



*Legislation Alert*

# Scrutiny of Legislation Committee

## 53<sup>rd</sup> Parliament

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## COMMITTEE RESPONSIBILITY

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

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

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

### 1. Examination of legislation

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

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

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

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

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

### 2. Monitoring the operation of statutory provisions

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

<i>Legislative Standards Act</i>	<i>Statutory Instruments Act</i>
<ul style="list-style-type: none"> <li>• Meaning of ‘fundamental legislative principles’ (section 4)</li> <li>• Explanatory notes (part 4)</li> </ul>	<ul style="list-style-type: none"> <li>• Meaning of ‘subordinate legislation’ (section 9)</li> <li>• Guidelines for regulatory impact statements (part 5)</li> <li>• Procedures after making of subordinate legislation (part 6)</li> <li>• Staged automatic expiry of subordinate legislation (part 7)</li> <li>• Forms (part 8)</li> <li>• Transitional (part 10)</li> </ul>

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:**

<b>Rights and liberties of individuals</b>	<b>Bills and subordinate legislation</b>	
	<ul style="list-style-type: none"> <li>• make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review</li> <li>• are consistent with the principles of natural justice</li> <li>• allow the delegation of administrative power only in appropriate cases and to appropriate persons</li> <li>• don't reverse the onus of proof in criminal proceedings without adequate justification</li> <li>• confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer</li> <li>• provide adequate protection against self-incrimination</li> <li>• does not adversely affect rights and liberties, or impose obligations, retrospectively</li> <li>• does not confer immunity from proceeding or prosecution without adequate justification</li> <li>• provide for the compulsory acquisition of property only with fair compensation</li> <li>• have sufficient regard to Aboriginal tradition and Island custom</li> <li>• are unambiguous and drafted in a sufficiently clear and precise way</li> </ul>	
<b>Institution of Parliament</b>	<b>Bills</b>	<b>Subordinate legislation</b>
	<ul style="list-style-type: none"> <li>• allow the delegation of legislative power only in appropriate cases and to appropriate persons</li> <li>• sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly</li> <li>• authorise the amendment of an Act only by another Act</li> </ul>	<ul style="list-style-type: none"> <li>• is within the power that allows the subordinate legislation to be made</li> <li>• is consistent with the policy objectives of the authorising law</li> <li>• contains only matter appropriate to subordinate legislation</li> <li>• amends statutory instruments only</li> <li>• allows the subdelegation of a power delegated by an Act only –                         <ul style="list-style-type: none"> <li>– in appropriate cases to appropriate persons</li> <li>– if authorised by an Act.</li> </ul> </li> </ul>

**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](http://www.parliament.qld.gov.au/SLC)); and
- from the Tabled Papers database ([www.parliament.qld.gov.au/view/LegislativeAssembly/tailedPapers](http://www.parliament.qld.gov.au/view/LegislativeAssembly/tailedPapers)).



## PART 1 – BILLS EXAMINED

### 1. FAIR TRADING INSPECTORS BILL 2011

<b>Date introduced:</b>	17 February 2011
<b>Responsible minister:</b>	Hon PJ Lawlor MP
<b>Portfolio responsibility:</b>	(Former) Minister for Tourism and Fair Trading

#### ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
  - **clauses 14, 31, 35, 40, 42-3, 56, 58-9, 61, 64, 68-70, 92 and 165** creating offence provisions and replacing one existing offence provision;
  - **clauses 83-5 and 87** creating evidentiary presumptions to apply in proceedings under the legislation;
  - **parts 2 and 3** (as modified by schedule 1) conferring powers of entry under warrant or with consent and various post-entry powers;
  - **clauses 34-5, 39-40, 55-8 and 60-1** modifying common law and statutory rights to silence; and
  - **clause 90** protecting designated people from civil liability.
2. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
  - **clause 63** and whether it would have sufficient regard to rights of individuals to privacy;
  - **clause 22** and the officers who might issue a warrant to allow inspectors to exercise powers of entry; and
  - **clauses 47, 49-50, 52-4, 116, 122, 129, 133, 139, 150, 156, 166, 175 and 183**, providing for forfeiture of property and which may provide for compulsory acquisition of property other than with fair compensation.

#### BACKGROUND

3. The legislation is to create consistency in fair trading legislation in respect of authorised inspectors and, in particular, regarding appointment, powers and procedures.

#### LEGISLATIVE PURPOSE

4. The objectives of the bill are to (explanatory notes, 1):
  - address inconsistencies, harmonise and consolidate inspectorate provisions in fair trading legislation by providing common provisions regarding enforcement;
  - improve the enforcement and compliance activities of the Office of Fair Trading through harmonised and consolidated inspectorate provisions; and
  - repeal the inspectorate provisions contained in some fair trading legislation and make other consequential amendments.
5. The common provisions would apply to the:
  - *Funeral Benefit Business Act 1982*;
  - *Introduction Agents Act 2001*;
  - *Land Sales Act 1984*;
  - *Manufactured Homes (Residential Parks) Act 2003*;

- *Residential Services (Accreditation) Act 2002*;
- *Retirement Villages Act 1999*;
- *Second-hand Dealers and Pawnbrokers Act 2003*;
- *Security Providers Act 1993*;
- *Tourism Services Act 2003*; and
- *Travel Agents Act 1988*.

## APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

6. The explanatory notes provide (at 4) general information regarding the consistency of the bill with fundamental legislative principles:

*Questions about consistency with fundamental legislative principles contained in section 4 of the Legislative Standards Act 1992 and those that are generally recognised will invariably arise given the subject matter of the Bill. However, investigative and enforcement powers are necessary to achieve the overarching consumer protection objects of the primary Acts. Moreover, consumer protection legislation would be ineffective without the ability of the Office of Fair Trading to investigate potential breaches and take enforcement action.*

*As indicated earlier, the Bill has largely been drafted using the precedent provisions developed by the Office of the Queensland Parliamentary Counsel which have sufficient regard to fundamental legislative principles. The powers contained in the Bill are a spectrum of powers from least to most intrusive. It is entirely appropriate, as well as intrinsic to the nature of their job, for inspectors to have at their disposal a range of powers to be used depending on the seriousness of the situation in question. For example, it would not be contemplated to use search and entry powers in a simple dispute between a consumer and trader over a refund. There are, however, instances in fair trading legislation involving health and safety and significant financial detriment and in such cases, the ability of inspectors to use more forceful powers to protect affected parties is vital. The Bill is structured in such a way that these variances are accounted for, with sufficient regard also for fundamental legislative principles. However, a more detailed discussion of fundamental legislative principles is provided below.*

### Sufficient regard to rights and liberties of individuals

#### Rights and liberties

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

#### Right to equal application and equal protection of the law

8. **Clauses 14, 31, 35, 40, 42-3, 56, 58-9, 61, 64, 68-70, 92 and 165** would create offence provisions and one would replace an existing offence provision. The proposed offences and respective maximum penalties are identified below.

Clause	Proposed offence	Proposed maximum penalty
	Fair Trading Inspectors Bill	
14	Failing to return identity card	20 penalty units (\$2000)
31(1)	Failing to comply with direction to stop or move vehicle	165 penalty units (\$16 500)
35(1)	Failing to comply with requirement to provide reasonable help	200 penalty units (\$20 000) or one year's imprisonment
40	Failing to comply with seizure requirement	50 penalty units (\$5000)
42	Failing to comply with requirement regarding security of seized property	50 penalty units (\$5000)
43(1)	Tampering with seized property	50 penalty units (\$5000)
43(2)	Entering place of restricted access	50 penalty units (\$5000)
56(1)	Failing to comply with requirement to provide personal details	50 penalty units (\$5000)
58(1)	Failing to comply with requirement to produce document	200 penalty units (\$20 000)
59(1)	Failing to comply with requirement for document certification	200 penalty units (\$20 000)
61(1)	Failing to comply with requirement to provide information	200 penalty units (\$20 000)



Clause	Proposed offence	Proposed maximum penalty
		or one year's imprisonment
64(1)	Disclosing confidential criminal history	100 penalty units (\$10 000)
68(1)	Giving inspector false or misleading information	200 penalty units (\$20 000) or two years' imprisonment
69(1)	Obstructing inspector	200 penalty units (\$20 000) or one year's imprisonment
70	Impersonating inspector	80 penalty units (\$8000)
92(1)	Disclosing confidential information	100 penalty units (\$10 000)
	<i>Security Providers Act</i>	
165 (25A replaced)	Failing to produce licence for inspection	20 penalty units (\$2000)

9. The explanatory notes provide (at 8) the following information regarding the penalties in the proposed Fair Trading Inspectors Bill:

*The Bill contains a number of offences and prescribes maximum penalties for the offences. The approach taken in the Bill in determining maximum penalties was to identify the range of penalties currently in the primary Acts, as well as other Queensland Acts, and to adopt the higher penalty. Accordingly, the penalties for offences currently provided in most primary Acts which now exist in the Bill will increase.*

*The penalties in the Bill, however, are still considered to be proportionate to the seriousness of the offence. For instance, a maximum penalty of 20 penalty units is prescribed under clause 14 if a person who ceases to be an inspector fails to return their identity card to the chief executive within 21 days. The more serious offences, such as those which go directly to an inspector's ability to exercise their powers and undertake an investigation, attract higher penalties. For instance, a maximum penalty of 200 penalty units or 2 years imprisonment is prescribed under clause 68 for the offence of giving an inspector false or misleading information.*

*Clause 59 makes it an offence for a person to contravene a document certification requirement made under clause 57(5). While this offence does not exist in the primary Acts, it does form part of the precedent provisions and also exists in a number of other Acts. The maximum penalties for the offence in the legislation do differ, with the higher penalty being 200 penalty units. Accordingly, the Bill has adopted the maximum penalty of 200 penalty units.*

10. In relation to clause 165, an explanation is provided (at 59) for the replacement of section 25A:

*Clause 165 replaces section 25A with a new section 25A in order to remove the reference to an inspector. Under the new section 25A, the licensee is now only required to produce their licence to a person with whom the licensee is dealing when carrying out the function. An inspector would therefore use their powers under the Bill to request the production of a licence.*

#### Right to privacy

11. **Clause 63** would allow the chief executive to obtain criminal history reports.
12. Under clause 63(1), the chief executive could request a criminal history report from the commissioner of the police service if an inspector reasonably suspected the person might:
- be present at a place when entered by the inspector; and
  - create an unacceptable level of risk to the inspector's safety.
13. In Queensland, in relation to amendments to enable criminal history screening, the *Criminal Law (Rehabilitation of Offenders) Act 1986* established a general rule that after the expiration of a 'rehabilitation period' (five or ten years from the date of conviction for a criminal offence, depending on the nature of the offence):
- a person need not disclose past criminal convictions;
  - other people were prohibited from disclosing the criminal convictions; and
  - officials considering the person's fitness for a profession or for any other purpose had to disregard the conviction.

14. The general rule in the *Criminal Law (Rehabilitation of Offenders) Act* is conditional on the person not having re-offended and is subject to exceptions in relation to specified employment. It may also be overridden by other Acts passed by the Parliament, such as legislation enabling a relevant official to request a copy of a person's 'criminal history' from the commissioner of the police service.
15. Where legislation would permit use of a person's criminal history for specified matters, the committee draws the attention of the Parliament to any provisions which:
- provide a definition of 'criminal history' that differs from the definition in the *Criminal Law (Rehabilitation of Offenders) Act* – 'the convictions recorded ... in respect of offences';
  - displace the 'rehabilitation period' provisions of the *Criminal Law (Rehabilitation of Offenders) Act*, requiring old convictions to be disclosed; and
  - may be ambiguous as to which aspects of the *Criminal Law (Rehabilitation of Offenders) Act* are to be displaced, particularly regarding the rehabilitation period.
16. In relation to clause 63, the committee notes:
- the legislation does not refer to the *Criminal Law (Rehabilitation of Offenders) Act* nor does it appear to define 'criminal history' and may be ambiguous as to which aspects of the *Criminal Law (Rehabilitation of Offenders) Act* are to be displaced;
  - a criminal history might be requested, on the basis of a 'reasonable suspicion' that a person might create an unacceptable level of risk to an inspector (clause 63(1));
  - the legislation does not identify whether the criminal history would be provided upon payment of a fee;
  - the chief executive might give the inspector information in the report (clause 63(5));
  - the legislation does not appear to detail protections of individual privacy generally included in legislation, such as how the criminal history is to be transmitted (electronically or in paper form), required internal protections within the department as to use and retention, and limits on retention prior to destruction; and
  - while the purpose of the part is 'to help an inspector decide whether unaccompanied entry would create an unacceptable level of risk to the inspector's safety', measures other than obtaining a criminal history report (and which may have greater regard to rights to privacy) may be available, such as a police presence during entry.
17. In respect of clause 63 and whether it would have sufficient regard to rights and liberties of individuals, the explanatory notes state (at 7-8):
- Clause 63 allows the chief executive to obtain a criminal history of a person if an inspector reasonably suspects the person may be present at a place when the inspector enters the place, and may create an unacceptable level of risk to the inspector's safety. While there may be a concern that this can lead to an unnecessary collection of private information, the provision is necessary to determine whether an inspector's unaccompanied entry of a place would create an unacceptable level of risk to the inspector's safety. However, the clause is sufficiently limited so as to prevent 'blanket' criminal histories being obtained for any and all persons at a place. Additionally, clause 64 provides a further safeguard as it makes provision for the confidentiality and destruction of criminal history reports.*
18. However, the committee invites the minister to provide further information about whether clause 63 would have sufficient regard to rights of individuals to privacy, including in respect of matters noted above.

### Onus of proof

19. 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.
20. 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.
21. **Clauses 83-5 and 87** would create evidentiary presumptions to apply in proceedings under the legislation.

22. The presumptions are to facilitate proof in proceedings of:
- the administrative power conferred on the chief executive or an inspector to do anything under the legislation (clause 83);
  - signatures purporting to be the signature of the chief executive or an inspector (clause 84);
  - certificates purporting to be signed by the chief executive and stating specified matters (clause 85); and
  - the day on which a matter came to a complainant's knowledge (clause 87).
23. These matters would not need to be proved in proceedings unless proof was required by a party (clause 83) or a party to the proceedings wished to overturn the statutory presumption.
24. In relation to clause 83, the committee notes the rule of statutory interpretation that statutory powers may include the authority to carry them out (*Fenton v Hampton* (1858) 14 ER 727 at 732, per Fleming CJ and *Egan v Willis* (1998) 195 CLR 424 at 468 per McHugh J). The rule is likely to be subject to the 'principle of legality' which provides that, in the absence of express language or necessary implication to the contrary, the courts presume that even the most general words were intended to be subject to the basic rights of the individual (*R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 per Hoffman LJ). Accordingly, clause 83 does not appear to expand the powers otherwise conferred by the legislation, but to facilitate proof of the powers, including those which have been delegated (see clause 91).
25. The explanatory notes do not address the consistency of clauses 83-5 and 87 with fundamental legislative principles.

#### Power to enter premises

26. 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.
27. **Parts 2 and 3** (as modified by schedule 1) would confer powers of entry under warrant or with consent and various post-entry powers.
28. Part 2 would provide for entry to a 'place' by an 'inspector' (see definitions in schedule 2). Clause 17 would confer an inspector with general power to enter places in specified circumstances. An inspector might enter under a warrant issued by a magistrate or with consent, or otherwise might enter a public place or a place of business when open for business.
29. In respect of entry under warrant, as provided in clause 22, the committee notes that an inspector might apply to a magistrate for a warrant. The committee invites the minister to provide information as to whether, for this provision, 'magistrate' would include a justice of the peace, court officers and other officers.
30. The powers of entry might be exercised in respect of a wide range of 'places' as:
- schedule 2 defines 'place' to include
    - premises;
    - vacant land;
    - a place in Queensland waters;
    - a place held under more than one title or by more than one owner; and
    - the land or water where a building or structure, or a group of buildings or structures, is situated; and
  - 'premises' is, in turn, defined to include –
    - a building or other structure;
    - a part of a building or other structure;
    - a caravan or vehicle;
    - a cave or tent; and
    - premises held under more than one title or by more than one owner.

31. Other clauses would provide for:
- entry by consent (clauses 18-21); and
  - entry under warrant (clauses 22-7).
32. Clause 27 would prescribe the procedure for entering a place under warrant.
33. Clause 5 provides for the common provisions in the legislation, including part 2, to be modified in circumstances identified in schedule 1. Accordingly, schedule 1 would modify the application of clause 17 for the:
- *Manufactured Homes (Residential Parks) Act* – allowing entry to an office or other place, other than residential premises, used for administering or managing a residential park for which site agreements are in force;
  - *Residential Services (Accreditation) Act* – requiring an inspector entering a private residence to preserve, as far as practicable, the privacy of anyone living in the residence;
  - *Retirement Villages Act* – allowing entry to a place, other than a residence, that is an office or other place for administering or managing a retirement village; and
  - *Tourism Services Act* – allowing an inspector to enter a place otherwise open for entry upon a reasonable belief that records relating to carrying on the business of an inbound tour operator, or business as a tour guide, are kept at the place.

34. In respect of these provisions, the explanatory notes indicate (at 5) sufficient regard to rights and liberties of individuals:

*While inspectors may enter a place without a warrant, the circumstances they may do so under clause 17 are sufficiently limited. Additionally, the Bill provides appropriate safeguards. For instance, clauses 20 and 21 prescribe procedures that inspectors must follow when entering a place with consent while clause 27 prescribes the procedure for entering a place under a warrant.*

*The Bill also restricts an inspector's ability to enter a place of residence (including a vehicle) only with consent of the occupier or a warrant. One primary Act where an inspector will invariably need to lawfully enter a place of residence is the Residential Services (Accreditation) Act 2002. In order to provide an additional safeguard to protect the personal privacy of a person living at the residence, a modifying provision in schedule 1 of the Bill requires an inspector to preserve, as far as practicable, the privacy of anyone living at the residence. This modifying provision continues the position currently in section 120 of the Residential Services (Accreditation) Act, which will be repealed as a consequence of this Bill.*

35. Part 3 would confer inspectors with powers:
- to stop or move vehicles (clauses 28-30);
  - exercisable after a place had been entered (clauses 32-34); and
  - of seizure and forfeiture (36-54).
36. In respect of the proposed conferral of powers to stop or require movement of vehicles, the explanatory notes state (at 5-6):

*Clause 29 confers power on inspectors to stop or move vehicles in order to exercise their powers. While this may appear to be an excessive power, the power may only be exercised if an inspector reasonably suspects, or is aware, that a thing in or on a vehicle may provide evidence of the commission of an offence against the Bill or a primary Act. It should also be noted that the power in the Bill is unlike the power available to police in that it is much more limited. For instance, inspectors do not have the power establish road blocks or conduct pursuits. The power is justified on the grounds that a vehicle is just as likely to contain evidence of the commission of an offence as a place, particularly in relation to itinerant traders. It therefore follows that inspectors should have the power to stop vehicles so that they can be searched. The Office of Fair Trading will also develop the appropriate policies, procedures and training to ensure that the power can be exercised safely and lawfully.*

37. As to post-entry powers, the explanatory notes indicate (at 6):
- Once an inspector has entered a place, the Bill confers a number of powers that may be exercised. Clause 33 lists the general powers that an inspector may exercise after entering a place. The powers in clause 33, having been drafted using the OQPC precedent provisions, are the usual powers available to inspectors in legislation and do not include any expanded or additional powers. In respect to seizing items, the Bill provides safeguards in that the decision to seize the item can be appealed against to the Magistrates Court; the person entitled to the seized item may have access to it; and the seized item must be returned (clauses 44-46). The chief executive's decision to forfeit a seized item to the State can also be appealed against to the Magistrates Court (clause 72).*

*Clause 37 confers powers on inspectors to seize evidence at a place that may be entered only with consent or warrant. An inspector may also seize anything else at the place on the reasonable belief that the thing is evidence*

*of an offence against a primary Act or has just been used in committing an offence against a primary Act. While concerns may be raised that seizing evidence of an offence unrelated to the investigation or warrant may adversely affect the rights and liberties of individuals, clause 37 enshrines the established common law power referred to as the 'chance discovery' principle. The chance discovery principle is also currently enshrined in the primary Acts to be harmonised in the Bill, as well as other Queensland laws and laws of the Commonwealth, States and Territories.*

38. More generally, the explanatory notes indicate (at 8-9) that safeguards of individual rights and liberties have been included in the legislation:

*As indicated, the Bill has been drafted using the OQPC precedent provisions that have been developed to have sufficient regard to fundamental legislative principles. Indeed, the Bill contains the usual safeguards which include:*

- *issuing inspectors with identification cards and requiring the cards to be produced or displayed before or when exercising a power;*
- *limiting the power to enter a place of residence with consent of the occupier or warrant only;*
- *requiring an inspector to give appropriate warnings before exercising a power;*
- *providing for the seizure of things only with justification (i.e. by warrant or reasonable belief);*
- *requiring an inspector to give a receipt for a seized thing;*
- *allowing the owner of a seized thing to have access to it;*
- *providing for the return of the seized thing, unless there are reasonable grounds that it should be forfeited;*
- *requiring an inspector to give notice of any damage to the owner of the property, and allowing the owner to make a claim for compensation; and*
- *providing evidential immunity to balance the abrogation of the privilege against self-incrimination.*

#### **Protection against self-incrimination**

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

40. **Clauses 34-5, 39-40, 55-8 and 60-1** would modify common law and statutory rights to silence.

41. The proposed provisions would require a person:

- to provide an inspector with reasonable help if required (including producing a document or giving information) and failure to do so would create liability for an offence (clauses 34 and 35);
- in control of a thing to be seized, including evidence, to comply with the requirements of an inspector (clauses 39 and 40);
- in specified circumstances, to state and give evidence of his or her name and address (clauses 55 and 56);
- to produce a document (clauses 57 and 58); and
- to provide information (clauses 60 and 61).

42. For the purposes of the *Travel Agents Act*, schedule 1 would modify the operation of clause 57. Where the document to be produced was not in English or undecipherable, it would require production also of a statement, written in English or decipherable, containing the whole of the information in the document.

43. The explanatory notes say (at 6-7) that the legislation would provide appropriate protection against self-incrimination:

*Clause 35 makes it an offence for a person to contravene a requirement to help an inspector made under clause 34. While self-incrimination is a reasonable excuse, it does not apply if a document or information the subject of the help requirement is required to be held or kept under a primary Act. It is considered appropriate to abrogate the privilege against self-incrimination in this instance as the person is specifically required under a primary Act to keep certain documents or information. Accordingly, such documents or information would be peculiarly within the possession or knowledge of the person and would otherwise be difficult to obtain or establish.*

*Clause 58 makes it an offence for a person to contravene a document production requirement made under clause 57. It is not a reasonable excuse for a person to fail to comply with the requirement if it might tend to incriminate the person. Again, it is considered appropriate to abrogate the privilege in this instance as the documents required to be produced are those which are issued to a person or required to be kept by a person under a primary Act.*

44. Further, clause 71 would provide 'evidential immunity' for a person giving information or producing a document under clauses 34 or 60. The explanatory notes state (at 7):

*In order to balance the abrogation of the privilege against self-incrimination, evidential immunity is provided in clause 71. Clause 71(2) provides that evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the person, or expose the person to a penalty, in the proceeding. However, this does not apply to a proceeding about the false or misleading nature of the information or anything in the document or in which the false or misleading nature of the information or document is relevant evidence.*

#### **Immunity from proceeding or prosecution**

45. 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.
46. **Clause 90** would protect designated people from civil liability.
47. Clause 90(1) would confer the chief executive, an inspector or a person acting under the authority or direction of an inspector with protection from civil liability (including the payment of costs ordered in a proceeding for an offence (clause 90(3)) for an act done, or omission made, honestly and without negligence under the legislation. Under clause 90(2), liability would attach instead to the State.
48. The committee draws attention to provisions such as clause 90 which would be inconsistent with the principle that all people should be equal before the law. The explanatory notes provide (at 7):

*Clause 90 provides protection from liability for a designated person (i.e. the chief executive, an inspector, or a person acting under the authority or direction of an inspector). However, the immunity only applies to an act done, or omission made, honestly and without negligence under the Bill. The conferral of the immunity is balanced by the fact that any civil liability that would otherwise attach to a designated person instead attaches to the State.*

#### **Compulsory acquisition of property**

49. 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.
50. **Clauses 47, 49-50, 52-4, 116, 122, 129, 133, 139, 150, 156, 166, 175 and 183**, providing for forfeiture of property, may provide for compulsory acquisition of property other than with fair compensation.
51. In addition to forfeiture provisions in the Fair Trading Inspectors Bill (clauses 47, 49, 50 and 52 to 54), the legislation would insert similar provisions into the:
- *Funeral Benefit Business Act* (clause 116, new sections 81 to 81D);
  - *Introduction Agents Act* (clause 122, replacement part 6);
  - *Land Sales Act* (clause 129, replacement part 3A);
  - *Manufactured Homes (Residential Parks) Act* (clause 133, replacement parts 16 and 17);
  - *Residential Services (Accreditation) Act* (clause 139, replacement part 8);
  - *Retirement Villages Act* (clause 150, replacement part 8);
  - *Second-hand Dealers and Pawnbrokers Act* (clause 156, replacement part 5);
  - *Security Providers Act* (clause 166, replacement part 3);
  - *Tourism Services Act* (clause 175, replacement part 6); and
  - *Travel Agents Act* (clause 183, replacement part 6).
52. For each Act, the relevant clause would allow:
- a court order, on conviction of a person for an offence under the Act, for forfeiture of anything used to commit the offence or anything else the subject of the offence;
  - the forfeited property to become the property of the State;
  - the chief executive to deal with forfeited property as considered appropriate, including by destroying it or giving it away; and
  - a court order, on conviction of a person for an offence under the Act, for disposal of anything related to the offence or anything the court considered likely to be used in committing a further offence against the Act.
53. Accordingly, the identified clauses may provide for the acquisition of property other than on just terms.

54. While the Queensland Parliament is not subject to the constitutional restriction found in the Australian Constitution that acquisition of property of all kinds by the Commonwealth must be on just terms, the *Acquisition of Land Act* prescribes conditions for the compulsory acquisition or resumption of land, including payment of compensation. In addition, there is a rule of statutory interpretation which says that legislation is presumed not to remove property rights without adequate compensation.
55. Where justified, the Queensland Parliament has enacted exceptions to the general statutory right and rule of statutory interpretation, such as the confiscation of property associated with crime and the proceeds of crime (*Criminal Proceeds Confiscation Act 2002*).
56. In respect of the principle in section 4(3)(i) of the *Legislative Standards Act* that legislation provide for the compulsory acquisition of property only with fair compensation, the committee draws the attention of the Parliament to proposed legislation which would vary the conditions imposed by the statutory presumption regarding the acquisition of property only on just terms. In this context, the committee notes that:
- currently, the fair trading legislation to be amended does not appear to confer powers to make forfeiture or disposal orders; and
  - neither the minister's second reading speech nor the explanatory notes address the consistency of the proposed provisions with fundamental legislative principles.
57. The following general information is contained in the second reading speech:<sup>1</sup>
- The bill represents a harmonisation and consolidation of the inspectorate provisions contained in fair trading legislation and has been drafted using the most recent precedent provisions developed by the Office of the Queensland Parliamentary Counsel. These precedent provisions have been developed to have sufficient regard to fundamental legislative principles. This is an acknowledgement of how critical it is to ensure that inspectorate provisions are exercised appropriately and with sufficient regard to the severity of the situation.*
- Members should note that the Office of Fair Trading does not merely investigate and prosecute breaches of legislation. It also proactively monitors and ensures compliance with the legislation, for instance, by conducting spot checks and requesting information and documents from traders. In fact, in 2009-10 the Office of Fair Trading monitored over 11,870 entities for compliance.*
- The bill therefore contains powers to enter and search places, obtain documents and information, obtain offence related and monitoring warrants, and seize and forfeit evidence.*
58. However, the committee invites the minister to provide information about whether the proposed provisions would have sufficient regard to rights and liberties of individuals.

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### Explanatory notes

59. 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)).
60. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

### Forms

61. Clause 93 states that the chief executive may approve forms for use under the legislation.

<sup>1</sup> The Hon PJ Lawlor MP, Minister for Tourism and Fair Trading, Second Reading Speech, Record of Proceedings (Hansard), 17 February 2011, 228.





## 2. QUEENSLAND RECONSTRUCTION AUTHORITY BILL 2011

<b>Date introduced:</b>	16 February 2011
<b>Responsible minister:</b>	Hon AM Bligh MP
<b>Portfolio responsibility:</b>	Premier and Minister for the Arts
<b>Date passed:</b>	17 February 2011
<b>Date of assent:</b>	21 February 2011

### ISSUES ARISING FROM EXAMINATION OF BILL

1. On 16 February 2011, the Queensland Reconstruction Authority Bill was declared an urgent bill under Standing Order 159. It passed with unusual expedition through all its stages. It became an Act upon assent on 21 February 2011.
2. Prior to assent, the committee considered and reported upon the application of fundamental legislative principles to the legislation. Report no 45, *Queensland Reconstruction Authority Bill 2011*, was tabled in the Legislative Assembly by the committee Chair on 17 February 2011.
3. By letter to the Chair of the Scrutiny of Legislation Committee dated 17 February 2011 and tabled in the Legislative Assembly on 17 February 2011, the Premier of Queensland provided a response to issues arising from the committee's examination of the Queensland Reconstruction Authority Bill (see chapter 4).

### BACKGROUND

4. The legislation is to enable a Queensland Reconstruction Authority to coordinate and manage rebuilding and recovery in communities affected by floods in December 2010 and January 2011, severe tropical cyclone Yasi and any other prescribed disaster event. The legislation is subject to a two-year sunset clause.

### LEGISLATIVE PURPOSE

5. The main purpose of the Act is to provide appropriate measures to ensure Queensland and its communities recover effectively and efficiently from the effects of disaster events (clause 2).
6. It is to expire two years after commencement (clause 139).
7. The Act is to complement the *State Development and Public Works Organisation Act 1971* and *Sustainable Planning Act 2009*. It would amend the:
  - *Building Act 1975*;
  - *Disaster Management Act 2003*;
  - *Integrity Act 2009*;
  - *Land Valuation Act 2010*;
  - *Public Service Act 2008*; and
  - *State Development and Public Works Organisation Act*.

### APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

8. See report no 45.

### OPERATION OF CERTAIN STATUTORY PROVISIONS

9. See report no 45.



**PART 2 – SUBORDINATE LEGISLATION EXAMINED****SUBORDINATE LEGISLATION TABLED: 16 FEBRUARY 2011 TO 7 MARCH 2011**

(Listed in order of sub-leg number)

SLNo 2010	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
317	Health Services Amendment Regulation (No.3) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
318	Proclamation commencing certain provisions		26/11/2010	11/05/2011	16/02/2011	24/05/2011
319	Superannuation (State Public Sector) Amendment of Deed Regulation (No.1) 2010	EI	26/11/2010	11/05/2011	16/02/2011	24/05/2011
320	Queensland Building Services Authority Amendment Regulation (No.2) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
321	Electricity Amendment Regulation (No.1) 2010	RIS	26/11/2010	11/05/2011	16/02/2011	24/05/2011
322	Rural and Regional Adjustment Amendment Regulation (No.7) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
323	Local Government Legislation Amendment Regulation (No.3) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
324	Building and Other Legislation Amendment Regulation (No.4) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
325	Proclamation commencing certain provisions		26/11/2010	11/05/2011	16/02/2011	24/05/2011
326	Land Sales Amendment Regulation (No.4) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
327	Liquor Amendment Regulation (No.3) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
328	Environmental Protection Amendment Regulation (No.1) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011
329	Proclamation commencing remaining provisions		26/11/2010	11/05/2011	16/02/2011	24/05/2011
330	Proclamation commencing remaining provisions	EI	26/11/2010	11/05/2011	16/02/2011	24/05/2011
331	State Penalties Enforcement Amendment Regulation (No.8) 2010		26/11/2010	11/05/2011	16/02/2011	24/05/2011

SLNo 2010	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
332	Superannuation (State Public Sector) Amendment Notice (No.6) 2010	EI	26/11/2010	11/05/2011	16/02/2011	24/05/2011
333	Infrastructure Investment (Asset Restructuring and Disposal) Notice 2010		29/11/2010	11/05/2011	16/02/2011	24/05/2011
334	Duties Amendment Regulation (No.1) 2010	EI	3/12/2010	11/05/2011	16/02/2011	24/05/2011
335	Statutory Bodies Financial Arrangements Amendment Regulation (No.1) 2010	EI	3/12/2010	11/05/2011	16/02/2011	24/05/2011
336	Forestry (State Forests) Amendment Regulation (No.2) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
337	Electricity Amendment Regulation (No.2) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
338	Proclamation commencing remaining provisions		3/12/2010	11/05/2011	16/02/2011	24/05/2011
339	Plant Protection Amendment Regulation (No.2) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
340	Urban Land Development Authority Amendment Regulation (No.6) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
341	Royal National Agricultural and Industrial Association of Queensland Regulation 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
342	State Development and Public Works Organisation (State Development Areas) Amendment Regulation (No.2) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
343	Sustainable Planning Amendment Regulation (No.5) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
344	Sustainable Planning Amendment Regulation (No.6) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
345	Proclamation commencing certain provisions		3/12/2010	11/05/2011	16/02/2011	24/05/2011
346	Security Providers Amendment Regulation (No.1) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
347	Water Amendment Regulation (No.5) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011

SLNo 2010	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
348	Nature Conservation (Protected Areas) Amendment Regulation (No.7) 2010		3/12/2010	11/05/2011	16/02/2011	24/05/2011
349	Water Fluoridation Amendment Regulation (No.1) 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
350	Statutory Bodies Financial Arrangements Amendment Regulation (No.2) 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
351	Proclamation commencing certain provisions		10/12/2010	11/05/2011	16/02/2011	24/05/2011
352	Proclamation commencing certain provisions		10/12/2010	11/05/2011	16/02/2011	24/05/2011
353	Proclamation commencing certain provisions		10/12/2010	11/05/2011	16/02/2011	24/05/2011
354	Fisheries Amendment Regulation (No.1) 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
355	Animal Care and Protection and Other Legislation Amendment Regulation (No.1) 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
356	Rural and Regional Adjustment Amendment Regulation (No.8) 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
357	Fisheries (East Coast Trawl) Management Plan 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
358	State Development and Public Works Organisation Amendment Regulation (No.1) 2010		10/12/2010	11/05/2011	16/02/2011	24/05/2011
359	Proclamation commencing certain provisions		10/12/2010	11/05/2011	16/02/2011	24/05/2011

SLNo 2011	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
1	Rural and Regional Adjustment Amendment Regulation (No.1) 2011	EN	11/01/2011	11/05/2011	16/02/2011	24/05/2011
2	Standard Plumbing and Drainage Amendment Regulation (No.1) 2011	EN	21/01/2011	11/05/2011	16/02/2011	24/05/2011
3	Transport and Other Legislation Amendment Regulation (No.1) 2011	EN	28/01/2011	11/05/2011	16/02/2011	24/05/2011
4	Health (Drugs and Poisons) Amendment Regulation (No.1) 2011	EN	28/01/2011	11/05/2011	16/02/2011	24/05/2011

SLNo 2011	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
5	Superannuation (State Public Sector) Amendment of Deed Regulation (No.1) 2011	EN	4/02/2011	11/05/2011	16/02/2011	24/05/2011
6	Statutory Bodies Financial Arrangements Amendment Regulation (No.1) 2011	EN	4/02/2011	11/05/2011	16/02/2011	24/05/2011
7	Sustainable Planning Amendment Regulation (No.1) 2011	EN	4/02/2011	11/05/2011	16/02/2011	24/05/2011
8	Not allocated at time of tabling.					
9	Prisoners (Interstate Transfer) Amendment Regulation (No.1) 2011	EN	4/02/2011	11/05/2011	16/02/2011	24/05/2011
10	Workplace Health and Safety (Codes of Practice) Amendment Notice (No.1) 2011	EN	4/02/2011	11/05/2011	16/02/2011	24/05/2011

\* EN – Explanatory Notes. RIS – Regulatory Impact Statement. EI – Explanatory Information received.  
TBA – Disallowance date to be advised when subordinate legislation has been tabled.

## SUBORDINATE LEGISLATION UNDER CONSIDERATION

### 3. ENVIRONMENTAL PROTECTION LEGISLATION AMENDMENT REGULATION (NO.1) 2010

**Date tabled:** 16 February 2011

**Disallowance date:** 24 May 2011

**Responsible minister:** Hon KJ Jones MP

#### ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information about the fees contained in section 14 (new schedule 10, part 1, items 1 and 2, of the Environmental Protection Regulation 2008), including:
  - the factors considered when setting the level of fees; and
  - the consultation undertaken with industry and environmental stakeholders.

#### APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

##### Sufficient regard to the institution of Parliament

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

##### Within power

3. Section 4(5)(a) of the *Legislative Standards Act* provides that whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation is within the power that allows the subordinate legislation to be made.
4. The amendment regulation was made under the *Environmental Protection Act 1994*. Part 2 amended the Environmental Protection Regulation 2008.
5. Section 14 purported to amend schedule 10 of the regulation which provides for fees. New part 1, items 1 and 2 provide for fees for:
  - submitting draft terms of reference for an EIS (\$120 000); and
  - giving an EIS amendment notice, other than an EIS amendment notice given under section 56(2)(c) of the Act (\$10 000).
6. Item 1 purports to be made under section 41(2)(b) of the Act. Section 41 requires submission to the chief executive of draft terms of reference for an EIS that allow the purposes of the EIS to be achieved for the project. Section 41(2) requires that the draft be in the approved form and 'accompanied by the fee prescribed under a regulation'.
7. Item 2 purports to be made under section 66(4) of the Act. Section 66 allows for amendment or replacement of an original EIS but requires, in section 66(4) that an EIS amendment notice 'be accompanied by the fee prescribed under a regulation'.
8. Section 580 of the Act provides a general regulation-making power. It states, in part:
  - (1) The Governor in Council may make regulations under this Act.
  - (2) Without limiting subsection (1), a regulation may be made about any of the following matters—
    - (a) the matters for which fees are payable under this Act, the amounts of the fees, the persons who are liable to pay fees, when the fees are payable, the recovery of unpaid amount of fees, and the exemption from payment of fees or the waiver of fees;

9. Section 14 of the amendment regulation may purport to impose new fees of such a magnitude that the amendment may not be within the legislative power delegated by the Act and, in particular, because fees of such a magnitude may not be based on recovery of the costs of administering the EIS relevant matters.
10. The courts will examine regulations made under such a delegation of legislative power to determine whether each fee set by regulation represents a fee for services (and is within the power delegated) or bears no relationship to administrative cost (and may be beyond the power delegated).<sup>2</sup> In *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572, the High Court held that a licence fee was invalid because (per Barwick CJ at 581):  
  
*... the fee bears no resemblance to the cost of administering a licensing system. It is evidently not a charge fixed as a reasonable fee for the issue of licences ... the statute in this case authorized no more than fees which fall within this description.*
11. As explanatory notes were not tabled with the amendment regulation, the committee invites the minister to provide information about the factors considered when setting the level of the fees.

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<sup>2</sup> See: LA 01/11 at 29.



## PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

### 4. QUEENSLAND RECONSTRUCTION AUTHORITY BILL 2011

<b>Date introduced:</b>	16 February 2011
<b>Responsible minister:</b>	Hon AM Bligh MP
<b>Portfolio responsibility:</b>	Premier and Minister for the Arts
<b>Date passed:</b>	17 February 2011
<b>Committee report on bill:</b>	Report no 45, tabled 17 February 2011
<b>Date response received:</b>	17 February 2011 (copy commences following page)

#### ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
  - **clauses 54, 92 and 149** which may affect rights of individuals otherwise available under statute;
  - **clauses 88, 100, 115 -119, 127, 146 and 161** creating new offences;
  - **clause 153** which may require the chief executive officer of the authority to provide the integrity commissioner and relevant minister with personal information;
  - **part 1** delegating to the Queensland Reconstruction Authority significant administrative powers;
  - **clause 61** excluding the operation of parts 3 and 5 of the *Judicial Review Act 1991* in respect of certain decisions made under the legislation;
  - **clause 101** allowing registration of a public utility easement without the signature of the registered owner of the relevant land;
  - **clauses 104 and 121-3** assisting the proof of certain matters in proceedings;
  - **clause 105** conferring powers of entry without warrant or consent, and post-entry powers, on authorised persons;
  - **clauses 127-8** which may modify common law and statutory protections of the right to silence;
  - **clause 146** which may have the potential to adversely affect the rights and liberties of, or impose obligations on, individuals retrospectively;
  - **clauses 129 and 133** conferring immunity from proceeding or prosecution; and
  - **clauses 99-104** providing for the taking of land by the authority or a local government.
2. 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 6, 43, 63, 150-1 and 161** which may delegate legislative power in inappropriate cases; and
  - **clauses 42, 45, 106-7 and 135** which may not provide for appropriate parliamentary scrutiny of delegated legislative power.
3. The committee invites the minister to provide information about whether **clause 105** has sufficient regard to rights and liberties of individuals.

#### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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



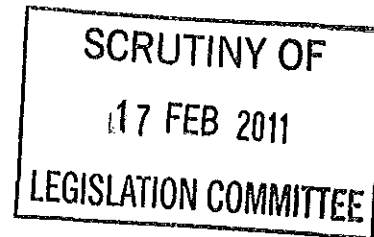
# Premier of Queensland

For reply please quote: LJP/RL -TF  
Your reference: (\*delete if not applicable)

17 FEB 2011

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Scrutiny of Legislation Committee  
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Dear Jo-Ann

Thank you for your letter of 17 February 2011 enclosing the Scrutiny of Legislation Committee's report in relation to the Queensland Reconstruction Authority Bill 2011. I thank the Committee for its detailed consideration of the Bill in such a short timeframe.

The Committee has highlighted breaches of fundamental legislative principles in the *Legislative Standards Act 1992* with respect to several clauses in the Bill and noted in its Alert where the Explanatory Notes to the Bill provide justification and rationale for breaches of fundamental legislative principles. I reiterate the information provided in the Explanatory Notes which sets out the necessity and justifications for these clauses.

The Committee has requested that I provide further information about the operation of clause 105 and whether the clause has sufficient regard to the rights and liberties of individuals. Clause 105 applies provisions of the *State Development and Public Works Organisation Act 1971* and allows persons authorised by the Queensland Reconstruction Authority (the Authority) to enter land in order to undertake works. As stated in the Explanatory Notes, the power to enter land may only be exercised in order to undertake works authorised under regulation, and does not extend to entry to residential premises.

I note the Committee's comments that the drafting of the clause, which applies section 136 of the *State Development and Public Works Organisation Act 1971*, requires a person to refer to another Act in order to understand the powers exercisable by an authorised person under the clause. In drafting the Bill, the approach adopted was to, as far as possible, maintain consistency in the powers being provided to the Authority with existing powers available to other Queensland Government agencies and officials, most notably the Coordinator-General and the Urban Land Development Authority. In



Queensland  
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the case of clause 105, the approach taken was to apply the provisions of the relevant section, rather than replicate the provision in the Bill. I note that the Explanatory Notes set out the effect of the application of section 136 of the *State Development and Public Works Organisation Act 1971* with the express intention of assisting in interpretation of the operation of this clause.

The Committee states the provision does not require, in the absence of an occupier, an authorised person to provide written notice of entry without consent, the identity of the person who entered, the purposes of entry or the date and time of entry. However, under clause 105(3) of the Bill, section 136(2) to (4) of the *State Development and Public Works Organisation Act 1971* will apply to the Authority. Section 136(3) will require the Authority to provide seven days notice of intended entry to land to an occupier, and in the absence of an occupier, an owner of land. Further, section 136(4) will require the Authority to provide produce any authority for entry of land to any occupier or owner of land on request. These provisions are intended to provide due notice to affected owners or occupiers of land.

The Committee has also noted that the Explanatory Notes did not provide information in relation to clauses 54, 129 and 133 about consistency with fundamental legislative principles. I provide further information about the operation of these clauses with respect to fundamental legislative principles.

Clause 54 enables the Authority to issue a step-in notice in respect of a prescribed decision or process in accordance with the procedures set out in part 5, subdivision 3 of the Bill. For example, the Authority could issue a step-in notice in respect of a development application made under the *Sustainable Planning Act 2009* and become the decision-maker in respect of the prescribed decision or process. The Minister's approval is required before a step-in notice is given.

A step-in notice can only be given in respect of development in a reconstruction area (identified under a regulation) or a declared project. Furthermore, the Minister must be satisfied that the giving of the notice is necessary to facilitate flood mitigation for an affected community, or the protection, rebuilding and recovery of, an affected community. This is a power which allows the Authority to protect and promote the achievement of its reconstruction objectives. This power is not intended to be used routinely or often, but is intended to allow the Government to intervene in the development assessment process in exceptional circumstances where necessary to ensure that flood mitigation is facilitated and the protection, rebuilding and recovery of affected communities is achieved.

Situations may arise where a proposed development is essential to the recovery effort of the State. In this instance, the step-in power can be used to ensure that a coordinated and efficient assessment of the application is undertaken. Alternatively, a proposed development could seriously affect the implementation of the reconstruction

objectives. In these situations, exercising the power to step in and assess and decide the application allows the Authority to redress what otherwise could become a serious problem for the community.

Under the Bill, any existing appeals or reviews in respect of the application are of no further effect once the step in notice is given. There is also no right of appeal against the Authority's decision on the application. However, there is an ability to seek a review of the decision under the *Judicial Review Act 1991*, unless the decision relates to a critical infrastructure project.

There are similar existing Acts dealing with development involving a State interest such as the Ministerial call in powers under the *Sustainable Planning Act 2009* and step-in powers of the Coordinator-General under the *State Development and Public Works Organisation Act 1971*. These Acts operate in a similar way, allowing the relevant Minister and the Coordinator-General to decide applications in the place of the original decision-maker. These provisions also do not provide for a right of appeal, and cause any existing appeals to be of no further effect.

The purpose of the step-in power is to enable the Authority to assume the role of decision maker so that it can coordinate and fast-track the assessment process. This will ensure that decisions are made efficiently and will enable appropriate developments to be delivered on the ground more quickly. If reviews and appeals were able to be made or continued in respect of these applications, unnecessary delays would occur in delivering appropriate developments on the ground. The Authority is also directly accountable to Parliament for its decisions, and must prepare a report about the decision for tabling in the Legislative Assembly within 14 sitting days of making the decision.

Clauses 129 and 133 of the Bill provide protection against liability for persons providing information to the Authority, and for certain officials in the performance of functions under the Act. While recognising the principle of equality before the law and that each person should be liable for their acts or omissions, it is considered that conferral of immunity under these clauses is appropriate in the circumstances.

It is considered necessary that immunity be conferred under clause 129, in order to ensure that persons are able to provide information to the Authority in accordance with its information-gathering powers under clauses 126, 127 and 128. The ability for the Authority to obtain information is considered critical to its functions of reconstruction, recovery and protection of disaster-affected communities, and the conferral of immunity is a necessary corollary of this information-gathering power. This reflects the Government's intention that, subject to the limitation on the provision of personal information and any statutory restrictions on release under Commonwealth law, the Authority should be able to access information required for the effective and efficient carrying out of its functions.

Clause 133 provides protection from liability for officials involved in the administration of the Act, which includes the Minister, a member of the Queensland Reconstruction Board, the chief executive officer and other staff of the Authority. It is considered appropriate, that in performing statutory duties, these individuals be provided with protection from liability, as long as their actions are performed honestly and without negligence. In such circumstances, consistent with provisions of many other Queensland Acts, liability would attach to the State, thus ensuring that any affected person would not be deprived of a remedy.

Once again, I thank the Committee for its consideration of the Bill. I acknowledge the broad powers conferred under the Bill, but reiterate that these powers are considered justified in the extraordinary circumstances of natural disaster currently faced by Queensland. In addition, I reiterate that the Bill only grants these powers for a limited period for reconstruction purposes, with clause 139 providing for the expiry of the Act two years after commencement.

I thank the Committee for the opportunity to comment on the above issues.

Yours sincerely



ANNA BLIGH MP  
PREMIER OF QUEENSLAND

**5. CRIMINAL PROCEEDS CONFISCATION (SERIOUS AND ORGANISED CRIME UNEXPLAINED WEALTH) AMENDMENT BILL 2010**

<b>Date introduced:</b>	24 November 2010
<b>Responsible member:</b>	Mr LJ Springborg MP
<b>Portfolio responsibility:</b>	Shadow Minister for State Development, Major Projects, Infrastructure and Planning, Shadow Minister for Trade
<b>Nature of bill:</b>	Private member's bill
<b>Committee report on bill:</b>	Report no 45, tabled 17 February 2011
<b>Date response received:</b>	7 March 2011 (copy commences following page)

**ISSUES ARISING FROM EXAMINATION OF BILL**

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
  - **clauses 6 and 11** allowing confiscation of wealth and property; and
  - **clause 6** imposing a persuasive onus on a respondent to an unexplained wealth application.
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 6 and 11** which may be incompatible with the Supreme Court's institutional integrity.

**EXAMINATION OF INFORMATION PROVIDED**

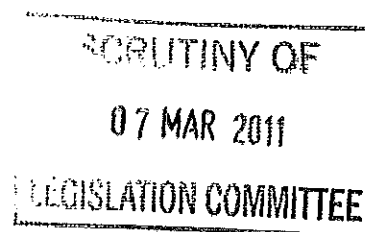
3. The committee thanks Mr Springborg for the information provided in his letter.
4. The committee makes no further comment regarding the legislation.

**Lawrence Springborg** MP  
Deputy Leader of the Opposition  
Deputy Leader of the Liberal National Party



2 March, 2011

Mrs Jo-Ann Miller, MP  
Chair, Scrutiny of Legislation Committee  
Parliamentary Annexe  
George Street  
BRISBANE QLD 4000



Dear Ms Miller

**Re: Criminal Proceeds Confiscation (Serious and Organised Crime Unexplained Wealth) Amendment Bill 2010**

Please allow me to take this opportunity to thank the Scrutiny of Legislation Committee for the work that it does in contributing to the workings of Parliament and for also allowing me this opportunity to respond to some of the points raised by the Committee in its' examination of this very important Bill.

This Bill seeks to strengthen the provisions contained in the Criminal Proceeds Confiscation Act which has been in force since 2002.

The Opposition makes no mistake that these amendments are a significant step forward in the battle against organized crime and serious drug crime. The nexus of these amendments came through discussions with key stakeholders during debate on the repugnant 'anti-association' laws forced through by the Government in 2009.

The research and evidence all point to the need to 'follow the money trail' when it comes to tackling organized crime. There is no evidence to suggest that imposing anti-association orders has any effect on breaking up organized crime groups and in fact in many circumstances has had the opposite effect.

I note the trends and issues paper released by the Australian Institute of Criminology on unexplained wealth where it wrote-

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*“Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws, with the Criminal Property Confiscation Act 2000 (WA). Citing the Parliamentary speeches when the legislation was introduced, Lusty (2002: 355) notes that the Act is ‘squarely aimed at “those people who apparently live beyond their legitimate means of support””.*

Also contained in this paper are the arguments in favor of ‘unexplained wealth’ which follow:

*When considering the Commonwealth Bill, the SLCAC noted a submission from the Police Federation of Australia that unexplained wealth laws have three objectives, namely:*

- to deter those who contemplate criminal activity by reducing the possibility of gaining or keeping a profit from that activity;*
- to prevent crime by diminishing the capacity of offenders to finance any future criminal activity that they might engage in; and*
- to remedy the unjust enrichment of criminals who profit at society’s expense (SLCAC 2009: 16).*

The success of the use of unexplained wealth orders have been highlighted in other jurisdictions, these include Western Australia, Northern Territory and in other countries such as Italy in its fight against the ‘mafia’.

It has been estimated that the unexplained wealth provisions currently operating in Western Australia and Northern Territory has resulted in the forfeiture of more than \$40 million .

The Parliamentary Joint Committee on the Australian Crime Commission found:

*“It was suggested to the PJC-ACC that laws of this nature, if applied successfully, remove the financial incentive to commit organised crime and they do so more effectively than proceeds of crime laws, because they do not rely on prosecutors being able to link the wealth to a criminal offence (PJC-ACC 2009: [5.51]).*

The Western Australian Office of the Director of Public Prosecutions reported in the annual report for 2009/10:

*“A significant proportion of confiscated property arises from the conviction of an accused person and the subsequent declaration that the person is a drug trafficker. Therefore the number of applications of declaration of confiscation is directly related to the number of people who have been declared drug traffickers.*

*“Upon declaration that a convicted person is a drug trafficker, all property relating to that person is confiscated to the State. While many individuals declared as drug traffickers have no assets, proceedings have begun against a number of declared drug traffickers during 2009/10. During 2009/10, 95 people were declared drug traffickers. It should be noted that formal confiscation may not necessarily occur within the same reporting year as a declaration that a person is a drug trafficker.*



*"The proceeds of confiscated assets are paid into the Confiscation Proceeds Account and the Attorney General has the power to make grants from the account for a range of purposes. In 2009/10 a total of \$10,047,391 was paid into the Confiscation Proceeds Account from the property of declared (or taken to be declared) drug traffickers.*

I note that the Committee questions the application of the Bill to the fundamental legislative principle regarding the rights and liberties of individuals.

This issue was considered at length and in developing this legislation and given the potential intrusive nature of the Bill, it was balanced against the need to tackle serious and organized crime. As such it was felt that having a fully active public interest monitor that could participate unrestricted in unexplained wealth application hearings was sufficient to balance the rights of individuals who may be caught by the legislation.

The Committee raises the concern about the application of the drug trafficker declarations and the institution of Parliament.

Very similar laws have been operating in Western Australia for more than 10 years and have withstood challenge. The Courts ability to not make such an order is not impeded should it find that evidence before it shows that the wealth has been explained to have been obtained lawfully. These orders will form part of sentencing such an offender.

The Amendments also provide for the ability of the court to order relief if hardship can be demonstrated and is at the decision of the court that will be assessed on a case by case basis and is for the court to determined based on submissions made from respective parties.

Whilst the Court is bound to make the declaration or order, it only has to do so should it satisfy itself that such provisions are first meet. In the case of drug traffickers that offenders would first have to be found guilty of prescribed offences.

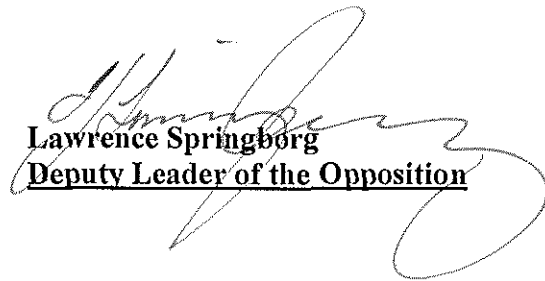
Subclause 5 of 216E states that the court must proceed with application in the absence of notice being given to respondent, however despite this the court may at any time prior to its final decision direct the State to give notice of the application to the respondent and any interested party within the time it deems appropriate.

I hope that this further information provides some further insight in the operation of the Bill.

In concluding, can I once again thank the Committee for the opportunity to elaborate further on the Bill and for its important contribution to the Parliamentary process.

I have taken the liberty of including a copy of the Australian Institute of Criminology trends and issues report on 'unexplained wealth'.

Yours sincerely



**Lawrence Springborg**  
**Deputy Leader of the Opposition**