether the child has a disability). The explanatory notes indicate (at 2) that the main source of URL data to meet obligations under the Agreement will be the Early Childhood Education and Care Services Census.

8. New sections 170B, 170C, 170D and 170E would allow for disclosure of URL data to the chief executive, 'central governing bodies', the Australian Bureau of Statistics and the Australian Institute of Health and Welfare.[1]

9. Section 170C(1) would allow the chief executive to use URL data for the following purposes:

- quality assuring of funding provided to relevant services and central governing bodies for approved kindergarten programs;
- planning for, monitoring of outcomes of, and reporting on, early childhood initiatives; and
- preparing the data for disclosure under section 170D.

10. Section 170E(1) would allow an authorised officer of a central governing body to use URL data received under the legislation for the following purposes:

- quality assuring and distributing funding received from the department for approved kindergarten programs;
- planning, developing and implementing services for children, parents and guardians;
- planning, developing and implementing professional development programs for staff members of relevant services;
- implementing curriculum development initiatives; and
- reporting on central governing body's performance.

11. New section 170E(2) stipulates that a central governing body may only report on URL data if the data has been aggregated and does not identify, directly or indirectly, any person to whom it relates. Subsection (3) would create a new offence by providing that a person who is or has been an authorised officer of a central governing body and who receives or received URL data under this subdivision must not record or use the data, or intentionally disclose the data to anyone, other than in accordance with section 170E(1), or recklessly disclose the data to anyone. The maximum penalty would be 100 penalty units.

12. In relation to the above, the explanatory notes provide lengthy information and justification for any inconsistency with fundamental legislative principles (at 8-10):

There may be a perception that the proposed amendments to allow for recording, use and disclosure of URL data about individual children and staff members may infringe on individual's rights and liberties, particularly the right to privacy. URL data would clearly be considered to be personal information and thus subject to the requirements under IPP 10 and 11.

However, these principles are subject to any overriding legislation and in this instance it is considered that the Bill establishes adequate safeguards to ensure that the information is only recorded, used and disclosed for the purposes set out in the legislation. Further, the Bill prohibits a person who is or has been an authorised officer of a central governing body and who receives or received URL data from recording or using the data or intentionally disclosing the data to anyone other than as prescribed, or recklessly disclosing the data. A maximum penalty of 100 penalty units applies in the case of a contravention. This is consistent with the current confidentiality requirements under section 167 of the Child Care Act 2002*.*

The Bill also makes it clear that when the chief executive is using URL data for the purposes of reporting on early childhood initiatives, URL data may be reported by the chief executive only if it has been aggregated and does not identify, directly or indirectly, any person to whom it relates. Consistent with IPP 2, relevant services will be required under the kindergarten funding agreement to provide a privacy notice to parents when collecting URL data to ensure that parents are aware of the reasons why the data is being collected, how it will be used and the circumstances in which it would be disclosed.

A child care service provider may also be captured by the provisions of the Privacy Act 1988 *(Cwth) if it is a business with an annual turnover of more than $3 million. A business with an annual turnover of less than $3 million is exempt from the* Privacy Act 1988 *(Cwth), unless the business:*

• is related to another service that has an annual turnover of $3 million;

• provides a health service or holds health records;

• discloses personal information for a benefit, service or advantage;

• provides someone else with a benefit, service or advantage to collect personal information; or

[1] 'Central governing bodies' would be entities, prescribed under regulation, that receive funding for approved kindergarten programs provided by one or more relevant services to which an entity provides all or part of the funding.

• is a contracted service provider for a Commonwealth contract.

Section 16 of the Privacy Act 1988 *(Cwth), also requires the Australian Bureau of Statistics and the Australian Institute of Health and Welfare (as agencies) not to do an act or engage in practice that breaches a Commonwealth Information Privacy Principle (Commonwealth IPP). Commonwealth IPPs encompass how and when an agency can collect personal information, how it should be used and disclosed, and how it should be stored and secured. The National Information Agreement on Early Childhood Education and Care provides that following quality assurance, the Australian Bureau of Statistics is to return URL data to the supplying agency. Information provided to the Australian Bureau of Statistics under the terms of that Agreement will be used for purposes of the* Census and Statistics Act 1905 *(Cwth), and to support the Statistician's function under the* Australian Bureau of Statistics Act 1975 *(Cwth).*

Section 19 of the Census and Statistics Act 1905 *(Cwth) provides that a person commits an offence if the person is or has been the Statistician or an officer and the person either directly or indirectly divulges or communicates to another person (other than the person from whom the information was obtained) any information given under that Act. The penalty is 120 penalty units or imprisonment for two years, or both. In addition, section 29 of the* Australian Institute of Health and Welfare Act 1987 *(Cwth) provides a penalty of $2000 or imprisonment for 12 months or both for breach of the confidentiality provision. The confidentiality provision prohibits a person either directly or indirectly from making a record of the information or divulging or communicating that information to any person, producing that document to any person, or being required to divulge or communicate any of that information to a court.*

13. **Clause 5** would insert, as indicated in the table below, a new offence in the *Child Care Act*.

Clause	New section	Offence	Proposed maximum penalty
5	170E(3)	Prohibited recording, use or disclosure of URL data by authorised officer of central governing body	100 penalty units ($10 000)

14. The explanatory notes provide (at 10) the following information regarding the consistency of clause 5 with fundamental legislative principles:

The proposed penalty for breach of confidentiality may give rise to the question of whether the penalty level has sufficient regard to the rights and liberties of persons potentially subject to the penalty. A penalty is required to be proportionate to the offence. Legislation should therefore provide higher penalties for an offence of greater seriousness than for a lesser offence. Penalties in legislation should be consistent with each other. Section 170E(3) is consistent with existing section 167 of the Child Care Act 2002*, which imposes a duty of confidentiality for the chief executive, a public service employee in the department and an authorised officer. The maximum penalty under section 167(2) is 100 penalty units or two years imprisonment. It is considered that the level of the penalty in this instance of 100 penalty units is proportionate to the offence and can be justified on the basis that it ensures URL data is not recorded, used or disclosed other than as authorised under the legislation.*

Natural justice

15. 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.

16. **Clause 11** (chapter 12, part 3, new division 1A) would allow a school principal to exclude a student if satisfied that sufficient grounds existed (see new section 288A).

17. New section 288B specifies the grounds for which a principal may exclude a student from the school under new division 1A, namely:

- disobedience by the student;
- misconduct of the student;
- other conduct of the student that is prejudicial to the good order and management of the school;
- disobedience, misconduct or other conduct so serious that suspension of the student from the school would be inadequate to deal with the behaviour.

18. New section 288B(2) would allow a principal to exclude a student because of the student's contravention of a behaviour improvement condition, for the student's challenging behaviour. Detailed provision is made in the legislation for the exercise of the power.

19. New section 288C stipulates when a principal can exclude a student under division 1A. New section 288C(1) provides that section 288C would apply if the principal:

- was reasonably satisfied that grounds exist to exclude the student from the school; and
- did not reasonably believe it would be inappropriate to make a decision to exclude the student from the school.

20. The section example specifically provides that it would be inappropriate for the principal to make a decision to exclude the student from the school if the principal would be prevented from doing so by the principles of natural justice relating to bias. The section note provides that if the principal cannot act under division 1A because of subsection (1)(b), the principal can make a recommendation to the principal's supervisor under division 2 that the student be excluded from the school. New section 288C(2) would require the principal to give the student a notice about the proposed exclusion and to suspend the student pending a final decision about the proposed exclusion.

21. Under subsection (3), the notice proposing exclusion must state:

- that the principal proposed to exclude the student for a stated period of not more than one year or permanently;
- the student was suspended from the school pending a final decision;
- the reasons for the proposed exclusion;
- that the student may make submissions to the principal about the proposed exclusion and suspension within 5 school days after the giving of notice or the longer period allowed;
- the title, name and address of the principal; and
- the way in which the submission might be made.

22. Under new section 288C(4), where the student was a child, the principal also must take reasonable steps to meet with the student's parents to discuss the student's behaviour that led to the giving of the notice. This must take place as soon as practicable after the notice proposing exclusion.

23. However, new section 288C(5) would provide that the principal would not be required to meet with the student's parents to discuss the student's behaviour if the principal was satisfied it would be inappropriate in the circumstances to do so; for example, if the student was living independently of his or her parents. Under new section 288C(6), if the principal need not meet with the student's parents, the principal must take reasonable steps to meet with the student to discuss the behaviour that led to the giving of the notice. The student may be accompanied by an adult during the meeting.

24. New section 288D would provide that if the principal suspended the student from the school under section 288C, the principal must arrange for the student's access to an educational program that would allow continuation of his or her education during the suspension.

25. New section 288E would allow a student to make submissions against a proposed exclusion and suspension in the way stated in a notice.

26. New section 288F (2) would provide that the principal might (no later than 20 school days after the day the notice was given to the student) exclude the student from the school for a period of not more than one year or permanently. Subsection (3) stipulates that, if the principal decides to exclude the student from the school, the principal must give the student a notice stating each of the following:

- the student is excluded from the school for a stated period of not more than one year or permanently;
- the reasons for the exclusion;
- that the student may make a submission to the chief executive asking the chief executive to review the decision under division 5;
- the title, name and address of the chief executive; and
- the way in which the submission may be made.

27. New section 288H provides that if a student is excluded, the enrolment is taken to be cancelled.

28. It is evident that clause 11 has the potential to seriously impact upon a child's fundamental right to education. In this regard, it is particularly noted that the bill enables a decision to be made, in serious cases, to exclude a student from all State schools.

29. Free and compulsory primary education, together with available and accessible secondary and higher education, and the liberty of parents to choose schools for their children is recognised as a basic

human right.[2] However, this needs to be balanced by the gravity of conduct, including conduct endangering the rights and liberties of others, which might result in a principal considering a child as warranting exclusion from the school.

30. The explanatory notes concede (at 11-2) that a decision by a state school principal to exclude a student may have a detrimental effect on the student's access to education. Justification is provided for the proposed provisions:

The principles of natural justice require that something should not be done to a person that will deprive a person of some right or interest or legitimate expectation of a benefit without the person being given the opportunity to present the person's case to the decision maker.

The Bill ensures that procedural fairness is afforded to students during the decision making process, in line with the current review process for a decision by a principal's supervisor. Under proposed section 288E, a student who has been given a notice proposing exclusion will have the opportunity to make submissions to the principal against the proposed exclusion and suspension.

The Bill provides that the principal is to consider any submission made by the student (or another person who may make a submission in relation to the notice) before making an exclusion decision. After considering any submission, the principal may decide not to exclude the student from the school.

The Bill also allows students who have been excluded by a State school principal to apply to the chief executive, or his or her delegate, for review of the principal's decision. This is consistent with the right of appeal from a decision by a principal's supervisor to exclude a student.

There is no external review of the decision of the chief executive to the Queensland Civil and Administrative Tribunal (QCAT), unless a decision is made to exclude the student from all State schools. Again, this is consistent with the existing appeal rights for exclusion decisions made by principals' supervisors. This could be considered to be a breach of fundamental legislative principles. However, it is considered that any potential breach is justified for the following reasons.

The external review provision is intentionally limited to the most significant decisions made under the Education (General Provisions) Act 2006*, such as a decision to exclude a student from all State schools. These decisions have the potential to severely limit the ability of a person to access State education. A decision by a principal to exclude a student from one school only would have less impact on a student's ability to attend and access State school education. The student would continue to have access to an education program, such as another State school in the area, distance education and attendance at youth education and training centres.*

The Department of Education and Training has practices and procedures to assist students to re-engage in State education. A case manager is appointed in the region to work with other agencies as required to oversee and monitor the student's continuing education program. The Department of Education and Training is also progressing a number of other initiatives to improve behaviour management in schools. The Department of Education and Training will develop polices and procedures to strengthen decision making processes by State school principals when considering exclusion of a student:

Guidelines are being developed to assist in the decision making process. These will provide clarification of the legislative provisions about when the decision to exclude a student must be made by a principal's supervisor.

State school principals will be provided with training to enhance their administrative decision making skills. This will ensure transparency and consistency in the decision making process.

The principal would be required to notify the region when he or she sends the notice proposing exclusion to trigger the appointment by the region of a case manager for the student.

The case manager would be required to meet with the parent to discuss the student's behaviour that led to the exclusion and facilitate the student's placement in another school or education program once the decision to exclude has been made.

Finally, there is a need to provide an expedient resolution of exclusion decisions for the student, student's parents and the school. Allowing an appeal to QCAT of an internal review by the chief executive of a principal's decision to exclude may result in a decision regarding the student's exclusion not being finalised for some time. This would not offer a practicable solution for the student, parents and the relevant school in facilitating the re-engagement of the student in another school or educational environment.

Clear meaning

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

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[2] Article 13 of the International Covenant on Economic, Social and Cultural Rights recognises a right to education. As to the content of the right, see: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf

32. **Clause 11** may not be drafted in a sufficiently clear and precise way. Chapter 12, part 3, new division 1A would include new section 288B which specifies the grounds on which a principal may exclude a student from a school; namely:

- disobedience by the student;
- misconduct of the student; or
- other conduct of the student prejudicial to the good order and management of the school.

33. The committee notes that new section 288B(c) would give a principal a wide discretion, with the wording capable of varying interpretations. The term 'disobedience' is not defined in the legislation nor clarified in the explanatory notes.

34. Similarly, new section 288C(4) to (6), concerning notice of a proposed exclusion and suspension pending a final decision, provide that the principal must take 'reasonable steps' to meet with the student's parents to discuss the student's behaviour that led to the giving of the notice. However, the principal would not be required to meet with parents if satisfied it would be 'inappropriate' in the circumstances to do so. In the latter case, the principal must take 'reasonable steps' to meet with the student instead. The terms 'reasonable steps' and 'inappropriate' are quite broad and might result in the legislation being interpreted and applied inconsistently.

35. The committee invites the Minister to provide further information about whether new section 288B(c) and new section 288C(4) to (6) are drafted in a clear and precise way and/or what additional information may be available to assist the exercise of administrative power under these proposed provisions, such as information contained in Guidelines or Policies and Procedures Manuals.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

36. 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.

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

38. 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

39. In respect of whether the bill is substantially uniform or complementary with legislation of the Commonwealth or another State, the explanatory notes first state that the legislation is consistent with the National Information Agreement on Early Childhood Education and Care (at 1-2):

> *On 6 November 2009, the Ministerial Council for Education, Early Childhood Development and Youth Affairs endorsed a National Information Agreement on Early Childhood Education and Care to support the development of nationally consistent, quality early childhood education and care information. Queensland signed the*

Agreement on 19 February 2010. A copy of the signed Agreement can be obtained from the Ministerial Council for Education, Early Childhood Development and Youth Affairs website.

The National Information Agreement on Early Childhood Education and Care requires jurisdictions to develop the capability for the collection and reporting of unit record level (URL) data. Under the Agreement, "URL" refers to data on individual children, which includes their name, date of birth, address and demographic information (such as Indigenous status, language background and whether the child has a disability). The main source of URL data to meet obligations under the Agreement will be the Early Childhood Education and Care Services Census.

A new funding scheme has been approved to support kindergartens and long day care services to deliver approved kindergarten programs in Queensland. URL data is required to be recorded for the purposes of quality assuring approved kindergarten provider funding entitlements in 2011. URL data for these purposes is at the level of individual enrolments, as well as the name and qualifications of individual staff members who deliver an approved kindergarten program. The primary source of this information will be the quarterly reporting requirements attached to kindergarten funding agreements.

The legislative capacity is therefore needed to enable Queensland to collect and report URL data in order to meet its obligations under the National Information Agreement on Early Childhood Education and Care, and to ascertain correct funding entitlements for kindergarten programs.

40. The explanatory notes then state (at 3-4) that the legislation also ensures compliance with the National Skills Framework:

On 30 June 2006, the Council of Australian Governments identified that some jobs require specific sets (or clusters) of skills to meet industry standards, or regulatory and legislative requirements, and that failure to acknowledge this was inhibiting economic growth and productivity.

The concept of a skill set has since been introduced into many industry training packages. The Training Package Development Handbook, which sets out the National Quality Council's policy and specifications for the development of training packages, states that:

- *training package developers must determine the need for a skill set in training packages; and*
- *"skill set" is defined as a single unit of competency, or combinations of units of competency from an endorsed training package, which link to a licensing or regulatory requirement or defined industry need.*

The Bill will ensure Queensland's compliance with the National Skills Framework by expanding the definition of "statement of attainment" to include a "skill set" as an additional category of achievement that may be certified by a registered training organisation.

The National Training Information Service is the official national register of information on training packages, qualifications, courses, units of competency and registered training organisations. The register is maintained by the Commonwealth. The register is currently being redeveloped and it is expected to be replaced by a new database which may carry a new name. Currently, the Vocational Education, Training and Employment Act 2000 *refers to the register by name. The Bill will remove the reference to the "National Training Information Service" and insert a new definition that accommodates future changes to the name of the database.*

2. ELECTORAL (TRUTH IN ADVERTISING) BILL 2010

Date introduced: 19 May 2010

Responsible member: Mr J-P Langbroek MP

Portfolio responsibility: Leader of the Opposition and Shadow Minister for the Arts

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:
   - **clauses 4, 6 and 8** affecting rights and liberties of individuals potentially subject to a penalty;
   - **clauses 4, 6 and 8** which would impose an evidential onus on a defendant; and
   - **clauses 4, 6 and 8** which may not be drafted in a sufficiently clear and precise way.

BACKGROUND

2. The legislation would introduce a series of offences into the *Electoral Act 1992*; the *Local Government Act 1993*; and the *Local Government Act 2009* applying to persons who authorise the publication of false or misleading electoral advertising.

LEGISLATIVE PURPOSE

3. The objectives of the bill are:[3]

   (To) ensure honest and truthful election advertising (and) give the Electoral Commission the power to direct the advertiser of the misleading or false information to withdraw it from publication or publish a retraction.

4. The bill would amend the:
   - *Electoral Act 1992;*
   - *Local Government Act 1993*; and
   - *Local Government Act 2009*.

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 4, 6 and 8** would create new offences, as indicated in the table below.

Clause	New section	Offence	Proposed maximum penalty
Electoral Act			
4	162A(1)(b)	Making misleading electoral advertisements or statements	100 penalty units ($10 000)

[3] Mr J-P Langbroek MP, Leader of the Opposition and Shadow Minister for the Arts, Second Reading Speech, *Record of Proceedings (Hansard)*, 19 May 2010, 1633-4.

Clause	New section	Offence	Proposed maximum penalty
Local Government Act 1993			
6	393A	Making misleading electoral advertisements or statements	100 penalty units ($10 000)
Local Government Act 2009			
8	260A	Making misleading electoral advertisements or statements	100 penalty units ($10 000)

7. The explanatory notes provide (at 1) the following justification for the level of penalty:

Any penalty imposed on a person can impact on the liberties of a person, but this penalty must be weighed against the detriment of allowing persons to deliberately mislead the electoral voters of Queensland during election campaigns.

Onus of proof

8. 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.

9. 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.

10. **Clauses 4, 6 and 8** would prescribe matters that may be proved by a person in defence of proceedings for authorising, causing or permitting the publication of a misleading electoral advertisement. It would be a defence for the defendant to prove that he or she took no part in deciding the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading. Accordingly, an 'evidential' onus of proof would rest with the defendant.

11. Where legislation may infringe the fundamental legislative principle regarding onus of proof, the committee considers information provided regarding justification for any reversal of the onus. In this instance, this potential breach of fundamental legislative principles was not identified in the explanatory notes.

Clear meaning

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

13. **Clauses 4, 6 and 8** state that it is a defence to a prosecution for authorising, causing or permitting the publication of a misleading electoral advertisement if it can be established that the defendant 'took no part' in deciding its content.

14. The committee notes that the words 'took no part' are relatively ambiguous and would be capable of varying interpretations. In practice it could be difficult to determine what degree of behaviour could be regarded as taking part in such decisions.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

15. 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)).

16. 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. GEOTHERMAL ENERGY BILL 2010

Date introduced: 19 May 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 28-9, 30-2 and 74-6 (and related provisions)** which state that all geothermal energy in Queensland belongs to the State and would allow geothermal exploration and production on any land in the State;
   - **clauses 118, 125, 130, 286 and 314** imposing civil penalties;
   - **chapter 10, part 2** which may affect rights of tenure holders and rural landholders as it would provide access to private land to facilitate resource sector growth;
   - **the large number of clauses** which would create offences;
   - **clauses 39, 186, 329 and schedule 1 and 335** which may make rights and liberties dependent on administrative power which is not subject to appropriate review;
   - **clause 320** which may be inconsistent with natural justice;
   - **clauses 322, 327 and 342** imposing an evidential onus on a defendant;
   - **clauses 299 and 355** conferring authorised persons with powers of entry without consent or warrant;
   - **clause 374** conferring a 'designated person' with immunity from civil liability; and
   - **clause 38(2)** which may provide for the 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 **clauses 16, 33 and 105** which may provide for inappropriate delegations of legislative power.
3. The committee invites the minister to provide further information regarding whether **clauses 480-1 and 562-3** have sufficient regard to Aboriginal tradition and Island custom.

BACKGROUND

4. The legislation would provide a framework for regulating geothermal exploration and production.

LEGISLATIVE PURPOSE

5. Clause 3 states that the bill is intended to:
   - encourage and facilitate the safe production of geothermal energy for the benefit of all Queenslanders by –
     - providing for the granting of authorities to explore for or produce geothermal energy; and
     - creating a regulatory system for the carrying out of activities relating to geothermal tenures;
   - ensure, for the carrying out of activities relating to geothermal tenures, that –
     - conflict with other land uses is minimised;
     - people affected by the activities are constructively consulted;
     - owners or occupiers of land adversely affected by the activities are appropriately compensated; and
     - land and resources are managed responsibly; and
   - encourage the use of renewable energy in the State.

6. The bill would repeal the:
   - *Geothermal Exploration Act 2004*; and
   - *Timber Utilisation and Marketing Act 1987*.

7. It would amend the:
   - *Aboriginal Land Act 1991*;
   - *Electricity Act 1994*;
   - *Environmental Protection Act 1994*;
   - *Geothermal Exploration Act 2004*;
   - *Greenhouse Gas Storage Act 2009*;
   - *Land Title Act 1994*;
   - *Mineral Resources Act 1989*;
   - *Pest Management Act 2001*;
   - *Petroleum Act 1923*;
   - *Petroleum and Gas (Production and Safety) Act 2004*;
   - *Torres Strait Islander Land Act 1991*;
   - *Valuation of Land Act 1994*;
   - *Water Act 2000*; and
   - *Workplace Health and Safety Act 1995*.

8. In addition, schedule 2 would make minor and consequential amendments to a further sixteen Acts.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

General information

9. The explanatory notes provide (at 15) general information regarding the consistency of the legislation with fundamental legislative principles:

   The Bill has been drafted with regard to fundamental legislative principles, as defined in the Legislative Standards Act 1992*. The Bill includes a number of provisions that may be regarded as breaching fundamental legislative principles. However, any breach can be justified on grounds of meeting the overall policy intent of the legislation and complying with community expectations for appropriate resource management as well as ensuring the State retains stewardship of the overall resource.*

   The Bill outlines a clear and accountable decision-making process in order to ensure a safe and sustainable geothermal tenure exploration and production regime which will benefit all Queenslanders.

Sufficient regard to rights and liberties of individuals

Rights and liberties

10. 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.*

11. **Clauses 28-9, 30-2 and 74-6 (and related provisions)** state that all geothermal energy in Queensland belongs to the State and would allow geothermal exploration and production on any land in the State.

12. Clauses 28 and 29 state that all geothermal energy belongs to the State.

13. Clause 28 provides that all geothermal energy on or below the surface of land in Queensland is, and has always been, the property of the State. If a person discovers geothermal resources, he or she does not acquire property in them.

14. Clause 29 provides that grants of land by the State contain a reservation to the State of all geothermal energy on or below any land. 'Grant' is defined as including an authority, lease, licence, permit or other instrument of tenure, however called (clause 29(4)). Further, clause 29(3) provides that the State may exercise an exclusive right to authorise people to enter land and carry out geothermal activities. It also

provides that the State may regulate, under the Geothermal Energy Act, geothermal activities carried out by others.

15. Committees of previous Parliaments examined similar provisions in the Petroleum and Gas Production and Safety Bill 2004, the Geothermal Exploration Act Bill 2004 and the Greenhouse Gas Storage Bill 2009.[4] In respect of that legislation, it was observed that, at common law, there is a presumption that a landowner owns everything on or below the surface of that land, including all minerals on or beneath the surface. The presumption was always subject to an exception in relation to 'royal metals' (precious metals, particularly gold and silver).[5]

16. In Australia, the application of the common law principle in many cases has been abolished by statute. The Crown in right of the State is now generally declared the owner of all minerals. Grants of land also routinely include express reservations to the Crown of all minerals.

17. The committee notes that these provisions would:

- arrogate 'geothermal energy' to the Crown ('geothermal energy' is defined in clause 11 as 'heat energy derived from the earth's natural (subsurface) heat') if it should not belong to the Crown already (the legislation is to replace the *Geothermal Exploration Act* which also reserved geothermal energy to the State);
- have a retrospective application as geothermal energy 'is take always to have been' the property of the State; and
- would allow the State to authorise exclusive entry onto land and then exclusive exploration and production.

18. Clauses 30-2 would provide for geothermal exploration. Chapter 2, part 1 would allow an authorised geothermal exploration permit holder to carry out the following activities in the permit's area:

- geothermal exploration (clause 31(a));
- evaluating the feasibility of geothermal production, including, for example, by production testing (clause 31(b)); and
- incidental activities (clause 32).

19. The notes to clause 30 indicate that:

- chapter 6, part 5, division 2 would authorise access to private land outside an area of geothermal tenure (see clauses 218-27 and explanatory notes at 88-91);
- chapter 8, part 1, division 2 would make general provision about authorised activities (see clauses 350-3 and explanatory notes at 128-9); and
- chapter 4 and chapter 8, part 1, division 2 would provide general restrictions on authorised activities, their relationship with owners' and occupiers' rights and as to who may carry out authorised activities for a geothermal tenure holder (see clauses 109-32 and explanatory notes at 53-60, and 350-3 and explanatory notes at 128-9).

20. In respect of these provisions, the committee notes in particular that clause 350 would provide that authorised activities for a geothermal tenure may be conducted irrespective of the rights of an owner or occupier of the land on which the activities are carried out.

21. Clauses 74-6 would provide for geothermal production. Chapter 3, part 1 would authorise activities for a geothermal lease. The permitted activities would include:

- geothermal exploration (clause 75(a));
- evaluating the feasibility of geothermal production, for example, by production testing (clause 75(b));
- geothermal production (clause 75(c)); and
- incidental activities (clause 76).

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4 See: *Alert Digest* 01/04 at 18-9, *Alert Digest* 02/04 at 4-5 and *Alert Digest* 01/09 at 44-6.

5 *Case of Mines* (1567) 75 ER 472.

22. Further provisions which may affect rights and liberties of owners and occupiers of land include:

- clause 200, conferring a right of entry to facilitate decommissioning of a geothermal well;
- clause 201 which would provide that a decommissioned well is transferred to the State upon the ending of the geothermal tenure or the removal of the land from the tenure area and, in particular, clause 201(4) which states that the provision applies despite the well being on land owned by a third party or the sale or other disposal of the land (see explanatory notes, 82);
- clause 221 which provides that the owners or occupiers of private land outside the area of a geothermal tenure may not unreasonably refuse to make an agreement for a geothermal tenure holder to cross the land to access a tenure area (see explanatory notes, 89);
- clause 304, stating that a thing removed from the property of the holder of a geothermal tenure, or of an agent or contractor for the holder, becomes the property of the State (see explanatory notes, 114); and
- clause 565 which would insert a new section 16 in *Valuation of Land Act* providing that a valuation for the unimproved value of land is not to include the value of geothermal energy, GHG storage reservoirs, minerals, petroleum or timber as defined by the listed relevant Acts.

23. For previous similar legislation examined, the committee has noted increasing statutory restrictions upon the common law rights of landowners to use their land in ways of their choosing. Similarly, clauses 28, 29 and 30 to 32 may subject landholders (including freehold owners, lessees and holders of native title rights) to intrusions and detriments.

24. The committee is aware that currently these issues are the subject of significant public discussion and, indeed, that the experience of some Queenslanders is that such intrusions and detriments are of a magnitude that their land is no longer habitable.

25. The explanatory notes acknowledge generally (see above) that provisions of the legislation may affect rights and liberties of individuals. More specifically, justification is provided in respect of individual provisions. In respect of clause 28, the explanatory notes state (at 26):

It may be considered that there is a breach of a fundamental legislative principle triggered by this clause, as the Bill claims as property of the State all geothermal energy. It deems, in existing or future tenures, a reservation to the State to carry out, and regulate, activities concerning geothermal tenures. This may be seen as adversely affecting the rights of a freehold landowner. At common law, there is a presumption that a landowner also owns everything on or below the surface of that land (including all minerals on or beneath the surface) subject to an exception for the 'royal metals'. Also, there is a general common law right of an owner of freehold land to use his or her land in whatever manner he or she thinks fit. In Queensland, however, the holder of freehold land may already hold it subject to a number of reservations to the State. The Parliament has already reserved petroleum (under the Petroleum and Gas (Production and Safety) Act 2004*), geothermal energy (under the* Geothermal Exploration Act 2004*) and greenhouse gas storage reservoirs (under the* Greenhouse Gas Storage Act 2009*) in this manner and is entitled to reserve geothermal energy under this Bill.*

26. For clause 29, the explanatory notes indicate (at 27):

Clause 29 provides that any land grants contain a reservation to the State of all geothermal energy on or below any land in Queensland, and that the State may exercise an exclusive right to authorise persons to enter and carry out geothermal activities, and regulate, pursuant to the Bill, geothermal activities carried out by others. This may be considered a breach of a fundamental legislative principle as it provides a right for the State or others authorised by the State to carry out geothermal activities that override the rights of owners and occupiers of land. However, the Bill includes extensive provisions about consultation with landholders, notice of entry and compensation for the carrying out of geothermal activities. The Bill also contains a series of safeguards, including notification of the activities, various restrictions on the activities involved and penalties for noncompliance with the safeguards.

27. Clause 30 is justified in the following way (at 28):

It might be considered that this is a breach of a fundamental legislative principle as the Bill provides that, subject to the Act, the right of an authority holder to carry out geothermal activities overrides the rights of owners and occupiers of land. However, the Bill contains extensive provisions about consultation with landholders and occupiers, notice of entry and compensation for the carrying out of geothermal activities. The Bill also contains a series of safeguards, including notification of the activities, various restrictions on the activities involved and penalties for noncompliance with the safeguards.

28. For clause 350, which provides for authorised activities to be carried out despite the rights of an owner or occupier, the explanatory notes say (at 128):

This may be considered to be a breach of a fundamental legislative principle in that the rights of a land owner or occupier could be construed as being overridden by the rights of the tenure holder as a result of this clause. However, the Bill includes extensive provisions about consultation with landholders, notice of entry and

compensation for the carrying out of geothermal activities. The Bill also contains a series of safeguards, including notification of the activities, various restrictions on the activities involved and penalties for noncompliance with the safeguards.

29. **Clauses 118, 125, 130, 286 and 314** would impose civil penalties.

30. Clauses 118 and 125 would require, in specified circumstances, payment of a fee up to ten times the initial fee prescribed.

31. Clause 118(1) would impose on a geothermal permit holder an obligation to give the minister a 'proposed later work program'. The proposed later work program must be accompanied by the relevant fee (clause 118(2)). If requirements of clause 118 are not met, the fee payable under the provision becomes 'an amount that is 10 times the prescribed fee' (clause 118(6)).

32. The explanatory notes state (at 56) that the proposed provision would have sufficient regard to rights and liberties of individuals:

While this may be considered a breach of a fundamental legislative principle with regard to having sufficient regard to the rights and liberties of individuals, this can be justified as the provision of an increased fee for late lodgement of a later work program is intended to be an incentive to encourage the timely submission of the later work program. The fee for late lodgement is also proportionate to the increased administrative burden.

33. Clause 125 would impose similar requirements on the holder of a geothermal lease. In respect of clause 125, the explanatory notes state (at 58):

It may be considered that there is a breach of a fundamental legislative principle triggered by this clause. However, this can be justified as the late lodgement fee is designed to encourage the timely submission of later development plans, by geothermal lease holders, for appropriate assessment and Ministerial approval. The time for lodgement of a later development plan has been determined with a view to completing the necessary work of assessing, and approving or rejecting the later development plan before the expiry of the current development plan approved for the geothermal lease. Late lodgement of a later development plan greatly reduces the time for this. To discourage the late lodgement of later development plans, and to reduce unnecessary increases in the Minister and administering department's workloads, an application fee greater than the lodgement fee is considered to be appropriate. The fee for late lodgement is also proportionate to the increased administrative burden.

34. Clause 130 would impose a civil penalty of either $1000 or 15 per cent of the annual rent (whichever is greater) for the non-payment of rent required under the legislation.

35. The explanatory notes acknowledge that the additional penalty may have insufficient regard to rights and liberties of individuals, but say (at 59):

[T]his penalty can be justified as it is intended to provide an incentive for the timely payment of the rent. It is considered that the penalty for non-payment of rent is proportionate to the gravity of the noncompliance. This aligns with practice in the Petroleum and Gas (Production and Safety) Act 2004 *and the* Greenhouse Gas Storage Act 2009*.*

36. Clause 286 would provide for an increased fee for late lodgement of a renewal application for a geothermal tenure. The fee would be an amount ten times the application fee (explanatory notes, 108-9):

The applicant for a renewal must pay an application fee prescribed under a regulation. If an applicant does not lodge their application within the timeframe specified in the clause, the applicant must pay an increased application fee. It may be considered that there is a breach of a fundamental legislative principle triggered by this clause. However, the time for lodgement of a renewal application has been determined with a view to completing the necessary work of assessing, and approving or rejecting the renewal application before the expiry of the current geothermal tenure. The late lodgement of a renewal application greatly reduces the time for this. To discourage late lodgement, and to reduce unnecessary increases in the Minister's and administering department's workloads, an application fee greater than the lodgement fee is considered appropriate.

37. Finally, clause 314 would provide for action that may be taken by the minister for non-compliance with geothermal tenures. Proposed actions include:

- reducing the area or term of a geothermal tenure;
- amending or imposing conditions on the tenure;
- requiring relinquishment of part of the tenure;
- suspension or cancellation of the tenure;
- withdrawing a work program or development plan approval and directing the tenure holder to provide a later work program or development plan; and
- payment of a monetary penalty if the tenure holder has agreed to that requirement being made instead of other compliance action.

38. The explanatory notes state (at 118):

It may be considered that there is a breach of a fundamental legislative principle triggered by the subclause that imposes a monetary penalty for noncompliance as it may be considered a quasi-judicial power. However, this provision is similar to the noncompliance powers under the Petroleum and Gas (Production and Safety) Act 2004 *and the* Greenhouse Gas Storage Act 2009 *and is considered proportionate to the gravity of offences.*

In addition, the Bill contains procedural fairness provisions for taking noncompliance action and rights of appeal against a Ministerial decision regarding noncompliance. This is considered adequate protection.

39. **Chapter 10, part 2** may affect rights of tenure holders and rural landholders as it would provide access to private land to facilitate resource sector growth.

40. The explanatory notes acknowledge generally (at 15) that provision for land access in the legislation may affect rights and liberties of individuals. General justification is provided:

The Bill includes a number of provisions that may be regarded as breaching fundamental legislative principles. However, any such breach can be justified on grounds of meeting the overall policy intent of the legislation and complying with community expectations for appropriate resource management as well as ensuring the State retains stewardship of the overall resource.

41. **A large number of clauses** would create approximately 51 new offences and have the potential to affect rights and liberties of individuals.

42. Clause 321 would create in the Geothermal Energy Bill the offence of carrying out unauthorised geothermal activities. The proposed maximum penalty would be 2000 penalty units ($200 000). In respect of the size of the proposed maximum penalty, the explanatory notes provide the following information (at 121):

[S]imilar penalties exist under the Petroleum and Gas (Production and Safety) Act 2004*, the* Mineral Resources Act 1989 *and the* Greenhouse Gas Storage Act 2009 *and are considered proportionate to the gravity of the offence.*

Administrative power

43. 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.

44. **Clauses 39, 186, 329, 335 and schedule 1** may make rights and liberties dependent on administrative power which is not subject to appropriate review.

45. Clause 39(1) would confer the minister with administrative power to grant a geothermal permit. Under clause 39(2), the minister must decide whether to approve the applicant's proposed initial work program before deciding to grant the geothermal permit. Clause 39(3) would allow the minister to impose conditions on the granting of the permit.

46. Clause 329 provides that a person whose interests are affected by a decision by the minister, where that decision is included in schedule 1, may appeal against the decision to the Land Court. Any person who has been, or is entitled to be given, an information notice under the legislation is considered a person affected by the relevant decision. However, schedule 1 does not include all decisions of the minister under the legislation.

47. The explanatory notes indicate that a right of administrative appeal would not exist in respect of decisions made under clause 39. However, it is suggested (at 32) that sufficient regard would be had to rights and liberties of individuals:

There is no appeal process under this Bill available to an unsuccessful geothermal permit applicant, or in relation to the provisions/conditions to be imposed on a geothermal permit. This may be considered to be a breach of a fundamental legislative principle. However, the application process for the grant of geothermal permits ensures that the best possible outcome can be obtained in relation to the management of the State's resources. The grant of a geothermal permit is a decision made by the Minister as the steward of the State's resources. Therefore, an appeal against this decision is not considered appropriate. Applicants aggrieved by a decision maintain their right to request a review of the decision under the Judicial Review Act 1991*. It is considered that this provides adequate protection for geothermal permit applicants. Appeal provisions contained in the Bill largely align with other Queensland resource-based legislation.*

48. Clause 186 would confer the minister with administrative power to amend a geothermal tenure by adding excluded land to its area. Under clause 186(3), it would be possible for the minister to add excluded land on his or her own initiative with the consent of the tenure holder or for the tenure holder to apply to the minister to add certain excluded land to a geothermal tenure. The minister may request

certain actions from the tenure holder and may amend the provisions of the geothermal tenure to reflect the addition of the land.

49. Again, a right of administrative appeal would not exist in respect of decisions made under clause 186 but the explanatory notes provide justification (at 77):

The Bill does not include appeal rights on the merits against this decision, which may be considered to be a breach of a fundamental legislative principle. However, the decision regarding whether land is appropriate for geothermal energy exploration or production is a decision made by the Minister as the steward of the State's resources. Therefore, an appeal against this decision is not considered appropriate. Applicants aggrieved by a decision in this regard maintain their right to request a review of the decision under the Judicial Review Act 1991*. It is considered that this provides adequate protection.*

50. Finally, although an administrative appeal to the Land Court would be available in respect of a decision not to grant a geothermal lease, the powers of the Land Court would be limited (explanatory notes, 123):

Clause 335 provides that if the Land Court is to decide an appeal against the Minister's decision not to grant a geothermal lease in an overlapping authority situation under this Bill, the Land Court cannot exercise its power to set aside the Minister's decision and substitute another decision, or its power to set aside the decision and return the issue to the Minister with directions, on the ground that any resource management decision for the application has to give the overlapping authority priority. This is considered an appropriate matter for the Minister to decide, given the Government's role as steward of the resources to which overlapping authorities relate.

Natural justice

51. 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.

52. **Clause 320** may be inconsistent with principles of natural justice.

53. Clause 320 would provide that, where a tenure holder failed to comply with a requirement to relinquish a stated part of a tenure area, the geothermal tenure would be cancelled. The explanatory notes acknowledge (at 119) an inconsistency with section 4(3)(b) but indicate justification exists:

It may be considered that there is a breach of a fundamental legislative principle triggered by this clause in that it provides for an automatic cancellation of a geothermal tenure without a right of appeal if the holder fails to comply with the relinquishment requirement. The holder of a geothermal tenure must be given a notice stating that it must comply with the relinquishment requirement within the specified timeframe and the holder has the opportunity to make submissions in relation to the proposed action under other clauses in this Part. Only if the holder does not comply with the relinquishment requirement is the tenure cancelled. The cancellation does not take effect until a further notice is given stating that the tenure is cancelled. Further, the decision is appealable.

Onus of proof

54. 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.

55. 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.

56. **Clauses 322, 327 and 342** would impose an evidential onus on a defendant.

57. Clause 322 would provide a defence to an offence of carrying out unauthorised geothermal activities (clause 321). The defendant would be required to prove (see explanatory notes, 120):

- the geothermal activity consisted of the injection into an underground reservoir of a greenhouse gas stream as defined in the *Greenhouse Gas Storage Act*;
- was for the purpose of greenhouse gas storage injection testing or greenhouse gas stream storage as defined under that Act; and
- that the activity was authorised under that Act.

58. Clause 327 would require the executive officers of a corporation to ensure that the corporation complied with 'designated provisions' of the legislation. Should a corporation commit an offence against a designated provision, each of the executive officers would be liable for the offence of failing to ensure that the corporation complied with the provision. An evidentiary provision in clause 327(3) would state that evidence that the corporation had been convicted of an offence against a designated

provision would be evidence that each of the executive officers failed to ensure the corporation complied with the designated provision. Clause 327(4) would provide defences for an executive officer.

59. The explanatory notes state (at 122):

It may be considered that there is a breach of a fundamental legislative principle triggered by this clause, as there is a reversal of the onus of proof.

However, this provision is a standard clause in many pieces of legislation, including the Greenhouse Gas Storage Act 2009 *and the* Environmental Protection Act 1994*. It is appropriate that an executive officer, who is in a position to influence the conduct of a corporation, should be accountable for offences committed against provisions of this Bill by the corporation. Apart from the Bill's general offences provisions, the duty to ensure compliance is confined to specific operational or administrative requirements such as the lodging of required reports.*

There are also standard defences within this clause relating to whether the executive officer was in a position to influence the corporation's conduct in relation to the offence or, if the executive officer was in this position, that the officer exercised reasonable diligence to ensure the corporation complied with the provision.

60. Clause 342 would contain evidentiary provisions where it was relevant in a proceeding for an offence to prove:

- a person's (or a representative of a person's) state of mind;
- that conduct engaged in by a representative was within the scope of the representative's actual or apparent authority – it may be taken to have been engaged in also by the person being represented, unless the person proved certain circumstances applied.

61. Justification for any reversal of the evidential onus is provided (explanatory notes, 125):

It may be considered that there is a breach of a fundamental legislative principle triggered by this clause, as this clause may be considered to imply a reversal of the onus of proof. However, it is appropriate that a person, who is in a position to influence the conduct of their representative, should be accountable for offences committed against provisions of this Bill by the representative. However, it should be noted that there are defences within this provision relating to whether the person was in a position to influence the representative's conduct in relation to the offence or, if the person was in such a position, that the person took reasonable steps to prevent the conduct.

Power to enter premises

62. 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.

63. **Clauses 299 and 355** would confer authorised persons with powers of entry without consent or warrant.

64. Clause 299 would allow an authorised person to enter land, but not a structure. The chief executive could authorise any person to enter either the area of the former tenure or land required to access the area of the former tenure in order to exercise remedial powers in accordance with the requirements in the legislation. Remedial powers would arise if a geothermal tenure holder or former tenure holder had not:

- complied with an obligation to remove equipment and improvements on the former tenure area;
- decommissioned any well in an area that no longer remained in the area of the tenure; or
- met any applicable environmental requirement under the *Environmental Protection Act 1994*.

65. Clause 299(3) would prevent an authorised person entering a residential structure without the consent of the occupier. Clause 299(4) would require the authorisation be in writing and subject to conditions deemed appropriate by the chief executive. Clause 300 would require notice of entry be provided at least ten business days prior to entry. In respect of the safeguards of rights and liberties of individuals, the explanatory notes state (at 112):

This may be considered a breach of a fundamental legislative principle as it may be considered a power to enter premises without a warrant. However, the powers in this Part contain a number of safeguards for the owner or occupier of the land (for example identification of the authorised person, exclusion of entry to residences without the consent of the occupier, a duty to avoid damages, notice of damage and compensation for damage). Further, it is anticipated that typically the owner of the land would instigate the remedial procedure and the purpose of the power is to protect their interests.

66. Clause 355 would allow the minister, by notice, to authorise a former holder of a geothermal tenure to either enter the land that was previously the subject of the geothermal tenure or the access land to the geothermal tenure in order to comply with:

- obligations to remove equipment and improvements from the land; or
- mandatory provisions of the land access code as defined in the legislation.

67. The explanatory notes indicate (at 129-30):

The right to enter land in these circumstances is subject to conditions and restrictions as outlined in this clause.

It may be considered that there is a breach of a fundamental legislative principle triggered by this clause, as there is a power to enter without a warrant and this will have an effect on the rights of owners or occupiers.

However, the authorisation contains a number of safeguards for the owner or occupier of the land (for example presentation of the authorisation to the occupier of the land, exclusion of entry to residences and the need for the former tenure holder to follow the Bill's relevant provisions regarding access to land as if the tenure were still in force). It is also anticipated that typically the owner or occupier would instigate the entry procedure and the main purpose of the authorisation would be to protect their interests.

68. In respect of the safeguards, the committee notes the application of clause 210 which contains an entry notice requirement. Failure to observe the requirement would constitute an offence with maximum penalty of 500 penalty units.

Immunity from proceeding or prosecution

69. 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.

70. **Clause 374** would confer immunity from civil liability on a 'designated person'.

71. Clause 374 provides that a 'designated person' (defined in clause 374(1) as the minister, a public service officer or employee, a person authorised to carry out an activity for the State, or a person who is required to comply with a direction given under the legislation) who is complying with a direction is protected from civil liability for an act done, or omission made, honestly and without negligence. Clause 374(3) provides that liability would instead attach to the State. Also, clause 374(5) provides a definition of 'civil liability'.

72. The explanatory notes state (at 134):

It may be considered that this provision breaches the fundamental legislative principle of equality before the law. However, this can be justified because, given the shifting of the liability to the State, nobody's interests are adversely affected by this provision.

Compulsory acquisition of property

73. 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.

74. **Clause 38(2)** may provide for the compulsory acquisition of property without fair compensation.

75. Clause 38(1) states that where an application for a geothermal permit is lodged and a restricted area declared over land the subject of the application prior to the application being decided, the application would lapse to the extent that the land was a restricted area. Clause 38(2) would provide that no compensation or reimbursement would be payable to the applicant.

76. Justification for this proposed provision is provided in the explanatory notes (at 31):

This provision may be considered a breach of a fundamental legislative principle as removing a right from an applicant to have their application considered. However, this can be justified – as the chief steward of the geothermal resource, it is considered that the Government should be able to restrict areas available for geothermal exploration and/or production. Without such a provision, the State's ability to allocate its geothermal resources in the best interests of Queenslanders may be hampered.

Aboriginal tradition and Island custom

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

78. **Clauses 480-1 and 562-3** may have insufficient regard to Aboriginal tradition and Island custom.

79. Respectively, these pairs of provisions would amend the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* to make corresponding provision to the provisions of the Geothermal Energy Bill which state that all geothermal energy in Queensland belongs to the State.

80. Accordingly, clauses 480 and 562 would provide that a deed of grant of transferred land must contain reservations to the State taken to be contained in the grant under the:

- Geothermal Energy Bill, section 29;
- *Greenhouse Gas Storage Act*, section 28;
- *Mineral Resources Act*, section 8;
- *Petroleum Act*, section 10; and
- *Petroleum and Gas (Production and Safety) Act*, section 27.

81. Clauses 481 and 563 would provide that a deed of grant of granted land and an Aboriginal or Torres Strait Islander lease must contain the reservations to the State taken to be contained in the grant under the provisions identified above.

82. As the explanatory notes do not contain information regarding the consistency of these provisions with section 4(3)(j) of the *Legislative Standards Act*, nor information regarding consultation with individuals whose rights and liberties may be affected, the committee invites the minister to provide relevant information.

Sufficient regard to the institution of Parliament

Delegation of legislative power

83. 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.

84. **Clauses 16, 33 and 105** may provide for inappropriate delegations of legislative power.

85. The legislation would make specific provision for 'large-scale geothermal production'. Clause 16 would provide for a regulation to determine whether geothermal production is large-scale. In respect of clause 16, the explanatory notes provide the following information (at 23):

The inclusion of the threshold criteria for large scale production in subordinate legislation may be considered to be a breach of a fundamental legislative principle as it could be a significant grant of power to subordinate legislation. However, as this industry is in its infancy in Queensland, the threshold is subject to change based on ongoing monitoring and assessment of the industry's development. Such change will be more efficiently made via an amendment to subordinate legislation than by amending the proposed Act. The inclusion of the threshold criteria in subordinate legislation is consistent with most other State jurisdictions. Further, including the threshold criteria in subordinate legislation allows sufficient time to undertake further consultation and analysis with stakeholders as to the appropriate criteria and threshold to define large-scale production for the purposes of the Bill.

86. Clause 33 would allow the minister to declare that land in an area is land for which a geothermal tenure application can not be made. Regarding this proposed provision, the explanatory notes provide (at 29) justification for what may appear a delegation of legislative power:

The ability for the Minister to declare certain areas of the State as restricted for the purpose of geothermal energy exploration and/or production is fundamental to ensure the State's continued stewardship of the geothermal resource and to minimise incompatibility of land use. When an area is declared restricted under this provision, the declaration must be published in the Queensland Government Gazette, or in another manner as outlined in the clause. This is to ensure transparency and public access to this information.

87. Clause 105 provides for a regulation to be made about any matter connected with geothermal royalty. The explanatory notes state (at 52):

Including royalty amounts in subordinate legislation rather than the Bill may be seen as a breach of a fundamental legislative principle, by conferring a significant amount of power on subordinate legislation. However, it is considered more appropriate to include royalty amounts and associated issues in subordinate legislation. As the geothermal industry is in its initial stages in Queensland, including detail regarding royalty amounts and associated criteria will enable these criteria to be assessed and amended, as appropriate, based on ongoing monitoring of the industry's development.

88. The committee notes that, generally, in respect of the appropriateness of the proposed provision for the delegation of legislation power in the bill, the explanatory notes provide the following information (at 15):

[A]s the geothermal industry is in its infancy in Queensland, it is necessary to include certain aspects of the regulatory regime in subordinate legislation, in order to allow for more efficient amendments to this regime based on ongoing monitoring and assessment of the geothermal industry's development.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

89. 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)).

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

4. WORKERS' COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 18 May 2010

Responsible minister: Hon C 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 20-1** which may affect entitlements of individuals taking legal action for damages for work-related injuries;
   - **clause 21** imposing an evidentiary onus on a worker seeking to claim damages for injury suffered while intoxicated; and
   - **clauses 21, 44 and 45** which may adversely affect rights and liberties of individuals retrospectively.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 21** which may inappropriately delegate legislative power.

BACKGROUND

3. The legislation is to enact reforms following the Business Review of WorkCover Queensland which made recommendations to ensure WorkCover's financial security.

LEGISLATIVE PURPOSE

4. The objectives of the legislation are to amend the *Workers' Compensation and Rehabilitation Act 2003*, *Workplace Health and Safety Act 1995* and certain subordinate legislation to ensure WorkCover Queensland's ongoing financial viability, while maintaining access to common law remedies for workers (explanatory notes, 1).
5. The subordinate legislation to be amended is the:
   - Civil Liability Regulation 2003; and
   - Workers' Compensation and Rehabilitation Regulation 2003.

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 20-1** may affect entitlements of individuals taking legal action for damages for work-related injuries.
8. In this regard, the explanatory notes provide general information regarding the consistency of the legislation with fundamental legislative principles (at 3):

   The Bill makes a range of amendments that may be considered adverse to the rights of individuals taking legal action for damages for work-related injuries. In large part, these amendments seek alignment with the Civil Liability Act 2003*. Generally, these amendments are to apply prospectively for injuries sustained or diagnosed after the date of commencement.*
9. Additionally, more specific information is provided regarding individual clauses to amend the *Workers' Compensation and Rehabilitation Act*.

10. Clause 20 would omit section 306 which provides that the Act does not reintroduce the absolute defence of contributory negligence. The explanatory notes discuss (at 9) the repeal and conclude that there is no need to reproduce the defence in the Act:

> *Until 1952, an employer was able to use the absolute defence of contributory negligence on the part of a worker to defeat a claim for damages at common law. The* Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952 *abolished the absolute defence of contributory negligence. However, that Act does not prevent the reduction of damages by up to 100 per cent due to the worker's contributory negligence. The defence of common employment implied that where an employee was injured through the negligence of a fellow employee, the employer could not be held vicariously liable. This defence was abolished in Queensland by the* Law Reform (Abolition of the Rule of Common Employment) Act 1951*. The abolition of these archaic defences is continued in statute by the* Law Reform Act 1995*. As such, there is no need to reproduce them in the Act.*

11. Clause 21 would insert new chapter 5, parts 8 and 9 to provide for civil liability for claims to damages and assessment of damages under that Act. New part 8 would concern the civil liability of persons or parties against whom a worker was seeking damages for injury; new part 9 would regulate the assessment of damages paid to a worker. Generally, in relation to clause 21, the explanatory notes state (at 9-10):

> *These provisions closely resemble certain provisions in the* Civil Liability Act 2003*. They have been brought into the Act in order to achieve the stated policy objectives of the Bill, and to maintain the clear distinction between the two statutes. It is considered inappropriate for the* Civil Liability Act 2003 *as a whole to apply to work injuries, as some of the limitations on liability conflict directly with common law principles regarding master and servant claims. For example, provisions regarding voluntary assumption of risk in the* Civil Liability Act 2003 *have not been brought over, as they are inappropriate for work situations.*

Onus of proof

12. 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.

13. 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.

14. **Clause 21** would impose an evidentiary onus on a worker seeking to claim damages for injury suffered while intoxicated.

15. New section 305J would create a rebuttable presumption of contributory negligence applying where:

- a worker who sustained an injury was intoxicated at the time of the breach of duty giving rise to the claim for damages; and
- contributory negligence was alleged against the worker.

16. Under new section 305J(2), contributory negligence would be presumed. However, new section 305J(3) would provide that the worker may rebut the presumption only by establishing on the balance of probabilities that the intoxication:

- did not contribute to the breach of duty; and
- was not self-induced.

17. As indicated in the explanatory notes (at 12), new section 305J is modelled on a provision in the *Civil Liability Act*.

Retrospective operation

18. 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.

19. **Clauses 21, 44 and 45** may have the potential to adversely affect rights and liberties of, or impose obligations on, individuals retrospectively.

20. Clause 21 would insert new section 306V of the *Workers' Compensation and Rehabilitation Act* to provide for annual indexation of general damages calculation provisions (new section 306P), damages for loss of consortium or servitium (new section 306M) and structured settlements (new section 306R).

21. New section 306V(6) and (7) would provide:

> (6) A regulation notified in the gazette after 1 July in a year and specifying a date that is before the date it is notified as the date from which the amount prescribed for the provision is to apply has effect from the specified date.
>
> (7) Subsection (6) applies despite the *Statutory Instruments Act 1992*, section 32.

22. Section 32 of the *Statutory Instruments Act* relates to prospective commencement of statutory instruments.

23. 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.

24. In relation to new section 306V, the explanatory notes provide general information about the proposed provision (at 14):

> *New section 306V provides the method by which annual indexation should occur for amounts used for the purposes of general damages calculation provisions, damages for loss of consortium and structured settlements. Monetary amounts are to be adjusted on 1 July each year by the percentage change in QOTE over the preceding four quarters.*

25. Clauses 44 and 45 may extinguish retrospectively some statutory causes of action.

26. Clause 44 would insert new part 3, division 5 of the *Workplace Health and Safety Act* (new section 37A) stating that no provision of the Act would create a civil cause of action based on a contravention of the provision.

27. Clause 45 would insert a new part 17, division 7 (new section 197) stating that new section 37A would apply to current claims and proceedings for damages to which the *Workers' Compensation and Rehabilitation Act* applied if the proceeding commenced after 8 August 2008. That date is the date of the judgment of the Court of Appeal in *Bourk v Power Serve P/L & Anor* [2008] QCA 225.

28. The explanatory notes state (at 19):

> *[T]he* Workplace Health and Safety Act 1995*, as in force immediately before the commencement of the amendment, will continue to apply to a proceeding for damages if the trial in the proceeding started before 1 July 2010. Where a claimant has already commenced proceedings but has not yet gone to trial, the amendments do not restrict the ability to make any necessary alterations to pleadings.*

29. Accordingly, the proposed provisions would extinguish a cause of action under the *Workplace Health and Safety Act* in respect of a contravention of the Act occurring before 1 July 2010 where proceedings:

- had not commenced before 1 July 2010; or
- commenced after 8 August 2008 but had not gone to trial prior to 1 July 2010.

30. In relation to the matters considered by the committee for retrospective provisions, the explanatory notes state (at 3):

> *The purpose of the amendment is to address a perception that strict liability attaches to an employer if a work injury has occurred, regardless of fault. The basis for this perception is the decision of the Queensland Court of Appeal in* Bourk v Power Serve P/L & Anor *[2008] QCA 225. This judgment affirmed that if a worker is injured at work and there is a causal connection between the injury and work, the employer has breached its duty under the* Workplace Health and Safety Act 1995*.*
>
> *This amendment applies retrospectively to all current proceedings for damages where a notice of claim was lodged after 8 August 2008 (the date of the Bourk judgment), unless the trial in the proceeding was started before 1 July 2010. This action is considered necessary to stem an increasing number of claims based on the strict liability perception.*
>
> *While the amendment removes a worker's right of action under the* Workplace Health and Safety Act 1995*, it does not affect any other cause of action the worker may have in relation to his or her injury, such as a breach of a duty of care in tort (negligence) or in contract. Where a claimant has already commenced proceedings, the amendments do not restrict the ability to make any necessary alterations to pleadings.*
>
> *Consequently, this amendment is justified on the basis that it will only affect those workers who are unable to establish that their employer was negligent in tort or had breached their duty of care under contract.*

In addition, the amendment is consistent with other Australian jurisdictions, the national Model Work Health and Safety Act *and the* Electrical Safety Act 2002 *and 45 would insert respectively new sections 37A and 197 of the* Workplace Health and Safety Act*.*

31. The committee received a submission from the Queensland Law Society regarding the legislation. The committee has considered the submission and has authorised its tabling and publication. It is available from: www.parliament.qld.gov.au/slc.

32. In the submission the Queensland Law Society expressed concern that clause 44 and, in particular, new section 197(2)(b), would not have sufficient regard to rights and liberties of individuals. The submission states:

In the circumstances of the Bill the QLS appreciates that the proposals are intended to address the issue of the difference in time between when a civil right accrues and the time when a proceedings relying on that right is initiated. In this context certain retrospective application of the legislation may be necessary, however selecting the correct trigger point in the process where this has sufficient regard to the rights and liberties of individuals is crucial.

Proposed section 197(b)(i)

In workers' compensation and workplace injury matters a number of steps must be undertaken, under either the Workers' Compensation and Rehabilitation Act 2003 *or the* Personal Injuries Proceedings Act 2002*, before a common law claim for damages may be initiated. A number of pre-proceedings steps will have had to be taken and decisions may have been made in reliance on the current state of the law before proceedings may be initiated. As an example, the decision to either accept or reject a statutory offer of lump sum compensation in the workers' compensation system will often be based upon advice about an injured workers' rights at common law.*

In the context of proposed section 197(b)(i) the retrospective application of the Bill will adversely affect rights and liberties of individuals and bring prejudicial results as the trigger for retrospectivity is set after a number of irrevocable decisions have been made and costs incurred by a claimant.

It is in our view a denial of procedural fairness for a cause of action which has been relied upon by an injured workers in a number of necessary pre-proceeding steps to be later denied to them.

On this basis the QLS contends that the proposed section 197(b)(i) does not have sufficient regard to the rights and liberties of individuals and breaches fundamental legislative principles.

Proposed section 197(b)(ii)

This provision denies a litigant a cause of action which existed at the time they commenced proceedings.

It is highly irregular for the law to be retrospectively amended for proceedings on foot and doing so brings with it the real danger for both parties that costs incurred up to this point will be wasted. This is heightened in the context of work that must be conducted in pre-trial disclosure and obtaining expert and medical evidence.

It is contrary to principles of natural justice for a proceeding to be determined on principles of law that differ from those which applied to a matter when an action was commenced. Retrospectively removing a valid cause of action from current proceedings is a denial of procedural fairness. This unfairness is heightened should litigants who initiated a valid action that becomes invalidated by operation of the legislation have adverse costs orders made against them.

It is the submission of the Society that litigants to existing proceedings will be adversely affected in both a financial and procedural sense by the retrospective application of the legislation. The proposed section 197(b)(ii) of the Bill is needlessly contrary to fundamental legislative principles and unnecessarily interferes with the rights of parties to existing proceedings.

Sufficient regard to the institution of Parliament

Delegation of legislative power

33. 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.

34. **Clause 21** may delegate legislative power in inappropriate cases. It would insert new sections 306M, 306P, 306R and 306V of the *Workers' Compensation and Rehabilitation Act*.

35. New sections 306M, 306P (including a definition of 'general damages calculation provisions') and 306R would allow amounts to be prescribed by regulation for certain purposes. Section 306V would empower the Governor in Council to amend the amounts prescribed.

36. 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.

37. In January 1997, the committee reported to the Parliament on Henry VIII clauses.[6] 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.

38. 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.

39. In this context, the committee observes that the explanatory notes suggest (at 13-4) that the proposed clause falls within one the acceptable categories. Further, information is provided which indicates that clause 21 constitutes an appropriate delegation of legislative power:

New section 306V provides the method by which annual indexation should occur for amounts used for the purposes of general damages calculation provisions, damages for loss of consortium and structured settlements. Monetary amounts are to be adjusted on 1 July each year by the percentage change in QOTE over the preceding four quarters.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

40. 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)).

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

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

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 14 APRIL TO MAY 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
63	Proclamation commencing remaining provisions		16/04/2010	31/08/2010	18/05/2010	1/09/2010
64	Superannuation (State Public Sector) Amendment Notice (No.2) 2010		16/04/2010	31/08/2010	18/05/2010	1/09/2010
65	Transport operations (Road Use Management-Vehicle Registration) Amendment Regulation (No.2) 2010		16/04/2010	31/08/2010	18/05/2010	1/09/2010
66	Queensland Competition Authority Amendment Regulation (No.1) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
67	Aboriginal Land Amendment Regulation (No.2) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
68	Building Amendment Regulation (No.2) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
69	Building and Other Legislation Amendment Regulation (No.2) 2010	RIS, EN	23/04/2010	31/08/2010	18/05/2010	1/09/2010
70	Urban Land Development Authority Amendment Regulation (No.2) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
71	Pest Management Amendment Regulation (No.1) 2010		30/04/2010	31/08/2010	18/05/2010	1/09/2010
72	Public Trustee Amendment Regulation (No.3) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
73	Health Legislation Amendment Regulation (No.1) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
74	Health Legislation Amendment Regulation (No.2) 2010		23/04/2010	31/08/2010	18/05/2010	1/09/2010
75	Motor Racing Events Amendment Regulation (No.1) 2010		30/04/2010	31/08/2010	18/05/2010	1/09/2010
76	Environmental Protection and Other Legislation Amendment Regulation (No.1(2010	RIS, EN	30/04/2010	31/08/2010	18/05/2010	1/09/2010
77	Water Amendment Regulation (No.2) 2010		7/05/2010	31/08/2010	18/05/2010	1/09/2010
78	Proclamation commencing remaining provisions		7/05/2010	31/08/2010	18/05/2010	1/09/2010
79	Nature Conservation (Protected Areas) Amendment Regulation (No.3) 2010		7/05/2010	31/08/2010	18/05/2010	1/09/2010
80	Proclamation commencing remaining provisions		6/05/2010	31/08/2010	18/05/2010	1/09/2010
81	Health Legislation Amendment Regulation (No 3) 2010		14/05/2010	31/08/2010	18/05/2010	1/09/2010
82	Proclamation commencing remaining provisions		14/05/2010	31/08/2010	18/05/2010	1/09/2010

SLNo 2010	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, MS)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
83	Corrective Services Amendment Regulation (No 1) 2010		14/05/2010	31/08/2010	18/05/2010	1/09/2010
84	Sustainable Planning Amendment Regulation (No 1) 2010		14/05/2010	31/08/2010	18/05/2010	1/09/2010
85	State Development and Public Works Organisarion Regulation 2010		14/05/2010	31/08/2010	18/05/2010	1/09/2010
86	Proclamation commencing remaining provisions		14/05/2010	31/08/2010	18/05/2010	1/09/2010
87	Births, Deaths and Marriages Registration Amendment Regulation (No 1) 2010		14/05/2010	31/08/2010	18/05/2010	1/09/2010
88	Wagering Amendment Rule (No 1) 2010		14/05/2010	31/08/2010	18/05/2010	1/09/2010

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

SUBORDINATE LEGISLATION UNDER CONSIDERATION

5. EXPLOSIVES AMENDMENT REGULATION (NO. 1) 2010

Date tabled: 26 March 2010

Disallowance date: 17 August 2010

Responsible minister: Hon A Fraser MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding:
   - sections 32 and 60 incorporating by reference documents which may not be readily accessible to members of the public;
   - section 34 which may make rights and liberties, or obligations, dependent on administrative power which is insufficiently defined and/or subject to inappropriate review; and
   - section 5 and whether it is drafted in a sufficiently clear and precise way.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

3. Sections 32 and 60 amended respectively section 92 and schedule 7 of the Explosives Regulation 2003. Two issues arise regarding the ability of individuals to determine their rights and obligations under the regulation, as amended.

4. First, sections 92 and schedule 7, as amended, make reference to AS 2187. The Australian Standard is available for purchase and, therefore, may not be readily accessible.

5. Second, schedule 7 now includes a definition of 'mobile manufacturing code'. The definition incorporates by reference a code published by the Australian Explosives Industry and Safety Group. Although an editor's note for the definition provides information about where to access the code, the identified website does not clearly signpost the code.

6. In relation to the incorporation of material by reference, the committee invites the minister to provide information about the ability of individuals to determine their rights and obligations under the regulation, as amended.

Administrative power

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

8. Section 34 amended section 92 of the Explosives Regulation to include further requirements for storage of explosives. Section 92(e) provides that a relevant holder must store an explosive, other than one mentioned in the section, under a safety measure approved by the chief inspector for the explosive. However, the regulation does not:
   - outline the way in which the approval may be sought; or
   - identify whether administrative review of a decision of the chief inspector would be available.

9. While information regarding the amendment regulation was provided to the committee, it did not address these issues. Accordingly, the committee invites the minister to provide relevant information.

Clear meaning

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

11. Section 5 amended section 12 of the Explosives Regulation which provides ways in which explosives may be classified. Following amendment, section 12 includes two new ways but does not define the term 'compatibility group'. By contrast, the term 'packing group' in new section 12(b) has been defined. The committee invites the minister to provide information as to whether section 12 as amended is drafted in a sufficiently clear and precise way.

6. 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. In *Legislation Alert* 06/10, the committee invited the minister to provide information about the lawfulness of the purported amendment regulation.
2. The committee notes that it had, in fact, received information from the minister. It stated that, in accordance with section 85 of the *Fair Trading Act 1989*, before making the order, the minister had given written notice accompanied by a copy of the order to persons considered to have a substantial interest in the matter and invited submissions to show cause why the order should not be made.
3. The committee is grateful to the minister for the information provided and makes no further comment regarding the subordinate legislation.

7. FORESTRY AND NATURE CONSERVATION LEGISLATION AMENDMENT REGULATION (NO. 1) 2010

Date tabled: 13 April 2010

Disallowance date: 18 August 2010

Responsible minister: Hon S Robertson MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding whether section 2 is drafted in a sufficiently clear and precise way.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Clear meaning

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

3. Section 2 states that the 'main purpose of parts 2 to 5 of th[e] regulation is to revoke the dedication of parts of the forest reserves mentioned in section 8(1) to allow each part of the forest reserve (a revoked forest reserve area) to become a protected area'.

4. As part 2 deals with timber reserves and part 3 sets apart and declares new areas of State forests, the committee invites the minister to provide information as to whether the legislation is drafted in a sufficiently clear and precise way.

8. GREENHOUSE GAS STORAGE REGULATION 2010

Date tabled: 13 April 2010

Disallowance date: 18 August 2010

Responsible minister: Hon S Robertson MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding whether:
   - section 29 may adversely affect rights and liberties of individuals; and
   - section 18 is drafted in a sufficiently clear and precise way.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

3. Section 29 prescribes a confidentiality period for section 261(1) of the *Greenhouse Gas Storage Act 2009*. Section 29(2) and (3) provide there is no confidentiality period in certain circumstances.

4. The committee invites the minister to clarify whether section 29 may have the potential to adversely affect the rights and liberties of individuals.

Clear meaning

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

6. Section 18 is to the effect that if the holder of a GHG authority carries out a seismic survey of the area of the authority, the authority holder must give the chief executive a seismic survey report for the survey. Section 18(4) requires certain things to accompany the report. Section 18(4)(b) requires that 'if an activity for the survey was carried out by a contractor of the tenure holder, a copy of any report given to the holder by the contractor for the activity' must accompany the report.

7. In the context of section 18(1), the reference to 'the tenure holder' and 'the holder' in section 18(4) may not be sufficiently clear and invites the minister to provide information in this regard.

9. STATE PENALTIES ENFORCEMENT AMENDMENT REGULATION (NO. 4) 2010

Date tabled: 13 April 2010

Disallowance date: 18 August 2010

Responsible minister: Hon C Dick MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding whether section 6 is drafted in a sufficiently clear and precise way.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Clear meaning

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

3. Section 6 amended schedule 5 of the State Penalties Enforcement Regulation 2000 by inserting a new entry for the *Sustainable Planning Act 2009*. The entry for section 580(1), items 6(b) and 16(b) refers to 'category A area'. Items 13 to 18 refer to 'actual clearing'. Neither term is defined.

4. The committee invites the minister to provide information as to whether the legislation is drafted in a sufficiently clear and precise way.

10. TRANSPORT OPERATIONS (ROAD USE MANAGEMENT—ROAD RULES) AMENDMENT REGULATION (NO. 1) 2010

Date tabled: 18 May 2010

Disallowance date: 1 August 2010

Responsible minister: Hon R Nolan MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding whether section 4 reverses the onus of proof in criminal proceedings without adequate justification.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Onus of proof

2. 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.

3. 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.

4. Section 4 amended section 266 of the Transport Operations (Road Use Management—Road Rules) Regulation 2009 to provide a limited defence to an offence against section 266(1).

5. Accordingly, an 'evidential' onus of proof rests with the defendant, but the Crown retains the 'persuasive' onus as to whether the commission of the offence is made out on the evidence.

6. As no information was received about the amendment regulation, the committee invites the minister to provide information as to whether the reversal of the onus of proof under section 266(4AA) is justified.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

11. 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
Date passed: 20 May 2010
Committee report on bill: 06/10 (at 1-7)
Date response received: 28 May 2010

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:

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 Stirling Hinchliffe MP
Member for Stafford

Queensland Government

Minister for Infrastructure and Planning

20 MAY 2010

SCRUTINY OF
28 MAY 2010
LEGISLATION COMMITTEE

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

Dear Jo-Ann

I refer to your Legislation Alert 06/10 with regard to the Building and Other Legislation Amendment Bill 2010 and I note that the Scrutiny of Legislation Committee has provided comment in relation to whether the Bill has sufficient regard to rights and liberties of individuals, and to the institution of Parliament.

Thank you for your comments in relation to the Bill and I take this opportunity to reiterate the commentary reflected in the explanatory notes in response to the matters you have raised and I refer you to specific responses in attached document.

In view of the matters raised, it is considered that the legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament in accordance with section 4(2) of the *Legislative Standards Act 1992.*

I trust this information is of assistance to you.

Yours sincerely

Stirling Hinchliffe MP
Minister for Infrastructure and Planning

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Clause	Response
Fundamental Legislative Principles raised by Committee	
New section 246AC(5) of the BA Offence provision	• This provision is intended to ensure pool owners do not 'shop around' to secure a pool safety certificate from a pool safety inspector other than the person who first inspected the pool; this helps maintain high quality safety inspections. The penalty proposed of 50 penalty units is intended to discourage owners from acting to undermining of the system by seeking out more lenient inspectors. It is considered appropriate in the circumstances.
New section 246AD(2) of the BA Offence provision	• This provision aligns with the BA s147 (2) & 150 where the building certifier must retain approval and inspection documents for a set time frame of 5 years from the relevant day. The penalty proposed is the same being 20 penalty units and it is therefore considered appropriate in the circumstances.
New section 246AJ(4) of the BA Offence provision	• This provision is intended to ensure pool fence inspectors purchase, use and display the prescribed identification number on the pool safety certificate. This is to ensure that the fee has been paid for the lodgement of the certificate and that it is a valid certificate. By having purchased numbers on the certificate auditing of the register and the accounts can be undertaken to ensure the system has the confidence of the end users. The penalty proposed of 50 penalty units is an important element in ensuring the integrity of the system and it is considered appropriate in the circumstances.
New section 246AP(2) of the BA Offence provision	• This provision aligns with BA s149 (1) where a building certifier must give the relevant local government a copy of all inspection details within 5 business day after a trigger date. The penalty proposed is 20 penalty units, whereas the penalty which can be imposed on a building certifier is 40 penalty units. The penalty is considered appropriate in the circumstances.
New section 246AR(2) of the BA Offence provision	• This provision is intended to ensure that owners of regulated pools register their pools within the set time frame. The establishment of an accurate register of all pools in Queensland is central to the proposed point of sale/lease inspection system being effective. The penalty proposed is 20 penalty units and is considered appropriate in the circumstances.
New section 246AU of the BA Offence provision	• The provision to be created by this subsection aligns with BA s125, 126, 134 &135 where a building certifier must not perform a building certifying function unless the person is appropriately licensed. The penalty proposed is the same, being 165 penalty units, and it is considered appropriate in the circumstances.
New section 246AV of the BA Offence provision	• The requirement for inspectors to have appropriate professional indemnity insurance is a critical consumer protection mechanism. This offence aligns it with BA s 173. Although there is no penalty provided in BA a penalty could be sought by the Building Services Authority (BSA) because BSA could cancel the building certifiers endorsement under this section. BSA then can take action under their complaint/audit process and determine whether the building certifier has engaged in unsatisfactory conduct or professional misconduct. If the BSA forms the opinion the building certifier has engaged in professional misconduct the matter is referred to QCAT to start disciplinary proceedings. As well as the ability to make orders the tribunal can impose a 80 penalty unit penalty for the first offence, 120 penalty units for

	the second offence and 160 penalty units for a subsequent offence. The penalty proposed of 100 penalty units is comparable to these penalties and it is considered appropriate in the circumstances.
New section 246AW(1) of the BA Offence provision	• This provision restricts the circumstances in which a pool safety inspector may give pool safety certificates. Pool safety inspectors must have inspected the pool themselves and they can only give a certificate if they are satisfied that the pool barriers and other safety equipment comply. The need for pool safety inspectors to perform their required role in compliance with the Act is fundamental to developing a pool safety inspection system and the penalty proposed of 165 penalty units is necessary and considered.
New section 246AW(2) of the BA Offence provision	• This provision restricts the circumstances in which a pool safety inspector may give nonconformity notices. Pool safety inspectors must have inspected the pool themselves and they can only give a notice if they are satisfied that the pool barriers and other safety equipment do not comply. The need for the pool safety inspector to perform their required role in compliance with the Act is fundamental to the developing a pool safety inspection system and the penalty proposed of 165 penalty units is necessary and considered appropriate in the circumstance.
New section 246CD(3) of the BA Offence provision	• This provision aligns with BA s181 where the building certifier may surrender the certifier's licence by notice to the BSA within 10 business days. The penalty proposed is the same, being 10 penalty units, and it is considered appropriate in the circumstances.
New section 246CF of the BA Offence provision	• This provision aligns with BA s183 where the building certifier must give the BSA notice of their change of address, or the cancellation, suspension or conviction recorded about a similar licence held in another State or New Zealand. The penalty proposed is the same, being 1 penalty unit for the change of address and 40 penalty units for the balance of the breaches, and it is considered appropriate in the circumstances.
New section 246CP(4) of the BA Offence provision	• This provision aligns with BA s195 where BSA may by notice require the building certifier produce a document for the investigation of a complaint or audit. The penalty proposed is the same, being 50 penalty units and it is considered appropriate in the circumstances.
New section 246CW(1) of the BA Offence provision	• This provison aligns with BA s 202 where a person must not, in relation to an investigation or audit under the BA state anything to the BSA that the person knows is false or misleading in a material particular. The penalty proposed is the same being 165 penalty units, and it is considered appropriate in the circumstances.
New section 246CX(1) of the BA Offence provision	• This provision aligns with BA s 202 where a person must not, in relation to an investigation or audit under the BA give a document to the BSA that the person knows is false or misleading in a material particular. The penalty proposed is the same being 165 penalty units and it is considered appropriate in the circumstances.

New section 246DS(5) of the BA Offence provision	• This provision is similar and aligns with BA s195 where BSA may by notice require the building certifier produce a document for the investigation of a complaint or audit. The penalty proposed is the same, being 50 penalty units, and it is considered appropriate in the circumstances.
New section 246DZ of the BA Offence provision	• The provision is similar and aligns with BA s125, 126, 134 &135 where a building certifier must not perform a building certifying function unless the person is appropriately licensed. In this case the person must not claim to be an eligible course provider or conduct an approved training course or issue certification unless they are an eligible course provider and the course has been approved. The penalty proposed is less than that which applies for building certifiers (80 penalty units in lieu of 156 penalty units) and it is considered appropriate in the circumstances.
New section 246EA of the BA Offence provision	• The provision is similar and aligns with BA s125, 126, 134 &135 where a building certifier must not perform a building certifying function unless the person is appropriately licensed. In this case the person must not claim to be an eligible course provider or conduct an approved training course or issue certification unless they are an eligible course provider and the course has been approved. The penalty proposed is less than that which applies for building certifiers (80 penalty units in lieu of 156 penalty units) and it is considered appropriate in the circumstances.
New section 246EB of the BA Offence provision	• The provision is similar and aligns with BA s125, 126, 134 &135 where a building certifier must not perform a building certifying function unless the person is appropriately licensed. In this case the person must not claim to be an eligible course provider or conduct an approved training course or issue certification unless they are an eligible course provider and the course has been approved. The penalty proposed is less than that which applies for building certifiers (80 penalty units in lieu of 165 penalty units) and it is considered appropriate in the circumstances.
New section 246FF(1) of the BA Offence provision	• This provision ensures that if the circumstances in regard to criminal history of a Council member changes, the member must disclose this change to the Minister. The penalty proposed of 100 penalty units, is intended to discourage the non disclosure of this information, which is relevant to maintaining eligibility to be a member of the Council. It is considered appropriate in the circumstances to ensure a high level of integrity.
New section 246AS of the BA Privacy concern	• The regulated pools register is an important component of the reforms and is expected to be a valuable aid for carrying out pool safety compliance programs. The Government is mindful of the privacy rights of individuals and accordingly the Bill does not stipulate, for example, that the owner's name should appear on the register. The provision allowing for other matters to be added is intended to allow fine-tuning of the register should it be thought necessary after a period of operation. It may, for example, be thought desirable to add a minor additional piece of information, such as the existence and content of a nonconformity notice or the minor repairs undertaken by inspectors in the interests of safety. • Parliament retains a critical review mechanism as it can disallow any regulation that proposes an inappropriate imposition on personal privacy. In addition, where privacy rights of individuals may be affected, access to the fields may be restricted to PSC or the relevant

	department. • In the circumstances, it is considered that the provision is appropriate and unlikely to adversely affect the privacy rights of individuals.
New section 246FE(1) of the BA Privacy concern	• The Minister may only ask the commissioner of the police service for a written report about a prospective member's criminal history if the prospective member consents. It is submitted that this is a satisfactory safeguard as regards prospective members. As regards existing members of the PSC, such members would be aware upon accepting appointment that they will be under an ongoing obligation to disclose any changes to their criminal history (proposed section 246FF). • In the circumstances, it is considered that the provision contains appropriate protection for the privacy rights of individuals.
New sections 246CO and 246CY of the BA Delegation concern	• The delegation power in this case is considered appropriate and is given to an appropriate independent body, the PSC. The power to investigate, conduct audits and impose disciplinary action is given to the PSC whose members are appointed by the Minister and include, as a minimum, a representative of the Department and a representative of the Local Government Association of Queensland. • Any decision made by the PSC after the investigation or audit to the effect that a ground for disciplinary action exists is subject to appeal (s.246CZ). Furthermore, any disciplinary measure imposed by PSC is also subject to appeal (s.246CZ). The powers are analogous to those that the Plumbing Industry Council can exercise against plumbers and drainers under the Plumbing and Drainage Act 2002.
New section 246AE of the BA Power to enter premises	• The power is expressly confined by proposed subsection 246AE(7) so as ***not*** to apply to the entry of a dwelling. If the owner or occupier is present at the pool site, the inspector must identify himself or herself and seek consent of the person to the entry. In the circumstances, it is submitted that the proposed section has sufficient regard to the rights and liberties of individuals. • The power only applies where the pool is known to be non-compliant. Also, as the entry power applies to the curtilage of a property and as the power is confined to the inspection of a pool it is not considered that there will be any use of force necessary for the appropriate use of the power. Nor is it considered necessary to restrict the times of entry as this will be limited by the practical difficulties of inspecting pools in darkness and the appropriate discretionary use of enforcement powers by local government officers.
New sections 246CP and 246DS of the BA Self-incrimination concern	• It is important for the integrity of the pool safety inspection system, and for public confidence in the system, that the PSC have effective powers to investigate complaints against pool safety inspectors. Pool safety inspectors will occupy a trusted and responsible position and will be able to charge fees to members of the public for their services. Further, they will be able to decide whether a pool barrier complies or needs upgrading or repairs. They must act impartially and may, from time to time, possibly be offered inducements to act otherwise. • It is also important for the integrity of the pool safety inspection system, and for public confidence in the system, that the PSC have effective powers to audit the activities of eligible course providers. The course providers are integral to the success of the system and they must deliver the approved courses faithfully or else the integrity of the system may be seriously compromised. • It is submitted some curtailment of the protection against self-incrimination in the investigation of a complaint against a pool safety inspector and in the auditing of eligible course providers is appropriate as the inspectors will be expected to act in the public interest in exercising

	statutory powers. The provisions are analogous to the provision in the *Building Act 1975* relating to the Building Services Authority requiring documents from building certifiers (see ss.195).
New sections 246ET Immunity from proceeding or prosecution	• The proposed new section 246ET seeks to protect members of the Pool Safety Council (PSC) from civil liability for acts done or omissions made honestly and without negligence. This is analogous to the protection afforded to the Plumbing Industry Council under the *Plumbing and Drainage Act 2002*. Members of the PSC will perform a quasi-judicial function in dealing with complaints against pool safety inspectors and imposing disciplinary measures. In performing that function it is desirable that members of the PSC should be free to act without fear of being sued even though they have acted honestly and with due care. Claimants are given a right of action against the State where the immunity applies. • In the circumstances, it is considered that the provision has due regard to the rights and liberties of individuals.
New section 246EC of the BA Parliamentary scrutiny of delegated power	• The proposed new section 246EC allows the chief executive to issue guidelines to help eligible course providers apply to PSC for approval of a training course. The guidelines will deal with matters such as the required form of application to the PSC, the required evidentiary documentation to be furnished, the need to pay the prescribed fee and the required course content. The guidelines are regarded as essentially administrative in character and may be contrasted with the code of conduct for pool safety inspectors (mentioned in proposed section 246AZ) which will not be merely administrative in character and accordingly is required to be tabled in the Legislative Assembly. • In the circumstances, it is considered that the provision has sufficient regard to the institution of Parliament.
New section 258 of the BA Parliamentary scrutiny of delegated power	• The proposed amendment to section 258 (clause 15 of the Bill) allows the chief executive to issue guidelines about ways of complying with the pool safety standard and performing pool safety inspection functions. The guidelines will deal with matters such as procedures for completing pool safety certificates and nonconformity notices, checklists for use by pool safety inspectors and processes for registering pool safety certificates and nonconformity notices. The guidelines are regarded as essentially administrative in character and may be contrasted with the code of conduct for pool safety inspectors (mentioned in proposed section 246AZ) which will not be merely administrative in character and accordingly is required to be tabled in the Legislative Assembly. • In the circumstances, it is considered that the provision has sufficient regard to the institution of Parliament.
New sections 231D of the BA Amendment of Act other than by another Act	• The power contained in proposed section 231D(1)(b) to prescribe regulation is limited by the requirement that the relevant standard must be for 'ensuring the safety of persons using a regulated pool'. • Standards are contained in the relevant part of the QDC which can only be amended by regulation. Also, any regulations would be subject to the tabling and disallowance procedures of part 6 of the *Statutory Instruments Act 1992* and hence still under the control of Parliament. • In the circumstances, it is considered that the provision has due regard for the institution of Parliament.
Amended sections 13 of	• The amendment preserves the ability of the Governor in Council to block any sale of land vested in the RNA which the Governor in Council

the RNA Act Amendment of Act other than by another Act	sees fit. With respect, under the proposed amendments, the Governor in Council is not given the power to amend the RNA Act. Rather, the Act will authorise the Governor in Council to impose conditions on the sale of relevant land, and the Governor in Council will merely be carrying out that function in imposing such conditions. • The provision is required to enable a workable regime for commercial dealings with RNA land. In the circumstances, it is considered that the provision has due regard for the institution of Parliament.

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

Date introduced: 24 March 2010

Responsible minister: Hon P Lawlor MP

Portfolio responsibility: Minister for Tourism and Fair Trading

Committee report on bill: 05/10 (at 15-18)

Date response received: 12 May 2010

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:

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

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

3. The committee makes no further comment regarding the bill.

Hon Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Trading

Ref: MN=112517
529374/1

11 MAY 2010

SCRUTINY OF
12 MAY 2010
LATION COMMITTEE

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

Dear Ms Miller

Thank you for your letter of 12 April 2010 about the *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010.*

I refer to your comments in the committee's *Legislation Alert* number 5 of 2010. The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals.

The attached document addresses each of these concerns in turn.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor.

Peter Lawlor MP
Minister for Tourism and Fair Trading

Encl.

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Response to Scrutiny of Legislation Committee Legislation Alert Number 05 of 2010

Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010

The rights and liberties of individuals

Clause 4: providing buyers under residential property contracts with different statutory protections of rights from those afforded to sellers

The committee has concerns about clause 4 (new sections 366, 368C and 369 of the *Property Agents and Motor Dealers Act 2000,* hereafter referred to as the PAMD Act) in relation to a lawyer's declaration of independence, the requirements for a warning statement to be attached, and the cooling-off period. The committee offers the opinion that sellers are not afforded these same rights under the amended Chapter 11 of the PAMD Act.

Firstly, it should be noted that Chapter 11 exists to provide consumer protection for buyers. Protections for sellers, as consumers, are to be found elsewhere in the PAMD Act. For example, Chapter 5 of the PAMD Act provides protection for sellers in relation to the seller appointing a real estate agent and the agent's commission. Further, Chapter 11 works to equalise the unequal negotiating position held by the seller and the seller's agent, including knowledge of the property for sale and the systemic processes of the act of selling and experience in real estate negotiations.

One of the protections identified by the committee as not being offered to the seller was the disclosure by a lawyer, engaged by the seller, of that lawyer's independence. As previously noted, Chapter 11 does not set out to provide protection for sellers. Protection for sellers is provided through the PAMD Act by the licensing and regulation of property agents who act as sellers' agents. Neither is the purpose of the PAMD Act to control the relationship between a seller of property and their legal representative. The only manner in which this legislation speaks to the issue of independence of an engaged lawyer is in achieving one of the purposes of the PAMD Act, namely consumer protection where the buyer is the consumer.

Another protection is the requirement for a seller to give a buyer a warning statement attached to the proposed relevant contract. The committee considers that for the purposes of Chapter 11 in the Bill, the new section 363(b) intends that all proposed relevant contracts and relevant contracts for the sale of residential property in Queensland are to have consumer protection information attached and the provision is not only for buyers. However, in a contract for the sale of residential property, the buyer is the consumer, not the seller. Therefore, consumer protection information is only for the purposes of the buyer. Also, the information regarding the rights of the buyer, which are contained in the warning statement, is available for perusal by the seller by virtue of the warning statement being attached to the contract when the seller signs the contract.

Finally in relation to seller versus buyer rights, the committee notes that a buyer is afforded a cooling-off period, but not the seller. This is the usual practice in a sales situation as any cooling-off for the seller is achieved through their being the second party to sign the contract in most real estate sales situations, and in controlling the sale negotiations in the first instance. The treatment of a cooling-off period as a buyer protection mechanism can also be found in the *Fair Trading Act 1989*. Buyers in door-to-door sales transactions are given a ten-day cooling-off period and this right is not extended to sellers in the legislation. Offering a cooling-off period to a seller in the real estate sales process would create great uncertainty for buyers. It would be possible for a seller to use their cooling-off period to accept a higher offer from another buyer, terminate the contract with no penalty and 'gazump' the buyer who had the original contract. This is not an acceptable situation.

Clauses 4, 10 and 15 and the schedule (sections 48, 49 and 58): creating new offence provisions and amending existing offence provisions

The committee has noted the offence provisions which are included in the Bill. While these offence provisions give the appearance of being new offences, many of them merely replace existing provisions, but without the prescriptive requirements of the provisions that are in the current version of the PAMD Act. This will, in fact, offer greater protection for real estate agents and sellers as they are less likely to make an inadvertent error which could lead to prosecution for an offence. Also, the offence provisions contained within the Bill reflect the critical importance of the consumer protection requirements contained within the provisions to which they are attached.

The two new offence provisions to be inserted into the *Body Corporate and Community Management Act 1997* have been added to replicate the provisions and offences in the PAMD Act around providing a statutory requirement to refund within 14 days any amount paid by a proposed buyer to the seller upon termination.

Clause 5 (new section 645)

The committee has noted the justification contained within the Explanatory Notes for the transitional provisions contained in clause 5 which affect the contractual rights of buyers under contracts made prior to commencement of the Bill. The transitional provisions were carefully considered in the development of this Bill and the committee has acknowledged that the justification provided has sufficient regard to the rights and liberties of individuals.

The rights and liberties of individuals – clear meaning

Clause 4 (new sections 363, 364, 366, 368C, and 369-370

The committee has raised a concern with the use of the term 'buyer' in the drafting of the proposed sections 363, 369, and 370. The committee has correctly applied the *Acts Interpretation Act 1954* (AI Act) so that a reference to a buyer includes a reference to the plural 'buyers'. Consequently, the committee has indicated that the application of the plural term may result in ambiguity in some provisions.

The first instance where ambiguity may arise is the proposed section 363 which outlines the purposes of the proposed Chapter 11. However, section 32C of the AI Act works in reverse, in that any use of the plural can also be taken to be the singular. Therefore, the purposes of the Bill can be read as applying to each buyer. Further, the purposes of the Bill are intended to be universal and apply to all buyers across time. As such the use of the plural is appropriate.

The new section 368C requires a seller to give 'a buyer' a copy of the relevant contract. Using the AI Act interpretation, if there is one buyer, that buyer is to receive a copy, and if there is more than one buyer, this can be read as the plural also.

The new section 369 defines the cooling-off period. The committee suggests there is ambiguity in the interpretation of this provision where there is more than one buyer, as the provision is silent on when a cooling-off period starts in these circumstances. Applying the AI Act, the new section 369(1)(a)(i) has the cooling-off period starting on the day the buyers receive a copy of the relevant contract from the seller. Therefore, all buyers must receive a copy of the relevant contract from the seller before the cooling-off period can start. The committee similarly suggests the new section 370(2) is ambiguous if there is more than one buyer. However section 14A of the AI Act requires that the interpretation of a provision should be the one that best achieves the purpose. The true purpose of section 370(2) is that a buyer is able to terminate a relevant contract without penalty by giving signed written notice if the seller or their agent has failed to comply with the proposed section 368A(2)(c)(i). If there is more than one buyer, these buyers may terminate on this basis by the buyers giving signed written notice.

The committee has raised a query in relation to the proposed section 366(1) in relation to a buyer engaging a lawyer to act for them in the purchase of a residential property. The committee notes that the term 'engaged' is not defined. In this case, the term takes its regular meaning for this context, which is "to enter into a contract to do"1. In practice, it is not enough that a lawyer's name is entered onto a contract. The lawyer must agree to act for the buyer before they can be considered engaged by the buyer. It is upon acceptance of their engagement that a lawyer will commence to act for the buyer and be in a position to provide the lawyer's certificate. In paragraph 20 of the committee's report, the committee states that the terms 'given' and 'communicated' are ambiguous. The committee notes that the proposed section 366(2) does not state how the lawyer's certificate must be given. However, section 39 of the AI Act expressly explains how documents are to be served, or given. Paragraph 20 incorrectly states that the proposed section 368C requires that a seller 'give' a buyer a copy of the relevant contract. Section 368C does not require this, but sets out what must happen when a buyer is given a copy of the relevant contract. The committee goes on to question the meaning of 'communicate' in the proposed section 369(2) where a buyer communicates their acceptance of the seller's offer to the seller. It is reasonable and unambiguous in this provision for 'communicate' to take its regular meaning, namely, "to pass on, transmit, or convey"2. This can be done in writing or verbally. The proposed

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[1] Oxford English Dictionary Online http://www.askoxford.com/dictionaries/?view=uk
[2] Oxford English Dictionary Online http://www.askoxford.com/dictionaries/?view=uk

section 369(2) has been included in the Bill to provide clarification for the rarer circumstance where a buyer initiates a sale by sending a proposed relevant contract to the seller to sign. Section 369(2) is required to establish when a cooling-off period would start under this less common circumstance.

In paragraph 21 of the committee's report, the committee has noted that the interchangeable use of 'a copy of the relevant contract' and 'the relevant contract' may lead to ambiguity. The purpose of the provision is to require the warning statement information, which is the consumer protection information, to be provided to the buyer with their copy of the relevant contract. The validity of the committee's concern is acknowledged, but the following points are made to address the committee's concern:

1. The Explanatory Notes clearly reveal the Government's intention with regard to this provision by stating that "the warning statement must also be attached to a copy of the relevant contract when the seller gives the buyer a copy. If the relevant contract is in relation to a unit sale, then the information sheet must also be attached. Failure to attach the warning statement, or for a unit sale failing to attach either the warning statement or the information sheet, is an offence attracting a penalty of up to 200 penalty units." (Explanatory Notes, page 10).
2. The Office of Fair Trading will be complementing the legislation and Explanatory Notes with a comprehensive education campaign for industry which will provide best practice recommendations with the intention of achieving the best level of compliance across the industry.
3. Practitioners will have, as their incentive for compliance with these provisions, the need to protect both their livelihood and their reputation.
4. The definition of "attached" in relation to a warning statement and any information sheet requires that the documents, if given other than by electronic communication, are attached so that the warning statement, any information sheet if required, and the proposed relevant contract or relevant contract appear to be a single document. If the documents are given by electronic communication, they must be given at the same time, or if by fax, as near as possible to the same time. The implication of this definition is that any copy of the relevant contract would normally have a warning statement, or any information sheet, attached as the document would have been copied as a whole, including the warning statement or any information sheet.

The Government acknowledges that the committee has noted that the Explanatory Notes, as tabled at the first reading of the Bill, are clear and precise and contain the information required by section 23 of the Legislative Standards Act 1992.

13. 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
Date passed: 20 May 2010
Committee report on bill: 06/10 (at 37 - 44)
Date response received: 3 June 2010

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.

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 Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Trading

Ref: MN113490

1 JUN 2010

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

Dear Ms ~~Miller~~ Jo-Ann

Thank you for your letter of 17 May 2010 concerning the *Racing and Other Legislation Amendment Bill 2010* (the Bill).

I refer to your comments in the committee's Legislation Alert No. 6 of 2010.

The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals; whether aspects of the Bill have sufficient regard to the institution of Parliament; and has invited comment on information regarding the application of the fundamental legislative principles to a number of aspects of the Bill.

The attached document addresses each of these concerns.

I trust this information is of assistance and thank the committee for its consideration of this Bill.

Yours sincerely

Peter Lawlor.

Peter Lawlor
Minister for Tourism and Fair Trading

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 6 OF 2010

Racing and Other Legislation Amendment Bill 2010

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the *Racing and Other Legislation Amendment Bill 2010* (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **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.

In relation to whether the Bill has sufficient regard to the institution of Parliament, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **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, retrospectively, delegate legislative power in an appropriate case and/or contain only matter appropriate to subordinate legislation.

The committee has also invited 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, 12-16 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 a director.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clause 17

The committee states that clause 17 of the Bill may affect individual rights to privacy as the clause would require a control body to publish details of all decisions of an appeal committee on the control body's website.

Response:

As stated in the explanatory notes, the purpose of this amendment is to increase transparency in decision-making. This requirement is consistent with most courts and tribunals in Queensland which publish their decisions on their websites. If sensitive or confidential information was divulged as part of an appeal, a party to the appeal could request the appeal committee not to include such information in its decision. An appeal committee which must be constituted by three persons including at least one lawyer, is responsible for determining whether information is appropriate for publication.

Clause 23

New sections 432 and 442

The committee is concerned that new sections 432 and 442 which are inserted by clause 23 of the Bill may affect employment-related rights of employees of control bodies.

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

The committee also states that 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, for example, members of a control body. Again, the committee notes that consultation appears to have been limited to the chairs and chief executive officers of control bodies.

Response:

All employees of the three control bodies have been advised of the proposed changes that will result from the amalgamation of the control bodies and are continuing to be provided with regular updates.

A human resource consultant has been engaged by the three control bodies to assist with all staff related issues including the integration of the current control bodies' human resource policies and to undertake consultation with relevant unions.

In regard to individuals other than employees of control bodies, such as directors or members of the current control bodies who are not entitled to compensation, it should be noted that the Bill does not appoint directors or members to the new control body company nor does it remove members from the former control body companies. All director positions are part-time with appointments for limited terms.

Clauses 12 and 23

The committee states that clauses 12 and 23 (new section 441) may have insufficient regard to the 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 12 omits chapter 2, part 5. The provisions 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.

New section 441 provides that on the commencement, the Queensland Country Racing Committee and the country racing associations are dissolved.

The committee notes that the explanatory notes do not provide specific information as to whether clauses 12 and 23 have sufficient regard to the rights and liberties of individuals.

Response:

While the Queensland Country Racing Committee and the country racing associations established under the Racing Act will be dissolved, the new control body, Racing Queensland Limited will establish a Country Racing Committee and country racing associations under its constitution.

These bodies will have similar functions to those bodies established under the Racing Act and those persons currently appointed as members of the Country Racing Committee and the country racing associations will continue in those roles.

It should be noted that persons currently appointed to positions on the Queensland Country Racing Committee and the country racing associations are able to be removed at any time by the racing participants they represent. They do not receive remuneration for these appointments. These positions perform an advisory role.

The current members of the Queensland Country Racing Committee were briefed on the new arrangements on 22 April 2010 and the Committee supported the new arrangements.

Clause 23

New sections 429 and 442

The committee comments that new sections 429 and 442 which are inserted by clause 23 and which provide for the compulsory acquisition of property without fair compensation may have insufficient regard to the rights and liberties of individuals.

New section 429 provides that on the commencement, all assets and liabilities of a former control body immediately before the commencement become assets and liabilities of the new control body. Also, the registrar of titles must, on request by the new control body, record the vesting of property in the new control body. New section 442 provides 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 Bill.

Response:

It is noted that the committee identified relevant justifications in the explanatory notes regarding inconsistencies with the rights and liberties of individuals. As stated in the explanatory notes, 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 reasonable that no compensation is payable. It should be noted that the current control bodies only own the relevant property because it was transferred to them in the same manner.

Also, it should be noted that the owners of all property affected support the proposed amendments.

Clause 23

New section 431

The committee is concerned that new section 431 which declares sections 429 and 430 to be Corporations legislation displacement provisions for section 5G of the *Corporations Act 2001* (Cth) to avoid any inconsistency between sections 429 and 430 and the Corporations Act may affect the rights and liberties of individuals.

New section 429 provides that on the commencement all assets and liabilities of a former control body immediately before the commencement become assets and liabilities of the new control body. New section 430 retrospectively authorises 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 a director.

Response:

New section 431 is necessary to ensure that new sections 429 and 430 are not rendered invalid to the extent of any inconsistency with provisions of the *Corporations Act 2001* (Cth).

New section 429 which transfers all assets and liabilities of the control bodies to the new control body is integral to the establishment of one control body for the three codes of racing. New section 430 is necessary to provide protection to the directors of the three control bodies who were asked by government to indicate their support or otherwise for the establishment of one control body for the thoroughbred, harness and greyhound codes of racing. It would be contrary to the interests of justice to expose any person to potential litigation because of their compliance with the government's request to indicate their support or otherwise for the proposed amalgamation. Accordingly, these sections do affect the rights and liberties of individuals in a very positive manner.

Clause 22

The committee comments that clause 22 which amends section 352A would alter requirements as to proof in administrative proceedings.

The committee notes however, that the relevant provisions appear to relate to administrative, not criminal proceedings.

Response:

It is noted that the committee identified relevant justifications in the explanatory notes that suggest sufficient regard to the rights and liberties of individuals.

2. *SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT*

Clause 23

New section 428

The committee is concerned that clause 23 (new section 428) which states that the Minister must give Racing Queensland Limited a control body approval may not have sufficient regard to the institution of Parliament.

The committee notes that existing provisions of the Racing Act delegate to the Minister administrative discretion regarding the approval of a control body but new section 428 would remove that discretion, mandating that approval be given to Racing Queensland Limited.

Response:

The committee notes that the amending legislation is clearly intended to establish one control body. The legislation identifies that the one control body will be Racing Queensland Limited. Accordingly, it is considered reasonable and necessary for the legislation to provide that an approval be granted to that company. If an approval is not granted, the consequence would be that racing in Queensland must cease and this would have serious ramifications Australia wide.

Clauses 31 and 34

The committee states that clauses 31 and 34 may not, respectively, delegate legislative power in an appropriate case and/or contain only matter appropriate to subordinate legislation.

The committee notes that clause 31 would replace sections 169(1) and (3) of the *Wagering Act 1998* 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 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.

Clause 34 replaces 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).

The committee states that 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.

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.

Response:

While the percentage of wagering tax prescribed in the Regulation could be considered high, it is important that it be prescribed in the Regulation to allow for policy flexibility in the future. Percentages of gaming tax to be paid into various funds are consistently prescribed in Regulations, as percentages are often subject to change over time due to changes in Government policy, which may be in response to changing community or industry requirements.

As the proposed amendment to the Regulation, which provides for the prescribed percentage, is included as part of the *Racing and Other Legislation Amendment Bill 2010*, it will be subject to Parliamentary Scrutiny, as if it were an amendment to primary legislation.

While the initial prescribing of the percentage is subject to Parliamentary Scrutiny, it is recognised that the provision allows for the Governor in Council to amend the proposed percentage in the future, which is consistent with current practice in regard to percentages of tax to be paid into the Community Investment Fund under the Gaming Acts. While other prescribed percentages of gaming tax to be paid into the Community Investment Fund may be nominally lower, they may equate in real terms to a higher amount of funds. For example, 45.75% of wagering tax equates to approximately $18 million (estimated 2009/2010 budget). However, 8.5% of gaming machine tax (currently prescribed in the Gaming Machine Regulation to be paid in to the Community Investment Fund) equates to approximately $44 million (estimated 2009/2010 budget).

The 45.75% prescribed percentage does not change the amount of tax collected, it simply transfers a percentage of funds that would have been paid into the Consolidated Fund into the Community Investment Fund. It is for a limited period (between 2010 and 2014) and the prescribed percentage will be authorised by appropriate provisions in primary legislation.

3. *COMMITTEE INVITES THE MINISTER TO PROVIDE FURTHER INFORMATION REGARDING THE APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES*

Clauses 12 and 23

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 the rights and liberties of individuals currently appointed as members of the Queensland Country Racing Committee or as chairperson of a country racing association.

Response:

Clauses 12 and 23 have been addressed under the heading '*1. Sufficient Regard to Rights and Liberties of Individuals*' on page 3.

Clause 23

The committee invites the Minister to provide further information regarding the application of fundamental legislative principles to new sections 429 and 442 which are inserted by clause 23 which provide for the compulsory acquisition of property without fair compensation.

Response:

New sections 429 and 442 have been addressed under the heading '*1. Sufficient Regard to Rights and Liberties of Individuals*' on page 3.

Clauses 6 to 9, 12 to 16, 18-20 and 23

The committee invites the Minister to provide further information regarding the application of fundamental legislative principles to sections 6 to 9, 12 to 16, 18 to 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.

The committee states that clauses 6-9, 12-16, 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.

Clause 6

Clause 6 would replace section 28 which limits the period for which an approval has effect to six years. The Bill provides that a control body approval continues until it is cancelled.

Response:

It is noted that the committee identified justification in the explanatory notes for the unlimited extension of the approval period.

Many licences and approvals are granted for indefinite or extended periods and it is only if a condition of the licence or approval is breached that action is taken to cancel or suspend the licence. The current regime requires a control body to undertake an unnecessary, costly and time consuming approval process every six years.

If a control body breaches the Racing Act or does not comply with a condition of its approval, there is a process under the Racing Act for taking disciplinary action against the control body which could result in cancellation of its approval.

Clauses 7 and 8

Clause 7 amends section 33 to clarify that a control body's powers are not limited to those stated in the Act.

Clause 8 amends section 34 to clarify a control body's powers. In particular, the amendment clarifies that a control body may impose conditions on any amount that it distributes to a licensed club for a purpose relating to the operations of the club and clarifies that a control body may impose conditions on any funding that it allocates for venue development and other infrastructure relevant to the code.

A new section 34(1)(j) is inserted that provides that a control body may 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 for the thoroughbred, greyhound or harness codes of racing. Clause 8 provides that a control body may exercise powers other than in accordance with a policy.

Response:

As stated in the explanatory notes, these amendments ensure that a control body has the necessary powers to manage the codes of racing for which it is responsible. The 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.

Section 81 of the Act specifies mandatory policies a control body must develop. However, there are a range of possible matters that while not relating to a policy may need to be addressed under the Australian Rules of Racing. The amendments provide that a control body need not make a policy for every power that it exercises.

Previously, advisory committees for non-TABQ thoroughbred racing were established under the Racing Act but will now be established administratively by the new control body. As the new control body will be responsible for the thoroughbred, harness and greyhound codes of racing, the amendment clarifies that the control body may establish committees for non-TABQ racing for any code of racing for which it is responsible.

Clause 9

Clause 9 inserts a new section 34A which requires a control body with an approval for more than one code of racing to make decisions that are in the best interests of all the codes of racing for which the control body holds an approval while having regard to the interests of each individual code.

Response:

Clause 9 ensures that the interests of all codes of racing in an amalgamated control body are taken into consideration in decision-making by the control body. This provision provides protection to each individual code.

Clause 12

Clause 12 omits chapter 2, part 5. The provisions 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.

Response:

Clause 12 has been addressed under the heading '*1. Sufficient Regard to Rights and Liberties of Individuals*' on page 3.

Clauses 13 to 16

Clauses 13 to 15 contain consequential amendments that are necessary as a result of the amendments in clause 16.

Clause 16 omits sections 92 and 93. Section 92 provided that a control body's rules of racing for its code of racing may provide for a matter only if the control body, in a policy, authorises the making of rules of racing in relation to the matter. Section 93 permitted a control body to make urgent rules of racing for a matter that the control body had not authorised in a policy.

Response:

As stated in the explanatory notes, the requirement to make a policy about a matter that authorises the making of a rule of racing, prior to making a rule of racing, is considered to place an unnecessary burden on the control body without any benefit.

Rules of racing deal with all aspects of administering racing and are so broad that the requirement to have a policy for each rule of racing is not reasonable or necessary.

Clauses 18 and 20

Clause 18 amends section 111 by inserting a new definition of 'deal with' an asset which includes granting a right in relation to the asset, mortgaging, lending, leasing or registering a charge over the asset, but does not include disposal of the asset.

Clause 20 inserts a new section 113AA which clarifies that a control body has the power to require a non-proprietary entity to obtain the control body's approval prior to dealing with its assets. Section 113AA provides that a non-proprietary entity must not deal with its assets other than under a policy of the relevant control body or the written approval of the relevant control body, obtained before the dealing.

Response:

This provision will ensure that clubs do not enter into financial or other arrangements without the control body's knowledge and approval that have the potential to place the club's viability at risk or could be to the detriment of the wider industry. In the event that a club experiences financial problems, it is the control body that ultimately manages the situation so as to avoid the club becoming insolvent.

The control body's policies will devolve decision making to the appropriate level and differentiate between the different levels of 'dealing with' club assets to ensure that there is limited impact on the day to day operations of a club. For example, a control body policy may not require a club to apply to dispose of generic office equipment, but may require a club to make application to dispose of major racing related capital equipment such as starting stalls.

Clause 19

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.

Response:

As stated in the explanatory notes, 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. Over the last ten years, the government has transferred over $60 million of government land to race club ownership.

This amendment only applies to land that is owned by a race club. Of some 130 race clubs in Queensland, only ten clubs own their own racecourse and this provision only applies after a club has made the decision to sell its land. A control body cannot force a race club to sell its land.

Clause 23

New section 428

New section 428 provides that the control body approvals held by the former control bodies are cancelled at midnight on 30 June 2010. 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.

The committee's concern is that the provision 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.

Response:

The one control body will be subject to the same accountability requirements as the current three control bodies. A control body that does not comply with the requirements of the Racing Act or a condition of its approval may be subject to disciplinary action.

The committee's concerns that new section 428 does not have sufficient regard to the institution of Parliament are dealt with on page 6.

Clause 23

New section 430

The committee invites the Minister to provide further information regarding the application of fundamental legislative principles to clause 23 (new section 430) which retrospectively authorises 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 a director.

Response:

As stated previously, this amendment provides protection for the directors of the three control bodies who were asked by government to indicate their support or otherwise for the establishment of one control body for the thoroughbred, harness and greyhound codes of racing. It would be unfair to expose any person to potential litigation because of their compliance with the government's request to indicate their support or otherwise for the proposed amalgamation.

14. 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
Portfolio responsibility: Minister for Infrastructure and Planning
Date passed: 19 May 2010
Committee report on bill: 06/10 (at 45-50)
Date response received: 20 May 2010

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.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Stephen Robertson MP
Member for Stretton

Queensland Government

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

Ref CTS 08624/10

19 MAY 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 of 17 May 2010 concerning the South-East Queensland Water (Distribution and Retail Restructuring) and Other Legislation Amendment Bill 2010.

In acknowledging your comments relating to the aforementioned Bill, I would like to thank you for your consideration of the Bill.

Should you have any further inquiries, please contact Judith Jensen, Director (Water Legislation, Policy and Pricing), Strategic Water Initiatives of the department on telephone 3330 6108.

Yours sincerely

STEPHEN ROBERTSON MP

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PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

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

Date tabled: 23 March 2010

Disallowance procedures date: 4 July 2010

Responsible minister: Hon T Mulherin MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

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

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 Tim Mulherin MP
Member for Mackay

Queensland Government

Minister for Primary Industries, Fisheries and Rural and Regional Queensland

Reference: **03654/10**

12 MAY 2010

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

Dear ~~Mrs Miller~~ Jo-Ann

Thank you for your letter of 12 April 2010 concerning the Fisheries and Other Legislation Amendment and Repeal Regulation (No.1) 2010 SL35.10 (the regulation).

I have reviewed the issues arising from the Scrutiny of Legislation Committee's initial examination of the regulation. I enclose additional information (Attachment 1) addressing each of your queries for consideration at your next meeting. I am satisfied that in each case the 2010 amendment and repeal regulation has sufficient regard for the rights and liberties of individuals.

If you require any further information regarding this matter, please do not hesitate to contact Nicole Seils, Acting Principal Advisor in my office on telephone 07 3239 3000.

Yours sincerely

TIM MULHERIN, MP
Minister for Primary Industries, Fisheries and Rural and Regional Queensland
Member for Mackay

Att

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Attachment 1

Fisheries and Other Legislation Amendment and Repeal Regulation (No.1) 2010 - response to specific issues arising from initial examination of subordinate legislation by the Scrutiny of Legislation Committee

Administrative Power

The committee has queried whether the power to decide an application for a stocked impoundment permit and the power to approve a nominee for an eel licence in the *Fisheries Regulation 2008* as amended by the *Fisheries and Other Legislation Amendment and Repeal Regulation (No.1) 2010* (the 2010 amendment and repeal regulation) is sufficiently defined and subject to appropriate review. In particular, the committee has queried whether the administrative power to decide these applications is defined in the same way under the subordinate legislation repealed by the 2010 amendment and repeal regulation given that transitional provisions inserted in the fisheries regulation by the 2010 amendment and repeal regulation provide that applications made under the repealed subordinate legislation are taken to be applications under relevant provisions inserted in the *Fisheries Regulation 2008*.

The decision making power for an application for a stocked impoundment permit continues to be the power under section 55 (Consideration of application for issue of authority) of the *Fisheries Act 1994* (the Act).

An authority is defined in the schedule of the Act as follows—

> '***authority*** means—
> (a) a licence, permit, resource allocation authority or other authority issued, and in force, under this Act; or
> (b) a quota in force under this Act.'

Under section 49(1) of the Act authorities may also be prescribed under a management plan.

The stocked impoundment permit was previously prescribed under section 44 of the *Fisheries (Freshwater) Management Plan 1999*. The amendments provide for it to be prescribed in Chapter 5 of the *Fisheries Regulation 2008* which lists a stocked impoundment permit as a permit the chief executive may issue (section 204) and describes the authorisation under a stocked impoundment permit (section 220A).

The decision making power for approval of a nominee was previously defined in section 47A of the *Fisheries (Freshwater) Management Plan 1999* and is now defined in exactly the same terms in section 310F of the *Fisheries Regulation 2008*.

A person whose interests are adversely affected by a decision on the grant of a stocked impoundment permit or a decision on approval of a nominee will continue to be able to apply for it to be reviewed by the Queensland Civil and Administrative Tribunal on one or more of the following grounds allowed by section 185 of the Act:

· the decision was contrary to the Act;
· the decision was manifestly unfair;
· the decision will cause severe personal hardship to the person.

Clear meaning – aggregate effect of legislation

The committee has queried whether the legislation is sufficiently clear and concise and sought clarification as to the aggregate effect of certain provisions in the 2010 amendment and repeal regulation and *Fisheries and other Legislation Amendment and Repeal Regulation (No. 1) 2008* (the 2008 amendments).

The aggregate effect of the legislation is to repeal an amendment to section 185A of the *Fisheries Regulation 2008* before it commenced because the amendment had become redundant as follows:

- Section 16 of the 2008 amendments amended section 185A of the *Fisheries Regulation 2008* which restricted the possession of crab apparatus. Section 16 of the 2008 amendments deleted inverted dillies from the definition of crab apparatus restricted under section 185A of the *Fisheries Regulation 2008* consistent with other changes in relation to inverted dillies at that time.
- Chapter 1, Part 1, Division 4 of the *Fisheries Regulation 2008* was substantially restructured by the 2010 amendment and repeal regulation. As part of this restructure, section 185A was omitted and restrictions on recreational fishers using crab apparatus were consolidated elsewhere in this division.
- Section 16 of the 2008 amendments had been due to commence on 2 April 2010 by virtue of section 2(4) of the 2008 amendments. As the amendment of section 185A of the *Fisheries Regulation 2008* was redundant, Section 16 of the 2008 amendments was repealed on 12 March 2010 by section 4 of the 2010 amendment and repeal regulation.

Clear meaning – Definition of cod-end

The committee has queried whether the legislation is sufficiently clear and concise because the term "cod-end" is not defined.

Definitions of eel trap and round eel trap were included in Schedule 11 (the dictionary) of the *Fisheries Regulation 2008* when prescriptions about eel traps and round eel traps, previously in the *Fisheries (Freshwater) Management Plan 1999*, were incorporated in the *Fisheries Regulation 2008* by means of the 2010 amendment and repeal regulation. An eel trap or round eel trap was defined as a mesh trap, supported by a rigid frame – a rectangular or cylindrical frame respectively - to which a cod-end or pocket is attached. The required design of the pocket is prescribed elsewhere in the legislation to promote survival of animals taken unintentionally by these traps.

The term "cod-end" is in common usage among fishers, particularly in relation to trawl nets. International dictionaries typically describe a cod-end as the narrow end of a tapered net. In a trawl net it is where the fish (typically cod in the northern

hemisphere hence the name) are concentrated and trapped as the net is pulled through the water. The term is used extensively in the trawl plan without definition particularly in relation to where bycatch reduction devices should be placed to allow escape of animals taken unintentionally.

The term "cod-end" is also in common usage among fishers in relation to an eel trap or round eel trap. Use of the term "cod-end" as an alternative to the term "pocket" may assist fishers in interpreting the requirements.

16. LAND SALES AMENDMENT REGULATION (NO. 1) 2010

Date tabled: 23 March 2010

Disallowance procedures date: 4 July 2010

Responsible minister: Hon P Lawlor 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.

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 Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Trading

Ref: FTP/0015, MN=113652

26 MAY 2010

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

Dear Mrs ~~Miller~~ Jo-Ann

Thank you for your letter of 17 May 2010 about the *Land Sales Amendment Regulation (No. 1) 2010.*

I refer to your comments in the committee's *Legislation Alert* number 6 of 2010. The committee has drawn the Legislative Assembly's attention to issues arising from examination of the Amendment Regulation, specifically the committee's concern as to the lawfulness of the Amendment Regulation.

In lieu of explanatory notes, I can provide you with the following explanation of the Amendment Regulation. The *Land Sales Act 1984* regulates the sale of residential units purchased off-the-plan. Section 27 of the Act protects consumers' interests by allowing a purchaser of a proposed unit to avoid the contract for sale if a registrable instrument of transfer has not been provided by the vendor within three and a half years from the date of contract.

Section 28 of the Act provides a regulation may prescribe an extended period (by up to two years) so the maximum period for the supply of a registrable instrument of transfer may be five and a half years. This provision was enacted to accommodate large-scale residential unit developments which have longer than normal construction time-frames. As a result of these longer time-frames, the period between when a purchaser signs a contract and when a registrable instrument of transfer is available is likely to be in excess of three and a half years.

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The Act provides a statutory default period in which the vendor must provide a registrable instrument of transfer to the purchaser. If the *Land Sales Regulation 2000* has extended this period, as is the case for the Milton site which is the subject of the Amendment Regulation, the extended period then applies. For the extended period to apply, pursuant to section 28(3), the vendor or their agent must give the purchaser a notice in the approved form stating the extended period, before the purchaser enters upon the purchase of the proposed lot.

Compliance with this notice requirement is not enforced by my portfolio and there is no regulated penalty for failure to provide the notice. It is, however, in the vendor's interest to provide this notice, as otherwise the default period of three and a half years applies and purchasers have the statutory right to avoid the contract at this point.

While this is a right which must be pursued by the purchaser individually, the provision provides certainty for the purchaser so that contractual rights can be easily enforced.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor.

Peter Lawlor MP
Minister for Tourism and Fair Trading

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

Date tabled: 4 August 2009

Disallowance date: 8 October 2009

Responsible minister: Hon R Nolan MP

ISSUES ARISING FROM EXAMINATION OF LEGISLATION

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

CORRESPONDENCE RECEIVED FROM MINISTER

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

Hon Rachel Nolan MP
Member for Ipswich

Queensland Government

Minister for Transport

Our ref: MC48290

Your ref: SL23.10

21 MAY 2010

SCRUTINY OF
28 MAY 2010
LEGISLATION COMMITTEE

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

Dear Ms ~~Miller~~ Jo-Ann

Thank you for your letter of 22 March 2010, enclosing an extract from the Scrutiny of Legislation Committee's Legislation Alert No. 4 of 2010.

I note that the Committee is concerned that pilotage fee increases provided for by the *Transport Legislation Amendment Regulation (No. 1) of 2010* (the regulation) may not have sufficient regard to the rights and liberties of individuals.

The regulation replaces the existing tables of pilotage fees with tables of fees to apply from 1 April 2010 and 1 October 2010.

Length based pilotage fees were introduced on 1 April 2005 and have not been amended since 1 November 2007. A regulatory impact statement was not required to amend the pilotage fees in 2007 nor for the 2010 fee changes.

Nevertheless, an industry consultation paper was prepared and subsequently published on the Maritime Safety Queensland (MSQ) website during October 2009, inviting comment on proposed pilotage fee increases.

A number of stakeholder groups were advised by letter of the publication of the industry consultation paper and were invited to comment. These stakeholder groups included Shipping Australia Limited, National Bulk Commodities Group, Rio Tinto Aluminium, North Queensland Bulk Ports Corporation, Port of Townsville, Townsville Port Operations Group, Far North Queensland Ports Corporation, Port of Brisbane, Gladstone Ports Corporation, Queensland Resources Council and Orion Expedition Cruises Pty Ltd.

The proposed fees to be applied in 2010 were arrived at following analysis of stakeholder feedback. The maritime industry and key industry stakeholders were advised in February 2010 by letter and publication on the MSQ website, of the revised pilotage fee increases for 2010.

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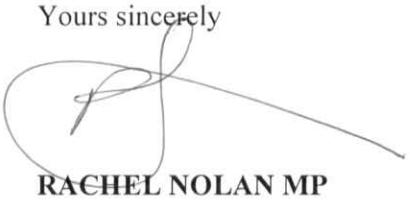
If you require further information, please call Ms Kirsten Dawson, Principal Manager (Pilotage and Hydrographic Services) on 3120 7013. Ms Dawson will be pleased to assist.

I thank the Committee for its careful consideration of the amendment regulation and for its comments, and trust that the above information is of assistance.

Yours sincerely



~~RACHEL~~ NOLAN MP
Minister for Transport