Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

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COMMITTEE RESPONSIBILITY

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

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

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

1. Examination of legislation

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

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

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

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

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

2. Monitoring the operation of statutory provisions

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

Legislative Standards Act	***Statutory Instruments Act***
• Meaning of 'fundamental legislative principles' (section 4) • 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
allow the delegation of administrative power only in appropriate cases and to appropriate persons
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. ELECTRICAL SAFETY AND OTHER LEGISLATION AMENDMENT BILL 2011

Date introduced: 8 March 2011

Responsible minister: Hon CR Dick MP

Portfolio responsibility: Minister for Education and 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:
   - **clause 15** creating offence provisions;
   - **part 4** removing Queensland Workplace Agreements from the industrial relations system;
   - **clauses 4-6** which may make obligations dependent on administrative power which may not be sufficiently defined;
   - **clauses 37 and 38** altering administrative review procedures regarding the Queensland workplace rights ombudsman;
   - **clause 66** limiting the grounds of appeal to the industrial court in respect of a decision of the industrial commission;
   - **clauses 9 and 15** which may impose evidentiary burdens on respondents in proceedings for offences; and
   - **clause 2** which may provide for the retrospective operation of some provisions of the legislation.
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 8** which may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system;
   - **clause 8** allowing the meaning of terms central to the operation of the legislation to be prescribed by regulation;
   - **clause 15** which may delegate legislative power in an inappropriate case; and
   - **clause 8** which may not sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

BACKGROUND

3. The legislation is to implement a new Electrical Equipment Safety System as part of a uniform system across Australia and New Zealand. Further, it is to put in certain industrial relations measures and to alter appeal rights for workers' compensation matters.

LEGISLATIVE PURPOSE

4. The bill is intended to (explanatory notes, 1):
   - implement a uniform Electrical Equipment Safety System, with the key objective of eliminating the human and financial costs of shock, injury and property damage that can be caused by unsafe electrical equipment used by consumers and installed in their premises;
   - ensure that local government employees are not disadvantaged by the termination of federal transitional instruments on 27 March 2011;
   - remove individual workplace agreements from the industrial relations system;
   - clarify procedural and other requirements for workers' compensation appeals; and
   - amend the arrangements for the Queensland workplace rights ombudsman.

5. The bill would amend the:
   - *Electrical Safety Act 2002*;
   - Electrical Safety Regulation 2002;
   - *Industrial Relations Act 1999*;
   - Industrial Relations Regulation 2000;
   - Industrial Relations (Tribunals) Rules 2000; and
   - *Workers' Compensation and Rehabilitation Act 2003*.
6. In addition, it would effect minor or consequential amendments to the:
   - *Child Employment Act 2006*;
   - *Coal Mining Safety and Health Act 1999*;
   - *Mining and Quarrying Safety and Health Act 1999*;
   - *Pastoral Workers' Accommodation Act 1980*;
   - *South East Queensland Water (Restructuring) Act 2007*; and
   - State Penalties Enforcement Regulation 2000.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

8. **Clause 15** would amend the Electrical Safety Regulation to create offence provisions, as identified below.

New section	Proposed offence	Proposed maximum penalty
New 98(5)	Giving false information or making a false declaration in registering as a responsible supplier	40 penalty units ($4000)
New 100A(2)	Failing to correct details in the national register	40 penalty units ($4000)
New 101(6)	Giving false information or making a false declaration in registering a type of level 2 in-scope electrical equipment	40 penalty units ($4000)
New 103A(6)	Giving false information or making a false declaration in registering a type of level 3 in-scope electrical equipment	40 penalty units ($4000)
New 104(1)	Prohibited selling of level 1 in-scope electrical equipment by responsible supplier	40 penalty units ($4000)
New 105(1)	Prohibited selling of level 2 or 3 in-scope electrical equipment by responsible supplier	40 penalty units ($4000)
New 106(1)	(Person) Selling in-scope electrical equipment not marked with regulatory compliance mark	20 penalty units ($2000)
New 106(2)	Selling unregistered in-scope electrical equipment	20 penalty units ($2000)
New 107(2)	Failing to keep documentary evidence proving level 1 item meets relevant standard	40 penalty units ($4000)
New 108(2)	Failing to keep compliance folder proving level 2 item meets relevant standard	40 penalty units ($4000)

New section	Proposed offence	Proposed maximum penalty
New 109(2)	Failing to keep current certificate of conformity for level 3 item	40 penalty units ($4000)
New 111(1)	(Responsible supplier) Selling in-scope electrical equipment not marked with regulatory compliance mark	40 penalty units ($4000)
New 112(1)	Marking in-scope electrical equipment that does not meet relevant standard	40 penalty units ($4000)
New 116H	Failing to return cancelled certificate of conformity	10 penalty units ($1000)
New 119K(2)	Failing to comply with reporting requirements	40 penalty units ($4000)
New 119L	Failing to comply with equipment safety rules	40 penalty units ($4000)
New 121(2)	Failing to take all reasonable steps to provide item for testing	40 penalty units ($4000)
New 121(3)	Failing to take all reasonable steps to ensure inspector able to test items	40 penalty units ($4000)
New 125(1)	Failing to give purchaser information about second-hand in-scope electrical equipment	40 penalty units ($4000)
New 126B(1)	Selling item of particular electrical equipment without 'DIY warning sign'	40 penalty units ($4000)
New 126C	Selling electrical equipment without complying with safety criteria	40 penalty units ($4000)
New 126D(4)	Contravening prohibition on sale or use of electrical equipment on safety grounds	40 penalty units ($4000)
New 126E(2)	Failing to attach label to item of electrical equipment with serious defect	40 penalty units ($4000)
New 126E(3)	Removing label from item of electrical equipment with serious defect	40 penalty units ($4000)
New 126G(7)	Failing to comply with safety requirements as to electrical equipment for hire	40 penalty units ($4000)

9. Clause 15 would insert a new part 6A of the Electrical Safety Regulation, containing general provisions regarding electrical equipment. The explanatory notes provide (at 26) the following information about new part 6A:

   Part 6A does not form part of the model provisions for the EESS. It contains some of the provisions currently in Part 6 of the Regulation that do not apply to in-scope electrical equipment. Inserting a new Part 6A and its sections is a consequential amendment.

10. In respect of proposed offence provisions in the new part 6A, the committee raises three matters for consideration.

11. First, the offence provision in new section 106(2) may not be drafted with sufficient clarity as criminal responsibility may be avoided if an honest and reasonable but mistaken belief as to registration was based on 'reasonable monitoring' of the national register (new section 106(3)). New section 106(3) provides that, in deciding whether the monitoring of the national register was reasonable, regard may be had to the nature of the item and the nature of the person's business in relation to the item. However, despite new section 106(3), the meaning of 'reasonable monitoring' may not be sufficiently clear, nor do the explanatory notes assist in this regard (see explanatory notes, 19).

12. Second, new section 126E would impose liability for a failure by a 'distribution entity' to ensure that a label was attached to the item of electrical equipment, but 'distribution entity' is not defined for the purposes of new part 6A (it is defined in section 195 for the purposes of part 12) and use of the term 'distribution entity' would appear to impose criminal liability on an entity rather than a natural person.

13. Third, the scope of the offence provision in new section 126G(2) depends upon the meaning of 'domestic electrical equipment', but this term may not be defined sufficiently clearly by new section 126G(8) – it is to re-enact section 126(6) which defines 'domestic electrical equipment' to mean 'computer equipment, browngoods or whitegoods' without defining 'browngoods'.

Right to work and work-related rights

14. **Part 4** would amend the *Industrial Relations Act* to remove Queensland Workplace Agreements from Queensland's industrial relations system. The following information is provided (at 4) in the explanatory notes:

For local government employees covered by a federal industrial instrument that expires on 27 March, 2011, the policy objectives of the Bill are achieved by providing that a local government that was not covered by the LGIR Act but was a respondent to the original federal award that was taken to be a State award made by the QIRC under the LGIR Act (the State award), is bound by the State award. The State award reinstates provisions that were stripped from awards by Work Choices. However, wages and allowances under the federal transitional award that applies to local governments before the commencement, will continue to apply. For local governments that have pre-reform certified agreements, the agreements will be converted to State agreements. Consistent with the LGIR Act, the State agreements will have model dispute resolution procedures approved by the QIRC, rather than the restrictive procedures mandated by Work Choices.

To remove QWAs from the system, the Bill repeals Part 2 of Chapter 6 of the IR Act. Some transitional arrangements have been included for any federal individual statutory agreements that might need to be catered for if a national system employer was returned to the State system and had employees who were still on old individual statutory agreements.

15. The explanatory notes state (at 6) that part 4 would have sufficient regard to rights and liberties of individuals:

The removal of QWAs will not impact on the rights of individuals by removing their ability to make, extend or amend this type of agreement. There are no QWAs in force in the State industrial relations jurisdiction and therefore no rights or liberties of any individual will be affected by their removal.

Administrative power

16. 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.

17. **Clauses 4-6** may make obligations dependent on administrative power which may not be sufficiently defined.

18. These provisions would extend obligations imposed by the *Electrical Safety Act* to specified people dealing with 'in-scope electrical equipment'. Clause 8 would then provide for a regulation to define terms relevant to the scope of the obligations imposed by clauses 4 to 6. Clause 8 is examined also under the heading, 'Delegation of legislative power'.

19. In respect of the definition of administrative power conferred by the legislation, the explanatory notes state (at 5):

There is a possible issue with the application of the scope of the proposed system. In-scope electrical equipment is low voltage electrical equipment that is designed, or marketed as suitable, for household, personal or similar use.

20. **Clauses 37 and 38** would alter administrative review procedures regarding the Queensland workplace rights ombudsman.

21. Currently, the *Industrial Relations Act* establishes the office of the Queensland workplace rights ombudsman. However, clause 37 would replace section 339C, to state that an ombudsman may be appointed from time to time.

22. Clause 38 would amend section 339D which specifies the functions of the workplace rights ombudsman. New section 339D(3) would provide that the ombudsman could conduct an investigation into a particular industry or sector, including an investigation into a specific area or part of the industry or sector, only if requested by the minister.

23. The explanatory notes do not address specifically the consistency of clauses 37 and 38 with fundamental legislative principles. However, general information is provided (at 3 and 5) regarding the reasons for the amendments and the way in which they are to be achieved:

The Queensland Workplace Rights Office (QWRO) and the ombudsman were established in July 2007 in response to Work Choices. The IR Act requires there to be an ombudsman. Work Choices was replaced with the Fair Work Act 2009 *and Queensland subsequently referred its industrial relations powers in relation to private sector employers. The changed industrial landscape makes greater flexibility desirable in determining whether there will be an ombudsman and that duplication of functions with the QIRC or the Commonwealth is minimised or removed, for example in conducting industry reviews…*

The Bill removes the statutory requirement for an ombudsman by providing that there may be an ombudsman. The Bill also provides for the ombudsman to undertake industry reviews at the request of the Minister for Industrial Relations.

24. **Clause 66** would limit the grounds of appeal to the industrial court in respect of a decision of the industrial commission.

25. It would amend section 561 of the *Workers' Compensation and Rehabilitation Act* which applies to workers' compensation appeal to the Industrial Court of Queensland. Section 561(2) and (3) would be replaced to limit grounds of appeals from a decision of the Queensland Industrial Relations Commission to errors of law or excess, or want, of jurisdiction.

26. The explanatory notes identify (at 3) the following reasons for the amendment:

*A decision of the Industrial Court of Queensland (ICQ) (*Uwe Arthur Willi Hetmanska v Q-COMP *(C/2006/70)) created uncertainty about the interaction of the appeals provisions in the* Workers' Compensation and Rehabilitation Act 2003 *(WCR Act) and the* Industrial Relations Act 1999 *(IR Act) with respect to Q-COMP appeals. It is necessary to clarify the appeals provisions to remove this uncertainty.*

27. Information is then provided (at 6) regarding consistency with fundamental legislative principles:

The amendments to the WCR Act to clarify that appeals from decisions of the QIRC to the ICQ are limited to the grounds of error of law or excess or want of jurisdiction may raise a question of the abrogation of the rights and liberties of individuals by narrowing the possible present scope for appeals to the ICQ to matters of law and thereby excluding any scope for appeals on matters of fact. However, the amendments are intended to overcome the effect of the decision in Hetmanska v Q-COMP *that these types of appeals extend to matters of law and fact. By the time an appeal reaches the ICQ the matter has already been through three tiers of review and has received written decisions, on matters of law and fact, from the insurer, the Regulatory Authority and the QIRC. As such the parties have already exercised substantial review and appeal rights without any limitation on the grounds of review.*

The Bill gives sufficient regard to the rights and liberties of the individual while being mindful of the principle that there must be an end to litigation in the interests of justice and the system of review as a whole. The provisions will not have a retrospective effect as they will only apply to decisions made after the commencement of the Bill.

Onus of proof

28. 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.

29. 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.

30. **Clauses 9 and 15** may impose evidentiary burdens on respondents in proceedings for offences under the *Electrical Safety Act*.

31. Clause 9 would insert a new section 181A of the *Electrical Safety Act* to provide that, in a complaint starting a proceeding, a statement that a thing was level 1, level 2 or level 3 in-scope electrical equipment under a regulation would be sufficient evidence of that element unless the contrary was proved. The explanatory notes provide (at 5-6) the following information regarding the proposed evidentiary arrangements:

In a complaint starting a proceeding, if the regulator claims that an item is within the scope of the system (ie is designed, or marketed as suitable, for household, personal or similar use), it will be taken to be that way unless the responsible supplier or manufacturer of the equipment proves the contrary is true. Such proof could include cases where electrical equipment is designed, operated and/or installed so that:

- *It is only used in a workplace where occupational health and safety legislation applies, and is only marketed to the workforce; or*
- *By its nature and/or its electrical ratings, it is extremely unlikely to be installed in premises occupied by members of the public.*

So, the responsible supplier or manufacturer of the equipment will need to show that the equipment is designed for commercial or industrial purposes in order to claim an exemption. The reason why the onus is on them is that

they are in the best position to know what their products are intended for. These are the people who are designing or importing products for a particular use for particular markets. The regulator has no role in this and would find it incredibly difficult to establish what the intended use is.

32. Clause 15 would identify matters that may be proved by respondents in defence of liability for an offence under the Electrical Safety Regulation. The proposed provisions which would declare the proof of a particular matter to be a defence are new sections:

- 104(2), regarding sale of level 1 in-scope equipment by a responsible supplier;
- 105(2), regarding sale of level 2 or 3 in-scope equipment by a responsible supplier;
- 106(3) and (4) regarding sale of in-scope electrical equipment generally;
- 107(3) regarding the keeping of documentary evidence; and
- 126D(5) regarding prohibited sale or use of electrical equipment on safety grounds.

33. The explanatory notes do not address the consistency of clause 15 with section 4(3)(d) of the *Legislative Standards Act*.

Retrospective operation

34. 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.

35. **Clause 2** may provide for the retrospective operation of some provisions of the legislation.

36. Clause 2(1) provides for some provisions, to amend the *Industrial Relations Act*, to commence on a day to be fixed by proclamation. Clause 2(2) states that:

> Section 52, to the extent it inserts chapter 20, part 12, division 1, commences, or is taken to have commenced, on 27 March 2011.

37. Accordingly, if the legislation does not receive assent by 27 March 2011, clause 2(2) would provide for part of clause 52 to have retrospective operation. However, the explanatory notes appear to provide (at 2-3) justification for any retrospective effect given to clause 52:

> *In 2008, after the Commonwealth's 'Work Choices' legislation (Work Choices) forcibly moved 'constitutional corporations' into the federal industrial relations system, the Queensland Parliament legislated to return local governments and their employees to the State industrial relations system (*Local Government and Industrial Relations Amendment Act 2008 *– LGIR Act). This included converting the federal awards and agreements that applied to local governments into State industrial instruments. Despite these measures, federal industrial instruments for some local governments continued to operate. These instruments, which can only apply to local governments that were not 'constitutional corporations' when Work Choices commenced, expire on 27 March 2011. When the instruments expire, affected local government employees will lose their right to enforce the employment terms and conditions provided by those instruments.*

Sufficient regard to the institution of Parliament

Institution of Parliament

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

39. Chapter 5 of the *Constitution of Queensland 2001* relates to revenue. Section 66 incorporates in the Constitution the constitutional principle that only parliament can authorise the appropriation of money from the consolidated revenue fund. It states:

> **Payment from consolidated fund**
>
> (1) The payment of an amount from the consolidated fund must be authorised under an Act.
>
> (2) Further, the Act authorising the payment must specify the purpose for which the payment is made.
>
> (3) This section does not apply in relation to the costs, charges and expenses relating to the collection and management of the consolidated fund.

40. The explanatory notes to the Constitution of Queensland Bill 2001 stated, in respect of the then clause 66:

> *Clause 66 provides that expenditure from the consolidated fund must be authorised by an Act. Further, the Act authorising the payment must specify the purpose of the payment. The clause replaces the existing phrase in*

section 39(1) of the Constitution Act 1867*, that the consolidated fund shall be subject to be appropriated to such specific purposes as by any Act of the legislature of the State shall be prescribed in that behalf.*

Clause 66 provides the second rule concerning parliamentary control of public finance, namely, the Government cannot spend public revenue without Parliament's authorisation. Acts which authorise the expenditure of public money are known as Appropriation Acts and, in Queensland, are generally introduced into Parliament in conjunction with the Government of the day handing down the State budget, or reviewing the budget during the financial year.

41. Section 68 of the *Constitution of Queensland* requires a message of recommendation from the Governor before the Legislative Assembly originates or passes a vote, resolution or bill for appropriation.

42. The Electrical Safety and Other Legislation Amendment Bill 2011 appears to meet these requirements.[1]

Delegation of legislative power

43. 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.

44. **Clause 8**, to amend the *Electrical Safety Act*, may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.

45. Section 210(4) delegates power to make regulations prescribing fees payable under the legislation. Clause 8 would insert new section 48I to provide for fees that may be prescribed for the registration of responsible suppliers of level 2 or 3 in-scope electrical equipment. New section 48I(2) states that the fees may be prescribed at a 'premium level'. Further, new section 48I(4) provides that subsections (1) and (2) would not limit the fees that may be prescribed under section 210(4) for part 2A (In-scope electrical equipment safety system) or the national register.

46. Clause 18 would amend schedule 7 of the Electrical Safety Regulation to prescribe fees payable in respect of in-scope electrical equipment.

47. The courts will examine regulations made 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). 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.

48. The explanatory notes do not address the delegation of legislative power to set fees at a 'premium level'.

49. **Clause 8** would allow the meaning of terms central to the operation of the *Electrical Safety Act* to be prescribed by regulation.

50. New section 48A states that the meaning of 'level 2' and 'level 3' in-scope electrical equipment is the meaning given by a regulation made for the new part 2A of the Act. Clause 15 would then amend the Electrical Safety Regulation to provide those meanings.

51. A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as an 'Henry VIII' clause. In January 1997, the committee reported to the Parliament on Henry VIII clauses. 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;

[1] See: tabled paper, Message, dated 7 March 2011, from Her Excellency the Governor, recommending the Electrical Safety and Other Legislation Amendment Bill, *Record of Proceedings (Hansard)*, 8 March 2011, 352.

- transitional arrangements; and
- the application of national schemes of legislation.

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

53. The committee notes that the clauses identified may fall within the final category of Henry VIII provisions considered excusable by the committee, and that the explanatory notes appear to address this matter when stating (at 5):

There is a possible issue with the application of the scope of the proposed system. In-scope electrical equipment is low voltage electrical equipment that is designed, or marketed as suitable, for household, personal or similar use.

54. However, the committee draws to the attention of the Parliament the substantive nature of matters to be prescribed by regulation.

55. **Clause 15** may delegate legislative power in an inappropriate case.

56. New section 126D(4) of the Electrical Safety Regulation would create an offence of contravening a prohibition on the sale or use of electrical equipment on safety grounds (maximum penalty, 40 penalty units ($4000)). However, the prohibition would be established by gazette notice made by the chief executive under new section 126D(1).

57. In respect of the proposed delegation of legislative power in new section 126D, the committee notes that:

- the gazette could prescribe a time during which the prohibition would remain in force (new section 126D(2));
- unless a court decides otherwise in the circumstances, it would not be a reasonable excuse for a contravention of the prohibition if the person did not receive an information notice in respect of the prohibition (new section 126D(5)).

58. The explanatory notes do not address the consistency of new section 126D with fundamental legislative principles.

Parliamentary scrutiny of delegated power

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

60. **Clause 8** may not sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

61. Clause 8 (new section 48J(1) of the *Electrical Safety Act*) would allow the chief executive to declare, by gazette notice, a scheme for the certification of types of in-scope electrical equipment to be a recognised external certification scheme. However, while the explanatory notes indicate that this would be an exercise of delegated legislative power by the chief executive, and new section 48J(2) would allow a regulation 'to make provision about the declaration of a scheme', a gazette notice made by the chief executive would not be 'subordinate legislation'. Accordingly, it need not comply with the provisions in parts 6 and 7 of the *Statutory Instruments Act* which are to ensure that delegated legislative power is subject to parliamentary scrutiny.

62. Similarly, new section 48K(1) would allow the chief executive to make equipment safety rules which are consistent with the Act (new section 48K(4)). New section 48K(5) would require the chief to notify the making of a rule in the gazette. However, the rules would not appear to be 'subordinate legislation' and, again, may not be subject to parliamentary scrutiny by way of the mechanisms in the *Statutory Instruments Act*.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

63. 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.

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

65. 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

66. The explanatory notes provide (at 1-2) the following statement regarding the electrical safety amendments to be made by the legislation:

Within Australia, electrical equipment safety is the responsibility of State and Territory governments administered through local legislation, regulatory requirements and compliance interventions.

The Electrical Regulatory Authorities Council (ERAC) is the peak body of electrical safety regulators in Australia and New Zealand. ERAC acts to ensure electrical safety regulatory systems are contemporary and harmonised wherever possible.

The current electrical equipment safety system in Australia has been in place for approximately 60 years. The changing marketplace profile, including increased imports and the emergence of non-traditional retail sources such as the internet, is increasing the risk of unsafe equipment being supplied in Australia and New Zealand.

These emerging challenges led ERAC to commission a comprehensive and formal review of the electrical equipment safety system in 2007. The review made a number of recommendations to improve and harmonise the system. The Final Review Report recommended implementing a new system that is underpinned by nationally consistent performance-based legislation in each jurisdiction and comprehensive scheme rules. It was proposed that this system should contain an appropriate mixture of pre-market registration and post-market enforcement and be coordinated by a centrally administered and managed ERAC Secretariat.

In December 2008, ERAC released a preliminary National Regulation Impact Statement (RIS) which outlined four options for implementing a new system in Australia. Following analysis of public submissions and consultation on the preliminary RIS, a preferred option was developed, and presented in the National RIS. This National RIS was endorsed by Cabinet and signed by the Attorney-General and Minister for Industrial Relations on 27 July 2009.

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 16 FEBRUARY 2011 TO 7 MARCH 2011

(Listed in order of sub-leg number)

SLNo 2011	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
8	Transport Legislation Amendment Regulation (No.1) 2011	EN	25/02/2011	25/05/2011	8/03/2011	26/05/2011
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
11	Disaster Management (Extension of Disaster Situation-Innisfail) Regulation 2011	EN	2/03/2011	25/05/2011	8/03/2011	26/05/2011
12	Bail (Prescribed Programs) Amendment Regulation (No.1) 2011	EN	4/03/2011	25/05/2011	8/03/2011	26/05/2011
13	Water Supply (Safety and Reliability) Regulation 2011	EN	4/03/2011	25/05/2011	8/03/2011	26/05/2011

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

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

2. CRIMINAL CODE AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 24 November 2010

Responsible minister: Hon PT Lucas MP

Portfolio responsibility: Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State

Committee report on bill: 01/11; at 31 – 37

Date response received: 9 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 8 and 30** creating offence provisions and amending existing provisions;
   - **clause 5** altering the scope of the partial defence of provocation in a number of respects;
   - **clause 10** allowing multiple offences to be joined in the one charge on an indictment;
   - **clauses 16-7** stating that no appeal would lie against a particular exercise of administrative power;
   - **clauses 8 and 30** imposing evidential burdens upon people defending charges of wilful damage to cemeteries or the summary offence of interference with graves; and
   - **clause 5** placing the evidential onus of proving the partial defence of provocation upon a defendant seeking to rely upon it
2. The committee invites the minister to provide information about whether **clause 11** would adversely affect rights and liberties retrospectively.

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 legislation.

Queensland Government

In reply please quote: 535595/1; J/11/00790

Office of the Deputy Premier, Attorney-General, Minister for Local Government and Special Minister of State

- 7 MAR 2011

SCRUTINY OF
09 MAR 2011
LEGISLATION COMMITTEE

B64-10

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

Dear Ms Miller

I refer to your letter dated 14 February 2011 to the Honourable Cameron Dick MP, about the Criminal Code and Other Legislation Amendment Bill 2010 (the Bill). Following recent ministerial changes, responsibility for the Department of Justice and Attorney-General has been transferred to me as Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State.

The Committee has invited comment on whether clause 11 of the Bill would adversely affect rights and liberties retrospectively.

Clause 11 of the Bill amends the Criminal Code by inserting a new section 728. New section 728 deals with the transitional application of the amendments. Subsection (1) provides that clauses 4 and 6 apply to proceedings for an offence started after the commencement of the amendments, whether or not the offence happened before or after commencement.

Clause 4 amends section 23(1) (b) of the Criminal Code (Intention – motive) to omit the term 'accident' and instead provide that a person is not criminally responsible for an event the person did not intend or foresee as a possible consequence of an act or omission and that would not be reasonably foreseeable as a possible consequence.

Over a period of many years, the Queensland Court of Appeal and the High Court of Australia attempted to define a proper meaning of the expression 'event which occurs by accident' culminating in the Court of Appeal decision

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in *R v Van den Bemd* [1995] 1 Qd R 401. In that case, it was held that the test of criminal responsibility under section 23 is whether the death was such an unlikely consequence of that act that an ordinary person would not reasonably have foreseen it. The High Court later upheld that construction.

The test is known as the 'reasonably foreseeable consequence' test.

In the Queensland Law Reform Commission's (QLRC) final report entitled, "*A review of the excuse of accident and the defence of provocation*", the QLRC endorsed the current 'reasonably foreseeable consequence' test.

The amendment legislatively enshrines the 'reasonably foreseeable consequence' test as articulated in *R v Taiters* [1997] 1 Qd R 333. As clearly stated in the Explanatory Notes, it is not intended to alter the current law and the amendment has been carefully drafted accordingly.

While the amendment to section 23(1)(b) will operate retrospectively to the extent that it will apply to offences committed prior to the commencement of the amendment (provided proceedings have not commenced), such an approach does not adversely affect the rights and liberties of individuals. The law remains unchanged and will apply consistently pre and post amendment.

Clause 6 amends section 304B of the Criminal Code (Killing in an abusive relationship) by amending the heading to clearly refer to killing for preservation. The heading change better articulates the essence of the new defence and clearly differentiates itself from section 304 (partial defence of provocation), particularly given the Bill introduces concepts of domestic violence into section 304. The heading change does not affect the current law.

Clause 6 also amends section 304B by clearly referencing the relevant sections of the *Domestic and Family Violence Protection Act 1989* (DFVP Act). This does not change the current law. Section 304B, as currently drafted, provides that the phrases 'domestic relationship' and 'domestic violence' are to be interpreted as interpreted under the DFVP Act.

The Bill moves the definition of 'domestic relationship' to section 1 of the Criminal Code given that the phrase is now relevant to section 304 as amended by the Bill. The drafting is 'tightened' by clearly referencing the relevant DFVP Act provisions. With respect, the Scrutiny of Legislation Committee is incorrect when it states at paragraph 37 that the phrase 'domestic relationship' is now undefined.

Clause 6 redrafts the reference to the phrase 'domestic violence' by clearly referencing the relevant DFVP Act provisions.

The amendments made by clause 6 do not change the current law and therefore, the retrospective application of the amendments does not adversely affect the rights and liberties of individuals. In fact, the amendments provide more certainty with regards the interpretation of the defence by clearly defining the relevant DFVP Act provisions.

I thank the Committee for its consideration of this Bill.

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government and Special Minister of State

3. MINES AND ENERGY LEGISLATION AMENDMENT BILL (NO.2) 2010

Date introduced: 25 November 2010
Responsible minister: Hon S Hinchliffe MP
Portfolio responsibility: Minister for Employment, Skills and Mining
Committee report on bill: 01/11; at 55 – 60
Date response received: 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 11-2, 24, 31, 81 and 112** amending existing offence penalties and creating new offences;
   - **clauses 25, 40, 94 and 119** which may adversely affect individuals' rights to privacy; and
   - **clauses 22, 91 and 117** which would provide for use of evidentiary certificates for some proceedings under the amended legislation;
   - **clause 73** expanding powers to enter land without consent or a warrant in specified circumstances; and
   - **clauses 19 and 88** which may not provide appropriate protection against self-incrimination.

EXAMINATION OF INFORMATION PROVIDED

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

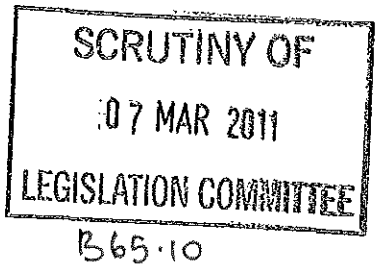
Queensland Government

Hon Stirling Hinchliffe MP
Member for Stafford

Minister for Employment, Skills and Mining

Your ref: B65.10
Our ref: CLLO/11004

- 4 MAR 2011



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

Dear Jo Ann

Thank you for your letter dated 14 February 2011 regarding the Scrutiny of Legislation Committee's comments on the *Mines and Energy Legislation Amendment Bill (No. 2) 2010* (the Bill).

I note that the committee has included information provided in the explanatory notes for the majority of issues raised in the Legislation Alert No. 01 of 2011.

The Committee has invited me to provide further information about whether the Bill would have sufficient regard to the rights and liberties of individuals in relation to Clauses 19 and 88 of the Bill. The Committee has specifically enquired as to whether these clauses have sufficient regard to the rights and liberties of individuals who may have investigated or reported on past accidents.

Clauses 19 and 88 propose to amend the *Coal Mining Safety and Health Act 1999* (CMSHA) and *Mining and Quarrying Safety and Health Act 1999* (MQSHA) to ensure that a report resulting from an investigation by a site senior executive into an accident or high potential incident at a mine can not be used as evidence against the site senior executive or other employees. Should it be necessary for the matter to be investigated by the regulator for the purposes of prosecuting an offence, the regulator conducts a separate investigation.

The regulator's policy has been to rely entirely on their own investigation report as evidence for prosecution purposes. Despite this policy and the assurances of the regulator, consultation with industry confirmed their preference that sections 201 CMSHA and 198 MQSHA respectively, be amended to clearly state the existence of a privilege against self-incrimination for individuals in their capacity as site senior executives when compiling the reports and in respect of the contents of those reports.

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The regulator encourages the continuous improvement of a safety culture in the mining industry. The purpose of requiring the site senior executives to investigate accidents and high potential incidents is accident prevention. The site senior executive investigation process includes the gathering and analysis of information, the drawing of conclusions about the nature and cause, and the making of recommendations for implementation. The amendments are intended to encourage investigations into discovering the cause of an accident or high potential incident, the compilation of a high quality report that does not contain false or misleading information and then implementing findings to prevent a recurrence of a similar nature.

The amendments will provide an assurance that it is not necessary to conduct an investigation with an emphasis on excluding content that might tend to incriminate an individual. The intent of the amendments is diminished if the individuals acting as site senior executives compile reports that contain false and misleading information. In those circumstances the privilege against self-incrimination is no longer available in so far as it is necessary to verify the site senior executive has failed to comply with the obligations imposed by sections 201 CMSHA and 198 MQSHA respectively, i.e. he/she has failed to compile a report that is adequate.

As regards the contents of what may be contained in a report which may incriminate individuals but for the regulator's long-held policy (now reflected in sections 201(3) CMSHA and 198(3) MQSHA respectively), the regulator conducts its own investigations into all serious accidents and is reliant on its own observations made at the accident scene, interviews of witnesses, documentation contained in the safety and health management system and other evidence discovered as part of its own systematic investigation. The contents of reports compiled by site senior executives are not relied upon.

In summary, the amendments will give legislative effect to the long-held policy of the regulator referred to earlier. As such, transition provisions were not considered necessary given that the regulator will not use the site senior executive's investigation report to compile evidence for the purposes of prosecution of an offence against the individuals acting as site senior executives or any other individuals referred to. Thus, in practice, the rights and liberties of individuals will not be affected.

I thank the committee for its careful consideration of the legislation and for its comments and trust the above information has been of assistance.

Yours sincerely

STIRLING HINCHLIFFE MP