

Scrutiny of Legislation Committee

53rd Parliament

Chair:	Mrs Jo-Ann Miller MP, Member for Bundamba
Deputy Chair:	Mr Peter Wellington MP, Member for Nicklin
Members:	Ms Peta-Kaye Croft MP, Member for Broadwater Ms Vicky Darling MP, Member for Sandgate Dr Alex Douglas MP, Member for Gaven Ms Grace Grace MP, Member for Brisbane Central Mr Andrew Powell MP, Member for Glass House
Research Director:	Mrs Julie Copley
A/Principal Research Officer:	Mrs Simone Gregory
Executive Assistant:	Ms Tamara Vitale

Contact Details:	Scrutiny of Legislation Committee Level 6, Parliamentary Annexe Alice Street Brisbane Qld 4000
Telephone:	+61 7 3406 7671
Fax:	+61 7 3406 7500
Email:	scrutiny@parliament.qld.gov.au
Web:	www.parliament.qld.gov.au/slc
Index of bills examined:	Use above web link and click on the 'Index of bills examined' link in the menu bar

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COMMITTEE RESPONSIBILITY

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

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

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

1. Examination of legislation

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

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

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

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

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

2. Monitoring the operation of statutory provisions

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

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

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

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

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

REPORT

Structure

This report follows committee examination of:

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

Availability of submissions received

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

- on the committee's webpage (www.parliament.qld.gov.au/SLC); and
- from the Tabled Papers database (www.parliament.qld.gov.au/view/LegislativeAssembly/tailedPapers).

PART 1 – BILLS EXAMINED**1. ABORIGINAL LAND AND TORRES STRAIT ISLANDER LAND AND OTHER
LEGISLATION AMENDMENT BILL 2010**

Date introduced:	23 November 2010
Responsible minister:	Hon S Robertson MP
Portfolio responsibility:	Minister for Natural Resources, Mines and Energy and Minister for Trade

ISSUES ARISING FROM EXAMINATION OF BILL

- 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 14-5, 137 and 139-40** altering land tenure and interests in land under the *Aboriginal Land Act* and the *Torres Strait Islander Land Act*;
 - clauses 88 and 186** validating dealings with Aboriginal and Torres Strait Islander leases since 18 July 2008; and
 - clauses 30, 61, 78, 153, 165 and 175** changing requirements for ministerial consideration of Aboriginal tradition and Island custom relevant to land the subject of decision-making.

BACKGROUND

- Following enactment of the *Aboriginal and Torres Strait Islanders Land Amendment Act 2008*, the legislation would make a second round of amendments to legislation governing land tenure and interests in land in Aboriginal and Torres Strait Islander communities.

LEGISLATIVE PURPOSE

- The objectives of the bill are to amend the (explanatory notes, 1-2):
 - Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* to:
 - recognise the rights of Aboriginal traditional owners at Seisia, Bamaga and Hammond Island and ensure that the Torres Strait Islander communities established on these lands can continue to prosper;
 - reduce the number of necessary organisations in a community by providing for land to be granted to bodies registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
 - improve the governance of existing land trusts established under the legislation;
 - improve the relationship with the *Native Title Act 1993* (Cth); and
 - ensure that community development can proceed efficiently in communities following the grant of land under the legislation;
 - Local Government (Aboriginal Lands) Act 1978* to clarify, simplify and update the legislative framework applying to Aurukun and Mornington Shires so that it aligns with and does not unnecessarily duplicate similar legislation applicable to all other Local Governments generally or to Indigenous Local Governments specifically;
 - Nature Conservation Act 1992* to revoke national parks on Cape York Peninsula on Aboriginal land.
- It would amend also the:
 - Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*;
 - Liquor Act 1992*;
 - Local Government Act 2009*;
 - Petroleum Act 1923*;
 - Petroleum and Gas (Production and Safety) Act 2004*;

- *Residential Tenancies and Rooming Accommodation Act 2008*; and
 - *Right to Information Act 2009*.
5. In addition, the bill would effect minor and consequential amendments to the:
- *Auditor-General Act 2009*;
 - *Environmental Protection Act 1994*;
 - *Greenhouse Gas Storage Act 2009*;
 - *Information Privacy Act 2009*;
 - *Mineral Resources Act 1989*;
 - *Police Powers and Responsibilities Act 2000*;
 - *Survey and Mapping Infrastructure Act 2003*; and
 - *Vegetation Management Act 1999*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

7. **Clauses 14-5, 137 and 139-40** would alter land tenure and interests in land under the *Aboriginal Land Act* and the *Torres Strait Islander Land Act*.

8. The clauses would amend:

- the definition of Deed of Grant in Trust land ('DOGIT land') to include 'prescribed DOGIT land' and land subject to approved lease applications, but not granted, under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* – enabling the lands to be transferred as 'transferable land' (clause 14, amending section 13 of the *Aboriginal Land Act*, and clauses 137 and 139, amending sections 9 and 12 of the *Torres Strait Islander Land Act*); and
- the definition of 'Aboriginal reserve land' and 'Torres Strait Islander reserve land' to include land subject to approved lease applications under the *Aborigines and Torres Strait Islanders (Land Holding) Act* but not yet approved – enabling transfer as above (clauses 15 and 139-40).

9. In respect of these provisions, the explanatory notes provide (at 7) the following information regarding consistency with fundamental legislative principles:

Clause 14 - Amendment of s 13 (DOGIT land) amends the definition of 'DOGIT land' under the ALA and acts retrospectively.

In particular, section 13(1)(b)(iii) of the ALA sets out that DOGIT land at the beginning of the enactment day of the DOGIT includes land subject to a lease granted under the Land Holding Act that is within the external boundaries of the DOGIT.

The (current) provision does not contemplate that leases under the Land Holding Act could be approved after the enactment day of the ALA. The consequence of this is that leases granted on or before the enactment day are 'transferable' lands under the ALA, but leases approved after the enactment day are not 'transferable' land.

The proposed amendment (Clause 14, section 5) rectifies this situation by providing that the term 'DOGIT' includes land that was the subject of an application under the Land Holding Act that had been approved by the trustee council or on appeal by the appeal tribunal, under the Land Holding Act, but for which a lease under that Land Holding Act has not been granted.

The same issue also arises in relation to the term 'Aboriginal reserve land' in the ALA (Clause 15) and the terms 'DOGIT' and 'Torres Strait Islander reserve land' in the TSILA (Clauses 139 & 140). This amendment extends to those definitions as well.

This amendment does not affect the rights of the individual lease applicants to have their leases granted but will provide that the underlying tenure is transferable land. Transferable land is land that can be granted to Indigenous grantees. Without this amendment the underlying land tenure would remain State land.

This provision simply puts approved lease applications into the same position as leases that were granted on or before the enactment date.

Retrospective operation

10. 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.
11. **Clauses 88 and 186** would validate retrospectively dealings with Aboriginal and Torres Strait Islander leases undertaken since 18 July 2008.
12. Clause 88 would insert new section 139B of the *Aboriginal Land Act* which would validate, with full retrospective effect, any transfer amendment, mortgage or sublease of a trustee (Aboriginal) lease granted under section 57 of the *Land Act 1994* before 18 July 2008, if the dealing was undertaken between that date and the commencement of the amending legislation.
13. The explanatory notes indicate (at 33) that the proposed amendment is to address uncertainty as to which Act covered dealings with a section 57 lease granted before the new *Aboriginal Land Act* leasing regime commenced in 2008.
14. Similarly, clause 186 would insert in the *Torres Strait Islander Land Act* a new part 9A validating transfers, amendments, mortgages or subleases of a trustee (Torres Strait Islander) lease granted under section 57 of the *Land Act* before 18 July 2008, if undertaken between 18 July 2008 and commencement.
15. Again, the explanatory notes state (at 59-60) that clause 186 is to address uncertainty as to which Act covered dealings, such as amendment, under a section 57 lease granted before a new leasing regime commenced in 2008.
16. The committee examines legislation that would have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:
 - the retrospective operation would be adverse to people other than the government; and
 - people have relied on and would have legitimate expectations based on the existing law.
17. The explanatory notes indicate (at 8) that sufficient regard would be had to rights and liberties of individuals:

Clauses 88 and 186 have a retrospective effect. As a result of the 2008 amendments to the Acts, new lease applications over Indigenous DOGITs and Reserves are made under the Acts, and the provisions of the Acts apply to the new leases. Leases that were granted over Indigenous DOGIT and Reserves prior to the 2008 amendments were granted under section 57 of the Land Act 1994 (Land Act).

As it is unclear which Act covers dealings with a section 57 lease (e.g. amendments to the lease) that was granted before the new leasing regimes commenced, amendments are provided to address this uncertainty.

It is necessary that these amendments act retrospectively to provide that existing leases granted under section 57 are deemed to be "trustee (Aboriginal) leases" or "trustee (Torres Strait Islander) leases" and that any dealings with these existing leases are taken to have been validly done.

Aboriginal tradition and Island custom

18. Section 4(3)(j) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.
19. **Clauses 30, 61, 78, 153, 165 and 175** would change requirements for ministerial consideration of Aboriginal tradition and Island custom applicable to land the subject of decision-making.
20. Part 2 of both the *Aboriginal Land Act* and of the *Torres Strait Islander Land Act* describes basic concepts used in the legislation, including the meaning of Aboriginal tradition (section 9 of that Act) and Island Custom (section 8 of that Act).
21. The clauses identified above would amend provisions regarding:
 - the minister appointing grantees of land (clauses 30 and 153);
 - particular land trusts and grants of claimable land (clauses 61 and 165);
 - resumption of granted land (clause 78); and
 - the Land Tribunal (clause 175).

22. Each amendment would replace a statutory obligation on the minister to act consistently with Aboriginal tradition or Island custom. Instead, the minister would be required to 'have regard to any Aboriginal tradition or Island custom applicable to the relevant land. In addition, proposed provisions require consultation with, and consideration of the views of, Aboriginal peoples or Torres Strait Islanders particularly concerned with the land (see, for example, new section 26 of the *Torres Strait Islander Land Act* (clause 153)).

23. In relation to whether the proposed amendments would have sufficient regard to Aboriginal tradition and Island custom, the explanatory notes state (at 8):

The Bill in clauses 30, 61, 78, 153, 165, and 175 amend the Acts to replace the obligation on the Minister to act in a way that is consistent' with any Aboriginal tradition or Island custom with 'must have regard to any' Aboriginal tradition or Island custom.

Where several groups have an interest in the land, it may prove impossible for the Minister to act consistently with every group's tradition or custom, therefore it is more appropriate that the Minister has regard to the traditions or customs.

These proposed amendments were included in the exposure draft of the Bill that was available for comment – no comments were received on this proposed amendment.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

24. 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)).

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

2. AGENTS FINANCIAL ADMINISTRATION BILL 2010

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

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **the large number of clauses** creating offence provisions;
 - **clause 134** imposing time limits for the commencement of proceedings and regulating proceedings for offences;
 - **clauses 135-6** which may make a person liable for the acts or omissions of others;
 - **clause 139** allowing public statements by the minister or chief executive to provide information or warnings, including by identifying people;
 - **clause 41** which may make rights and liberties dependent on administrative power which may not be subject to appropriate review;
 - **clause 39** which may be inconsistent with principles of natural justice; and
 - **clauses 132-3 and 135-6** which may impose evidential burdens on a person charged with an offence under 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 the proposed delegations of legislative power in **clauses 104 and 145**.

BACKGROUND

3. Implementing a recommendation of the former Service Delivery and Performance Commission to divide the *Property Agents and Motor Dealers Act 2000*, the bill would provide for the administration of trust accounts held by licensed agents and establish a claim fund to compensate people for financial loss arising from dealings with agents.

LEGISLATIVE PURPOSE

4. The main object of the bill is to protect consumers from financial loss in dealings with agents licensed under legislation replacing the *Property Agents and Motor Dealers Act*. The object is to be achieved mainly by (clause 5):
 - regulating the way agents establish, manage and audit trust accounts;
 - establishing a claim fund to compensate persons in particular circumstances for financial loss arising from dealings with agents; and
 - promoting administrative efficiency for claims made against the claim fund.
5. Other bills introduced to divide the *Property Agents and Motor Dealers Act*, examined in this *Legislation Alert* are the:
 - Commercial Agents Bill 2010 (chapter 4);
 - Motor Dealers and Chattel Auctioneers Bill 2010 (chapter 10); and
 - Property Agents Bill 2010 (chapter 11).

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

7. **A large number of clauses** would create offence provisions. The proposed offences and respective maximum penalties are identified below.

Clause	Proposed offence	Proposed maximum penalty
8(1)	Licensee opening trust account other than at approved financial institution	200 penalty units (\$20 000)
8(2)	Failing to provide copy of licence to financial institution	200 penalty units (\$20 000)
9(1)	Failing to ensure general trust account name includes words 'trust account'	200 penalty units (\$20 000)
9(2)	Failing to ensure special trust account name includes words 'special trust account'	200 penalty units (\$20 000)
10(2)	Failing to give notice of account's opening, closing or name change	200 penalty units (\$20 000)
12	Failing to deal with amount on receipt	200 penalty units (\$20 000) or two years' imprisonment
13	Failure to invest as directed	200 penalty units (\$20 000) or two years' imprisonment
14(1)	Making other payments to trust account	200 penalty units (\$20 000) or two years' imprisonment
14(2)	Unauthorised dealing with amount consisting of trust money and non-trust money	200 penalty units (\$20 000) or one year's imprisonment
17(1)	Failure to keep payment in trust account	200 penalty units (\$20 000) or two years' imprisonment
17(2)	Unauthorised payment from trust account	200 penalty units (\$20 000) or two years' imprisonment
18(1)	Unauthorised drawing from trust account	200 penalty units (\$20 000) or two years' imprisonment
18(4)	Failing to draw from trust account	200 penalty units (\$20 000) or two years' imprisonment
19(1)	Failing to account to clients	200 penalty units (\$20 000) or two years' imprisonment
20(1)	Failing to meet duties of financial institution managers	200 penalty units (\$20 000) or one year's imprisonment
22	Unauthorised payment of amount in dispute	200 penalty units (\$20 000) or two years' imprisonment
23	Failing to pay amount in dispute	200 penalty units (\$20 000) or two years' imprisonment
24(2)	Failing to give notice regarding amount in dispute	200 penalty units (\$20 000) or two years' imprisonment
26	Failing to appoint auditor	200 penalty units (\$20 000) or one year's imprisonment
27(2)	Failing to give notice and evidence of auditor's appointment	200 penalty units (\$20 000)
28(2)	Failing to give notice of auditor's appointment ending	200 penalty units (\$20 000)

Clause	Proposed offence	Proposed maximum penalty
28(3)	Failing to give notice and evidence of replacement auditor's appointment	200 penalty units (\$20 000)
28(4)	Failing to give notice of auditor's death	200 penalty units (\$20 000)
32(2)	Failing to have trust accounts audited	200 penalty units (\$20 000) or two years' imprisonment
34	Failing to give notice of auditor's advice	200 penalty units (\$20 000) or one year's imprisonment
35(3)	Auditor failing to give notice of licensee failing to produce documents	200 penalty units (\$20 000) or one year's imprisonment
36(2)	Failing to have trust accounts audited on ceasing to be licensee or to carry on business	200 penalty units (\$20 000) or two years' imprisonment
37(1)	Auditor failing to give signed audit	200 penalty units (\$20 000) or one year's imprisonment
40(1)	Financial institution failing to comply with direction	200 penalty units (\$20 000) or one year's imprisonment for an individual; 1000 penalty units (\$100 000) for a corporation
40(4)	Manager or principal officer failing to comply with direction	200 penalty units (\$20 000) or one year's imprisonment
42	Operating account without authorisation	200 penalty units (\$20 000) or two years' imprisonment
48	Licensee failing to give notice of appointment of receivers to each executive officer	100 penalty units (\$10 000) for an individual; 500 penalty units (\$50 000) for a corporation
50(2)	Failing to provide receiver with information	200 penalty units (\$20 000) or one year's imprisonment
54	Improperly withdrawing, destroying or concealing receivership property	200 penalty units (\$20 000) or two years' imprisonment
56	Obstructing receivers	200 penalty units (\$20 000) or one year's imprisonment
64(2)	Failing to give receivership property to new receiver	200 penalty units (\$20 000) or one year's imprisonment
64(3)	Failing to pass on receivership property after appointment ends but new receiver not appointed	200 penalty units (\$20 000) or one year's imprisonment
64(5)	Former receiver failing to follow direction	200 penalty units (\$20 000) or one year's imprisonment
71(1)	Licensee failing to comply with special investigator's lawful requests	200 penalty units (\$20 000) or one year's imprisonment
88(2)	Corporation failing to give notice of claim	100 penalty units (\$10 000) for an individual; 500 penalty units (\$50 000) for a corporation
88(5)	Respondent failing to give information	100 penalty units (\$10 000) for an individual; 500 penalty units (\$50 000) for a corporation
105	Claimant failing to give notice of other recovery	200 penalty units (\$20 000) or three years' imprisonment
107(2)	Claimant improperly dealing with overpayment	200 penalty units (\$20 000)
113	Contravening an order of QCAT	540 penalty units (\$54 000)

Clause	Proposed offence	Proposed maximum penalty
129	Unauthorised dealing with trust account	200 penalty units (\$20 000) or three years' imprisonment
130(1)	Making false or misleading statements	200 penalty units (\$20 000) or two years' imprisonment
131(1)	Giving an official false or misleading documents	200 penalty units (\$20 000) or two years' imprisonment
131(3)	Making a false or misleading entry in a document	200 penalty units (\$20 000) or two years' imprisonment
136(2)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual

8. In respect of the proposed offences in the table above, the committee notes that:
- a large number of offence provisions would enforce the regulation of the activities of commercial agents, particularly when read with the other legislation regulating the agents in the relevant occupation;
 - some offence provisions are in similar terms (see, for example, clauses 129 and 17-8); and
 - where the proposed maximum penalties include terms of imprisonment, the term of imprisonment may differ between offences even where the maximum monetary penalty would not.
9. **Clause 134** would govern proceedings for offences under the legislation. It would:
- impose time limits for the commencement of proceedings; and
 - regulate proceedings for offences under the legislation.
10. In relation to the first limb, clause 134(1) states that, other than proceedings for indictable offences to be dealt with on indictment, proceedings for offences under the legislation must be taken in a summary way within the later of:
- one year from the date of commission of the offence; and
 - six months after the commission of the offence comes to the complainant's knowledge but within two years after the commission of the offence.
11. Clause 134(2) would allow the prosecution to elect for an indictable offence to be heard summarily or on indictment. In respect of clause 134, generally, the explanatory notes state (at 57-8):
- Clause 134 provides for proceedings for offences and the time limits for starting a proceeding. The maximum penalty that is able to be imposed on a summary conviction of an indictable offence (an offence for which the maximum penalty is 2 or more years imprisonment) is 200 penalty units or 1 year's imprisonment.*
- The prosecution may elect for an indictable offence to be heard by way of summary proceeding under the Justices Act 1886 or on indictment. If a person charged with an indictable offence asks at the start of a summary proceeding for the offence that the charge be prosecuted on indictment, the magistrate must not decide the charge by way of summary proceeding and must proceed by way of committal proceeding.*
12. **Clauses 135-6** may make a person liable for the acts or omissions of others.
13. Clause 135(3) would provide an act done or omitted to be done for a person by a representative of the person, and within the scope of the representative's authority, would be taken to have been done or omitted to be done by the person, unless by the exercise of reasonable diligence, the person could not have prevented the act or omission.
14. In respect of consistency with fundamental legislative principles, the explanatory notes state (at 11):
- While the clause imposes liability for the actions of others, it is justified on the grounds that it follows the general law of agency in that the principal is liable for the actions of their agent. The clause is also consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees.*
15. Clause 136 would provide that if a corporation committed an offence against the legislation, each of the executive officers would also commit an offence of failing to ensure that the corporation complied with the legislation.

16. For 136, the explanatory notes provide (at 5) the following justification:

The imposition of liability for the actions of the corporation is justified because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, be accountable. This provides an incentive for the executive officers of a corporation to ensure that the corporation is compliant. The clause also provides that it is sufficient for the executive officer to prove that the act or omission that constituted the offence was done or made without the officer's knowledge, despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.

To provide further justification, clause 136 is consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees. The clause is also consistent with the suitability requirements for applicants and licensees under the Agents Bills. In deciding whether a corporation is suitable, the chief executive must have regard to whether an executive officer of the corporation has been convicted of an offence against this Bill or the Agents Bills. If derivative liability was not imposed, an executive officer who had influence over an offence by a corporation that resulted in the corporation's licence being cancelled, could continue the unlawful conduct under a new corporate entity.

Another issue that may be raised in relation to clause 136 is that derivative liability can potentially apply to any offence under the Bill. However, it is not considered appropriate to limit derivative liability to certain offences, such as more serious offences. This is because there is potential for the commission of relatively minor offences in a manner that is systematic and widespread.

It is noted that the Council of Australian Governments is undertaking a review of provisions imposing liability on executive officers. The object of the review is to ensure that there is sufficient justification for making directors liable for corporate fault. As the review has not yet been finalised, it is anticipated that any further assessment around the appropriateness of executive officer liability in relation to offences in the Bill would be undertaken once the review is completed.

Right to privacy

17. **Clause 139** would allow the minister or chief executive to make or issue public statements for the purposes of providing information or warnings, including statements identifying people.
18. Clause 139(1) would permit publication of public warning statements about offences against the legislation and people who commit them. Clause 149(2) would allow a statement to identify particular offences and persons.
19. The explanatory notes provide (at 7-8) justification for inconsistency with rights and liberties of individuals:

Clause 139 allows the Minister or chief executive to make or issue public warning statements identifying individuals who have committed offences against the Bill. These public statements may have an adverse affect on individuals. However, before making a statement, the Minister or chief executive must be satisfied that it is in the public interest to do so. Accordingly, the inconsistency with the fundamental legislative principle is justified on the grounds that it is in the public interest to allow the making of warning and information statements for the protection of consumers.

It should be noted that this power is common in consumer protection legislation. It is a vital power as public warning statements can protect consumers from committing large amounts of money or entering into transactions in which they would suffer detriment, while information statements play an educative role in informing consumers about particular conduct or behaviour that may place consumers at risk. The power also alerts licensees to non-compliant behaviours. The public exposure of non-compliant licensees also provides a compliance incentive to other licensees wishing to avoid such negative publicity.

It is a reserve power, not able to be delegated, and used only in the rarest of circumstances where it becomes apparent to the Minister or chief executive there is a demonstrable, tangible pattern of conduct or behaviour that may cause widespread detriment to consumers. An example of where its use may be considered is where the Minister or chief executive has strong evidence that consumers may suffer financial detriment and such loss may be considerable if a public warning statement is not issued.

Clause 140 provides that nothing in the Bill affects or limits any civil remedy that a person may have against a licensee or another person for any matter. Accordingly, the Minister and chief executive will not have immunity from legal liability in relation to public statements and this is a matter that is taken into consideration in deciding to issue a statement that identifies a person.

Administrative power

20. 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.

21. **Clause 41** may make rights and liberties dependent on administrative power which may not be subject to appropriate review.
22. Clause 39 would confer the chief executive with administrative power to freeze a licensee's account if it appeared that trust money had or may have been stolen, misappropriated or misapplied.
23. Clause 41(1) would allow a person dissatisfied with a decision of the chief executive under clause 39 to apply to the Queensland Civil and Administrative Tribunal for a review of the decision. However, clause 41(2) would prevent QCAT from exercising power (otherwise exercisable under section 22(3) of the *Queensland Civil and Administrative Tribunal Act 2009*) to stay the operation of the decision of the chief executive.
24. In relation to whether clause 41 would have sufficient regard to rights and liberties of individuals, the explanatory notes state (at 4):

Clause 41 provides that QCAT may not stay a decision to freeze a licensee's account under clause 39 while it decides a review of the decision. The removal of the power to stay the original decision may amount to a breach of the fundamental legislative principle that legislative power be proportionate, and that extraordinary power only be conferred for extraordinary or urgent circumstances. Not providing for the stay of a decision by the chief executive to freeze an account while the decision is being reviewed is necessary to ensure that any stealing or misappropriation of trust money not continue and to minimise the risk of any future financial loss for consumers dealing with the licensee.

Natural justice

25. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.
26. **Clause 39** may be inconsistent with principles of natural justice.
27. It would confer the chief executive with power to give a written direction that a licensee's accounts be frozen. If it appeared to the chief executive that a licensee, a person in charge of a licensee's business or an employee of a licensee may have stolen, misappropriated or misapplied trust money (clause 39(1)), the chief executive could direct in writing that (clause 39(2)):
 - all or part of the amount standing to the credit of a stated account be paid to the chief executive, if a claim had been made against the fund for the trust money;
 - no money be withdrawn from a stated account without the chief executive's approval; or
 - the stated account be operated only under stated conditions.
28. The chief executive would be required to give the direction to the holder of each account and the financial institution where the account was kept, stating the account to which it related and any conditions under which the account might be operated.
29. The explanatory notes provide (at 4) justification for inconsistency with section 4(3)(b) of the *Legislative Standards Act*:

The immediate freezing of an account without providing a licensee with an opportunity to make representations is a denial of natural justice. This provision is justified on the basis that the stealing or misappropriation of trust money can result in significant consumer detriment as consumers can lose relatively large sums of money. The provision prevents the continuation of any misappropriation in relation to an amount of trust money, reducing the extent of any financial loss to a consumer or preventing future financial loss to others consumers.

Onus of proof

30. 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.
31. 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.
32. **Clauses 132-3 and 135-6** may impose evidential burdens on a person charged with an offence under the legislation.
33. Clauses 132-3 and 138 would be evidentiary provisions, altering the usual rules of evidence in proceedings under the legislation. Statutory presumptions would operate in respect of:
 - the appointment or power of an inspector (clause 132(2));

- a signature purporting to be the signature of the chief executive or an inspector (clause 132(3));
- a certificate purporting to be signed by the chief executive, a member of the Queensland Civil and Administrative Tribunal or its principal registrar, or an inspector (clause 132(4)); and
- an entry in a book kept by or belonging to a licensee or found in the licensee's premises (clause 133).

34. In respect of clause 133, the explanatory notes state (at 5) that the proposed evidentiary presumptions are justified:

Clause 133 provides that an entry in a document kept by or belonging to a licensee is evidence that the entry has been made by or with the authority of the licensee. The provision reverses the onus of proof by requiring the licensee to prove that an entry in a document has not been made by the licensee or with the authority of the licensee. However, it is a reasonable assumption made for the purpose of procedural efficacy to assume that entries in documents in the possession of the licensee or belonging to the licensee have been made with the authority of the licensee, particularly given that evidence related to the authorship of entries in documents is likely to be within the knowledge of the licensee.

35. Clauses 135 and 136 are examined above under the heading 'Rights and liberties'. For these provisions, the explanatory notes address also the proposed reversals of the onus of proof, stating (at 5):

Clause 135 provides that an act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done by the person, unless the person proves the person could not, by the exercise of reasonable diligence, have prevented the act or omission. The reversal of the onus of proof is justified on the grounds that the information relating to the exercise of reasonable diligence would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.

Clause 136 provides that if a corporation commits an offence against a provision of the Bill, an executive officer is automatically liable for committing the offence of failing to ensure the corporation complies with the provision, subject to the defences that the executive officer took all reasonable steps to ensure the corporation complied, or that the executive officer was not in a position to influence the conduct of the corporation. The reversal of the onus of proof is justified because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, be accountable. This provides an incentive for the executive officers of a corporation to ensure that the corporation is compliant. The clause also provides that it is sufficient for the executive officer to prove that the act or omission that constituted the offence was done or made without the officer's knowledge, despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.

Sufficient regard to the institution of Parliament

Delegation of legislative power

36. 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.
37. **Clauses 104 and 145** would delegate legislative power.
38. Clause 104(1) would limit claims against the claim fund, stating that a claimant may not recover from the fund an amount more than the balance of the claimant's loss, after deducting the amount (including the value of all benefits) received or recovered by the claimant from a source other than the fund and the amount (including the value of all benefits) the chief executive or QCAT considers the claimant might reasonably have received or recovered if not for the claimant's neglect or default.
39. Under clause 104(2), for a single claim, a claimant could recover from the fund an amount no more than an amount prescribed by regulation. Accordingly, clause 104(4) would delegate legislative power to make a regulation prescribing the maximum total amount that might be paid from the fund arising out of a contravention, failure to ensure clear title to a vehicle, stealing, misappropriation or misapplication by a single person.
40. Regarding the proposed delegation of legislative power in clause 104, the explanatory notes state (at 8):

Clause 104 provides for monetary limits on amounts that may be paid from the claim fund for a single claim or arising out of the wrongdoing of a single person to be prescribed by regulation. It is appropriate that this amount be prescribed by regulation, as the scale of financial loss that can be suffered in these transactions will be subject

to changes in the value of these transactions. The maximum amount that can be claimed should have some correlation with the financial loss that is suffered by consumers in these transactions.

41. Clause 145 would provide a general regulation-making power, allowing the Governor in Council to make regulations under the Act. The explanatory notes indicate (at 8):

The Bill replicates the relevant heads of regulatory power under the PAMD Act. The matters to be prescribed under regulation are those matters usually prescribed under regulations, i.e. matters to be prescribed in documents and minor offences. As these are mostly administrative matters that can be subject to change over time, it is appropriate that they are provided for in a regulation, rather than primary legislation. The regulation will comply with the requirements of section 4(5) of the Legislative Standards Act 1992.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

42. 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)).
43. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

3. BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 23 November 2010
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: Minister for Tourism and Fair Trading

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clause 5** permitting market value to be used as the sole consideration to set lot entitlements;
 - **clauses 7 ,8, 12, 21 and 41** creating offences and amending an existing offence provision;
 - **clause 8** removing the right of lot owners in some community titles schemes to apply for adjustment of their contribution schedule lot entitlements; and
 - **clause 41** requiring bodies corporate to revert contribution schedule lot entitlements to their original settings on the application of one lot owner.
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 17** which may delegate legislative power for regulation modules potentially affecting rights and liberties of individuals.

BACKGROUND

3. The legislation is to provide a new lot entitlements system for community title schemes and to simplify management of schemes with only two lots.

LEGISLATIVE PURPOSE

4. The bill is to amend the *Body Corporate and Community Management Act 1997* to establish (explanatory notes, 1):
 - a lot entitlements system with two principles for the setting of contribution schedule lot entitlements and a limited ability to adjust contribution schedule lot entitlements; and
 - simplified management arrangements for residential community title schemes containing two lots.
5. In addition, the bill would amend the:
 - Queensland Civil and Administrative Tribunal Regulation 2009; and
 - Queensland Civil and Administrative Tribunal Rules 2009.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

7. **Clauses 7, 8, 12, 21 and 41** would insert new offences and amend an existing offence.

8. With the exception of clause 21, the new offences would relate to the failure of a body corporate to lodge a request to record a new community management statement and have the potential to affect the rights and liberties of individuals. The maximum penalty for these offences would be 100 penalty units (\$10 000), as indicated in the table below.

Clause	Amended/new section	Offence	Proposed maximum penalty
7	New 47A(5)	Body corporate failing to lodge quickly request to record new community management statement incorporating change	100 penalty units (\$10 000)
8	48(6)	Body corporate failing to lodge quickly request to record new community management statement incorporating change after adjustment order by specialist adjudicator or QCAT	100 penalty units (\$10 000)
12	New 51B(4)	Body corporate failing to lodge quickly request to record new community management statement incorporating change if given written notice of lot entitlements for post-subdivision lot	100 penalty units (\$10 000)
12	New 51C(4)	Body corporate failing to lodge quickly request to record new community management statement incorporating change if given written notice of lot entitlement for post-amalgamation lot	100 penalty units (\$10 000)
21	New 183C(6)	Failing to comply with continuing contravention notice	20 penalty units (\$2000)
21	New 183D(7)	Failing to comply with future contravention notice	20 penalty units (\$2000)
41	New 385(6)	Body corporate failing to lodge request to record new community management statement incorporating change to contribution schedule lot entitlements	100 penalty units (\$10 000)
41	New 387(4)	Body corporate failing to lodge request to record new community management statement incorporating change to contribution schedule lot entitlements after community meeting	100 penalty units (\$10 000)
41	New 388(8)	Body corporate failing to lodge request to record new community management statement incorporating adjustment ordered by specialist adjudicator or QCAT	100 penalty units (\$10 000)

9. The explanatory notes provide (at 7) the following information about the proposed offences:

The proposed amendments to the BCCM Act also potentially breach the fundamental legislative principle that legislation have sufficient regard to the rights and liberties of individuals as the Bill creates several new offences.

Proposed sections 47A, 47B, 51B, 51C and 389 create new offences for the failure of a body corporate to lodge a request to record a new community management statement. The maximum penalty for these offences is 100 penalty units, which is consistent with existing similar provisions in the BCCM Act.

New sections 183C and 183D create new offences. If a person is issued with a contravention notice under section 183C or 183D for contravening the by-laws in a two-lot scheme to which the Specified Two-Lot Schemes Module applies and fails to comply with the notice, a maximum of 20 penalty units may be imposed. This is consistent with the existing provisions in section 182 and 183 of the BCCM Act for failing to comply with contravention notices.

10. The committee received submissions about the bill from the Queensland Law Society and the Unit Owners Association of Queensland. In accordance with section 50(2) of the *Parliament of Queensland Act*, the committee has authorised the tabling and publication of the submissions. Copies are available from the committee's website and the Queensland Parliament's tabled papers site.¹
11. In its submission, the Queensland Law Society raised a number of matters. First, the Queensland Law Society considered (at 2) that new sections 385 and 387 (clause 41) which concern applications for reversion do not have sufficient regard to the rights and liabilities of individuals, and would be an inappropriate use of a criminal sanction.

¹ Available at: <http://www.parliament.qld.gov.au/view/legislativeAssembly/tailedPapers/home.asp> and www.parliament.qld.gov.au/slc.

12. Second, the Queensland Law Society raised (at 4) a concern regarding a possible significant fetter on the discretion of QCAT.
13. Part 5 of the *Body Corporate and Community Management Act 1997* regulates lot entitlements. It would be amended to:
- include new section 47A to enable bodies corporate to adjust the contribution schedule lot entitlements of the lots included in a community titles scheme by a resolution without dissent (clause 7);
 - include new section 47B to allow a specialist adjudicator or the Queensland Civil and Administrative Tribunal to adjust contribution schedule lot entitlements if a community titles scheme is affected by a material change or for a community titles scheme established after commencement if a lot owner in the scheme believes the contribution schedule lot entitlements do not accurately reflect the deciding principle for the lots entitlements (clause 7); and
 - remove the right of a lot owner in a community titles scheme established prior to commencement ('an existing scheme') to apply to a specialist adjudicator or to the Queensland Civil and Administrative Tribunal for an adjustment to the owner's contribution schedule lot entitlements – only adjustment of interest schedule lot entitlements would be possible (section 48, as amended by clause 8).
14. The Queensland Law Society's submission noted (at 4) that new section 47B would provide that the order of the specialist adjudicator or QCAT would be limited to applying the original deciding principle irrespective of whether it was just and equitable to do so.
15. Third, it is suggested that the differential treatment of lot owners, dependent on when a community title scheme was established, might adversely affect the rights and liberties of lot owners in existing schemes who were unable to apply for an adjustment and might adversely affect the value of their lots.
16. The second reading speech states that 120 adjustment applications have been made to date which have affected thousands of lot owners and with many more applications pending the potential exists for tens of thousands of lot owners to be affected.²
17. The Queensland Law Society's submission (at 3) notes that for existing schemes:
- ...this will mean that one lot owner can force the body corporate to revert to the pre-adjustment lot entitlements and there is no right for the body corporate to challenge this reversion or to implement an equitable distribution of lot entitlements unless there is unanimous agreement or a material change in the scheme.*
18. **Clauses 27-33** may adversely affect the rights of sellers.
19. Clauses 27-33 would require sellers to disclose additional information to buyers and provide additional rights of cancellation in limited circumstances before settlement. The explanatory notes note (at 6):
- These enhanced disclosure requirements will enable lot owners to make an informed decision when purchasing a lot in a scheme and will aim to reduce the need for adjustments of contribution schedule lot entitlements.*
20. In its submission, the Queensland Law Society questions (at 4) the utility of requiring sellers to disclose a document to buyers, the recorded community management statement (CMS) which may be 50 to 100 pages long. Further, the submission states:
- There is no statutory obligation on a body corporate following the recording of a CMS to provide a copy of the CMS to all lot owners. This proposed section imposes new obligations and liabilities on the average seller who is unlikely to know when a CMS is recorded and is unable to require the body corporate to inform him or her.*
21. **Clause 41** may adversely affect rights and liberties of all lot owners.
22. It would insert a new chapter 8, part 9 (new sections 379-387) to provide that a body corporate of a community title scheme that had been the subject of one or more adjustment orders, would be required to revert all contribution schedule lot entitlements to their original settings on the motion of one lot owner who was adversely affected by an adjustment made while he or she was a lot owner.
23. New section 379 contains a sunset clause on motions for reversion of three years from commencement. It would be prospective in operation, taking property interests to a retrospective point in time prior to all or any adjustments of the original contribution scheme lot entitlements.

² The Hon PJ Lawlor MP, Minister for Tourism and Fair Trading, Second Reading Speech, *Record of Proceedings (Hansard)*, 23 November 2010, 4129.

24. The new sections might adversely affect rights and liberties of all lot owners in a scheme that was the subject of a motion for reversion. On the motion of a single lot owner, a body corporate would be required to revert all contribution schedule lot entitlements to their original settings subject to any subdivisions, amalgamations, boundary changes or material changes.
25. Lot owners would be given an opportunity to make submissions to the body corporate but a body corporate could consider only the effect of any subdivisions, amalgamations, boundary or material changes on original contribution settings.
26. Accordingly, some lot owners who purchased after an adjustment might be adversely affected by reversion but unable to apply for reversion themselves.
27. Any orders of a specialist adjudicator or QCAT made prior to commencement of the bill would cease to have effect on reversion.
28. The explanatory notes state (at 7) that these inconsistencies with fundamental legislative principles are justified to restore as much certainty as possible around body corporate costs:
- Whilst prima facie, this proposed amendment does not have sufficient regard to the rights and liberties of individuals, the objective of the Bill is to provide as much certainty around body corporate costs as possible whilst recognizing that administrative and sinking fund budgets will vary from year to year depending upon the circumstances of each individual scheme.*
29. On the issue of reversion, the Queensland Law Society made the following submission (at 1-2):
- Except in the case of certain changes to the scheme since establishment, the committee or body corporate has no discretion to alter the pre-adjustment lot entitlements to reflect any notion of equity or fairness. This will be despite the fact the original lot entitlements may have been set in an arbitrary manner by the original developer under the pre-1997 legislation.*
- Insufficient regard is also given to the rights and liberties of individuals as the result of the reversion may be to reinstate:*
- *Pre-adjustment lot entitlements that were inequitable; or*
 - *Lot entitlements that are inconsistent with the proposed principles for setting lot entitlements in the Bill.*
- In both of these scenarios the body corporate is not given the discretion or the ability to challenge the reinstatement of these lot entitlements despite obvious unfairness or inequities.*
30. The submission received from the Unit Owners Association of Queensland opposes what it regards as the creation of two classes of buildings, being post commencement buildings where contributory schedules are adjusted under the bill and pre-commencement adjusted buildings that, under the bill, would be reverted to 'unfair and unjust developer imposed contribution schedules'. The submission suggests that sufficient regard for rights and liberties of individuals could be achieved, for example, by testing the adjusted contribution schedules of all pre-commencement adjusted buildings against the new principles of the bill and readjusting where necessary to ensure compliance.

Natural justice

31. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.
32. **Clause 5** (new section 46A) may be inconsistent with principles of natural justice as it may allow a decision to be made based on an irrelevant consideration.
33. New section 46A sets out the principles for calculating lot entitlements in schemes established after commencement:
- the equity principle; and
 - the relativity principle.
34. The relativity principle would include the market value of the lots as a relevant consideration. Lot entitlements might be set based solely on the market value of lots placing a larger portion of body corporate costs on owners of lots with higher market values irrespective of the size of their lots or any other relevant considerations.
35. The explanatory notes state (at 10):
- Under the relativity principle, it is acceptable to have an unequal contribution scheme (or a purposely weighted schedule) provided that the inequality demonstrates a relationship between lots, and that the relationship is based on relevant factors provided for in the Bill.*

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36. The submission received from the Queensland Law Society states (at 3) that the use of market value may be quite prejudicial to rights and liberties.

Clear meaning

37. Section 4(3)(k) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.
38. **Clauses 5, 30 and 32-3** may not be drafted in a sufficiently clear and precise way.
39. New section 46A (clause 5) would establish the equality principle and the relativity principle for deciding contribution schedule lot entitlements for lots in a community titles scheme. The new section would use the term 'market value' as an element of the relativity principle, but the term is not defined in the bill or the Act. Accordingly, it may not be clear whether market value would be the sale price of a lot or an amount assessed by a valuer at another point in time.
40. New section 209A (clause 30) would provide that a buyer of a lot might terminate the contract for the sale of the lot if the seller was the original owner for the scheme and the buyer reasonably believed the contribution schedule lot entitlements did not accurately reflect the contribution schedule principle on which they were decided and the buyer would be materially prejudiced if compelled to complete the contract.
41. New section 217A (clause 33) would allow the buyer of a proposed lot to terminate the contract of sale for the lot if the seller was intended to be the original owner for the scheme when it was established and the buyer reasonably believed the proposed contribution schedule lot entitlements or interest schedule lot entitlements did not accurately reflect the deciding principle on which they were proposed to be decided and the buyer would be materially prejudiced if compelled to complete the contract.
42. Each of new sections 209A and 217A would include a right to terminate a contract if a buyer 'reasonably believed' that the contribution schedule lot entitlements were inconsistent with the principle on which they were calculated. A right to terminate, based on a reasonable belief held by the buyer, may not create sufficient certainty as drafted.
43. Amended section 217 (clause 32) would allow termination of a contract for inaccuracy of statement. Again, the exact meaning of the termination right in section 217(b)(v) and (vi) may be unclear.
44. These matters were identified in a submission received from the Queensland Law Society (at 3-5).

Sufficient regard to the institution of Parliament

Delegation of legislative power

45. 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, a bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.
46. **Clause 17** may delegate legislative power in inappropriate cases.
47. It would provide for the development of a new regulation module, the Specified Two-Lot Scheme Module, to address procedures for the operation of residential two-lot scheme bodies corporate.
48. The *Body Corporate and Community Management Act* utilises regulation modules to prescribe management processes and procedures rather than dealing with these matters in the Act. Currently four regulation modules provide detailed management processes for different types of schemes under the Act.
49. The delegation of legislative power in this way was identified by the committee as a concern in its consideration of the Body Corporate and Community Management Bill 1997,³ with the committee noting that the regulation modules would deal with matters affecting individual rights and obligations that might be more appropriately dealt with in the Act. In relation to that bill, the committee stated that it considered rights and obligations of individuals to be core provisions of sufficient significance to be protected by an Act rather than being left to regulations.

³ *Alert Digest 5/97*.

50. The practice of delegating legislative power for regulation modules is continued in clause 17. The explanatory notes state (at 7-8) that the existing regulation modules place unnecessarily onerous and complex management obligations on lot owners of duplexes and that a separate regulation module is needed to simplify the management arrangements for owners of two-lot schemes:

The primary object of the BCCM Act is to provide flexible and contemporary communally based arrangements for the use of freehold land. To achieve flexibility in the legislative framework to accommodate the management needs of diverse types of schemes, the BCCM Act provides management processes and procedures through a set of regulation modules designed for the different types of schemes. Including management provisions tailored to different types of schemes in the BCCM Act would be impractical and cumbersome and unlikely to achieve the same level of flexibility and simplicity as the current regulatory framework. It is considered that the division of matters between the BCCM Act and the regulation modules is appropriate given the intent of the legislation to provide flexible management arrangements for community titles schemes and given the successful operation of this legislative framework to date.

51. Further, the second reading speech notes that the new module would apply to almost one third of community titles schemes in Queensland; that is, about 12 000 community title schemes.⁴

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

52. 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.
53. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.
54. 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.

⁴ The Hon PJ Lawlor MP, Minister for Tourism and Fair Trading, Second Reading Speech, *Record of Proceedings (Hansard)*, 23 November 2010, 4130.

4. COMMERCIAL AGENTS BILL 2010

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

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **the large number of clauses** creating offence provisions;
 - **clause 144** imposing time limits on commencement of proceedings and allowing the prosecution to elect for an indictable offence to be heard summarily on indictment;
 - **clauses 145-6** which may impose liability for the acts or omissions of others;
 - **the large number of clauses** which may affect rights to privacy;
 - **clause 149** allowing public information or warning statements, including statements identifying people;
 - **clauses 15, 17 and 85-6** imposing restrictions on people who may be issued with licences or registration certificates;
 - **clauses 28, 48, 93 and 104** allowing conditional licences and suspension of licences and registration certificates;
 - **clauses 24 and 91** making people aged under 18 ineligible for a licence or registration;
 - **clauses 10, 17, 25, 33, 36, 41, 44, 48, 82, 92-3, 95, 98, 101 and 104** making access to licences and registration dependent on administrative power which may be insufficiently defined;
 - **clauses 49 and 105** which may make rights and liberties subject to administrative power which may not be subject to appropriate review;
 - **clauses 48-9 and 104-5** which may be inconsistent with principles of natural justice; and
 - **clauses 138, 142-3 and 145-6** which may impose evidential burdens on a person charged with an offence.
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 155** which does not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system; and
 - **clauses 70-1, 110 and 138** which may allow the delegation of legislative power other than in appropriate cases.

BACKGROUND

3. Implementing a recommendation of the former Service Delivery and Performance Commission to enact a law dealing exclusively with the activities, licensing and conduct of commercial agents and their employees, the bill also provides consumer protections.

LEGISLATIVE PURPOSE

4. The main object of the bill is identified in clause 7, which identifies also how the object is to be achieved. The main object is to:
 - provide a system for licensing and regulating people as commercial agents (largely debt collectors) and registering and regulating persons as commercial subagents; and
 - achieve an appropriate balance between the needs to –
 - regulate for the protection of consumers; and
 - promote free enterprise in the market place.

5. The bill is one of four introduced to divide the *Property Agents and Motor Dealers Act 2000*. The other three, examined in this *Legislation Alert* also, are the:
- Agents Financial Administration Bill 2010 (chapter 2);
 - Motor Dealers and Chattel Auctioneers Bill 2010 (chapter 10); and
 - Property Agents Bill 2010 (chapter 11).
6. In addition, the bill would amend the:
- *Fire and Rescue Service Act 1990*; and
 - *State Penalties Enforcement Act 1999*.

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. **A large number of clauses** would create offence provisions. The proposed offences and respective maximum penalties are identified below.

Clause	Proposed offence	Proposed maximum penalty
22(1)	Disclosing confidential criminal history	100 penalty units (\$10 000)
39(2)	Failing to maintain and make available for inspection documents relating to substitute licence	100 penalty units (\$10 000)
39(3)	Failing to make application for substitute licence	200 penalty units (\$20 000)
40(3)	Failing to maintain and make available for inspection documents relating to substitute licence for employed licensee	100 penalty units (\$10 000)
40(4)	Failing to make application for substitute licence for employed licensee	200 penalty units (\$20 000)
42(2)	Licensee acting during appointment of substitute licensee	200 penalty units (\$20 000)
45(2)	Failing to produce licence for amendment	100 penalty units (\$10 000)
45(3)	Failing to return suspended or cancelled licence	100 penalty units (\$10 000)
48(6)	Failing to return suspended licence	100 penalty units (\$10 000)
49(2)	Failing to return cancelled licence	100 penalty units (\$10 000)
54(1)	Failing by licensee to notify of changes in circumstances	100 penalty units (\$10 000)
58(1)	Failing by natural person to be in charge of commercial agent's business at a place	200 penalty units (\$20 000)
58(2)	Failing by corporation to be in charge of commercial agent's business at a place	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation
58(3)	Being in charge (natural person) of a commercial agent's business at more than one place	200 penalty units (\$20 000)
60(1)	Acting as commercial agent other than pursuant to appointment	200 penalty units (\$20 000)
60(7)	Failing to provide client with copy of signed appointment	200 penalty units (\$20 000)
63	Acting as commercial agent for process serving other than pursuant to written instructions	200 penalty units (\$20 000)
64(2)	Unauthorised remedy for reward or expense	200 penalty units (\$20 000)
65(1)	Unauthorised recovery of costs	200 penalty units (\$20 000)

Clause	Proposed offence	Proposed maximum penalty
69(1)	Failing by principal licensee to notify of change in place of business	200 penalty units (\$20 000)
69(2)	Failing by employed licensee to notify of change in business address	200 penalty units (\$20 000)
70	Unauthorised publication of licensee's name	100 penalty units (\$10 000)
71(1)	Failing to keep employment register	200 penalty units (\$20 000)
71(2)	Failing to record required particulars in an employment register	200 penalty units (\$20 000)
71(3)	Failing to update required particulars in an employment register	200 penalty units (\$20 000)
72(1)	Performing an activity to be performed under commercial agent licence other than as permitted under Act	200 penalty units (\$20 000) or two years' imprisonment
72(2)	Acting as a commercial agent other than as permitted under Act	200 penalty units (\$20 000) or two years' imprisonment
73(1)	Pretending to be a commercial agent	200 penalty units (\$20 000)
74(1)	Acting for more than one party	200 penalty units (\$20 000)
75(1)	Failing by commercial agent to produce licence	100 penalty units (\$10 000)
75(2)	Failing by commercial subagent to produce registration certificate	100 penalty units (\$10 000)
76(1)	Employment of unregistered commercial subagent	200 penalty units (\$20 000)
76(2)	Employment of business associate as commercial agent	200 penalty units (\$20 000)
76(3)	Employment of executive officer of corporation as commercial subagent	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation
77(1)	Improper use of licence or registration certificate	200 penalty units (\$20 000) or one year's imprisonment
78	Unlawful entry	200 penalty units (\$20 000) or one year's imprisonment
79(1)	Misrepresentation	200 penalty units (\$20 000) or two years' imprisonment
80(1)	Creditor impersonating commercial agent	200 penalty units (\$20 000) or two years' imprisonment
80(2)	Commercial agent providing creditor with document to enable creditor to impersonate commercial agent	200 penalty units (\$20 000) or two years' imprisonment
89(1)	Disclosure of confidential criminal history given to investigate suitability of applicant for registration	100 penalty units (\$10 000)
102(2)	Failing to return registration certificate for amendment of conditions	100 penalty units (\$10 000)
104(5)	Failing to return suspended registration certificate	100 penalty units (\$10 000)
105(2)	Failing to return cancelled registration certificate	100 penalty units (\$10 000)
110(1)	Failing by commercial subagent to notify of changes in circumstances	100 penalty units (\$10 000)
111(1)	Failing by principal licensee to open and maintain a trust account	200 penalty units (\$20 000) or two years' imprisonment
123(5)	Contravening an order of the Queensland Civil and Administrative Tribunal	540 penalty units (\$54 000)
136(2)	Wrongful conversion or keeping false accounts	1000 penalty units (\$100 000) or five years' imprisonment
136(4)	Misrepresentation as to amount received	540 penalty units (\$54 000)
137(1)	Charging fee for providing documents	200 penalty units (\$20 000) or one year's imprisonment

Clause	Proposed offence	Proposed maximum penalty
138(1)	Asking for, or receiving, excess or improper remuneration	200 penalty units (\$20 000) or one year's imprisonment
139(1)	Lending a licence	200 penalty units (\$20 000) or two years' imprisonment
139(2)	Borrowing, hiring or buying a licence	200 penalty units (\$20 000) or two years' imprisonment
140	False or misleading statements	200 penalty units (\$20 000) or two years' imprisonment
141(1)	Providing an official with a false or misleading document	200 penalty units (\$20 000) or two years' imprisonment
141(3)	Making a false or misleading entry in a document	200 penalty units (\$20 000) or two years' imprisonment
146(2)	Failing to ensure corporation complies with legislation	Penalty identified in provision

9. In respect of the proposed offences in the table above, the committee notes that:
- a large number of offence provisions would enforce the regulation of the activities of commercial agents;
 - the large number of offence provisions which would have elements of the offence prescribed by regulation (see, below, under 'Delegation of legislative power');
 - together, the acts or omissions proscribed by clauses 48 and 49 appear similar to those proscribed by clause 45; and
 - where the proposed maximum penalties include terms of imprisonment, the term of imprisonment may differ between offences even where the maximum monetary penalty would not.
10. **Clause 144** would govern proceedings for offences under the legislation. It would:
- impose time limits for the commencement of proceedings; and
 - regulate proceedings for offences under the legislation.
11. In relation to the first limb, clause 144(1) states that, other than proceedings for indictable offences to be dealt with on indictment, proceedings for offences under the legislation must be taken in a summary way within the later of:
- one year from the date of commission of the offence; and
 - six months after the commission of the offence comes to the complainant's knowledge but within two years after the commission of the offence.
12. Clause 144(2) would allow the prosecution to elect for an indictable offence to be heard summarily or on indictment. In respect of clause 144, generally, the explanatory notes state (at 57-8):
- Clause 144 provides for proceedings for offences and the time limits for starting a proceeding. The maximum penalty that is able to be imposed on a summary conviction of an indictable offence (an offence for which the maximum penalty is 2 or more years imprisonment) is 200 penalty units or 1 year's imprisonment.*
- The prosecution may elect for an indictable offence to be heard by way of summary proceeding under the Justices Act 1886 or on indictment. If a person charged with an indictable offence asks at the start of a summary proceeding for the offence that the charge be prosecuted on indictment, the magistrate must not decide the charge by way of summary proceeding and must proceed by way of committal proceeding.*
13. **Clauses 145 and 146** would impose liability for the acts or omissions of others.
14. Clause 145(3) would provide an act done or omitted to be done for a person by a representative of the person, and within the scope of the representative's authority, would be taken to have been done or omitted to be done by the person, unless by the exercise of reasonable diligence, the person could not have prevented the act or omission.
15. In respect of consistency with fundamental legislative principles, the explanatory notes say (at 10):
- While the clause imposes liability for the actions of others, it is justified on the grounds that it follows the general law of agency in that the principal is liable for the actions of his or her agent. The clause is also consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees.*

16. Clause 146 provides that if a corporation committed an offence against the legislation, each of the executive officers would also commit an offence of failing to ensure that the corporation complied with the legislation.

17. The explanatory notes provide (at 10-11) lengthy information in respect of clause 146:

The imposition of liability for the acts of the corporation is justified because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, be accountable. This provides an incentive for the executive officers of a corporation to ensure that the corporation is compliant. The clause also provides that it is sufficient for the executive officer to prove that the act or omission that constituted the offence was done or made without the officer's knowledge, despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.

To provide further justification, clause 146 is consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees. So too, should executive officers be liable for offences of a corporation, but only where the executive officer was in a position to influence the conduct of the corporation in relation to the offence. The clause is also consistent with the suitability requirements for applicants and licensees under clause 17. In deciding whether a corporation is suitable, the chief executive must have regard to whether an executive officer of the corporation has been convicted of an offence against this Bill, the other industry specific Bills or the Agents Financial Administration Bill. If derivative liability was not imposed, an executive officer who had influence over an offence by a corporation that resulted in the corporation's licence being cancelled, could continue the unlawful conduct under a new corporate entity.

Another issue that may be raised in relation to clause 146 is that derivative liability can potentially apply to any offence under the Bill. However, it is not considered appropriate to limit derivative liability to certain offences, such as more serious offences. This is because there is potential for the commission of relatively minor offences in a manner that is systematic and widespread.

It is noted that the Council of Australian Governments is undertaking a review of provisions imposing liability on executive officers. The object of the review is to ensure that there is sufficient justification for making directors liable for corporate fault. As the review has not yet been finalised, it is anticipated that any further assessment around the appropriateness of executive officer liability in relation to offences in the Bill would be undertaken once the review is completed.

Right to privacy

18. **A large number of clauses** may affect rights of individuals to privacy.

19. In Queensland, the *Information Privacy Act 2009*, *Public Records Act 2002* and *Right to Information Act 2009* regulate the fair collection, handling and publication of personal information for public purposes. Proposed provisions which may require dealings with personal information for the purposes of the legislation include:

- clauses 11(1)(d), 32(2) and 35(2) – names and addresses of business associates;
- clauses 13, 17(1), 20(1)-(2), 39(5), 40(5), 82-87 and 90 – material likely to contain personal information, such as material regarding the character of a person and of his or her business partners or associates, criminal histories, insolvency information, and information about whether a person would be capable of satisfactorily performing relevant activities; and
- clauses 11(2)(d), 32(4), 35(4), 94(3) and 97(3) – colour photographs of applicants.

20. The explanatory notes provide (at 9) the following information about the consistency with fundamental legislative principles of proposed provisions which may affect individual rights to privacy and confidentiality:

Clauses 20 and 87 provide that the chief executive may make investigations about particular persons, including obtaining a criminal history report, to help decide if an applicant, existing commercial agent or commercial subagent is a suitable person to hold a licence or registration certificate. The provision of a criminal history report to the chief executive impacts the privacy of the person who is the subject of the report. Clause 20 also provides that the chief executive may obtain a criminal history report in relation to a business associate of an applicant or licensee, for the purposes of making investigations into the suitability of a licensee or an applicant. The chief executive does not need to acquire the business associate's consent to obtain the report. These infringements on privacy are justified on the basis that a criminal history report is necessary to ensure that only suitable persons become commercial agents and commercial subagents. Given that the work of commercial agents involves persistent requests for debts and the repossession of property in circumstances where consumers are at their most vulnerable, it is reasonable to ask for details of a potential licensee's probity and propriety. This extends to requiring details about their associates. Under the Bill, applicants must provide the names of their business associates. These are persons with whom the applicant or licensee carries on, or intends carrying on, business under the licence. Given the direct involvement of business associates in a licensee's business and their ability to

influence business behaviour, investigations into the propriety of these people is a necessary step in ensuring the business operates in accordance with the law, and limits the risk of consumers being subject to any detriment in their dealings with the business.

Clauses 22 and 89 provide a safeguard in relation to the confidentiality of the criminal history reports by providing that a public service employee performing functions under the Act must not disclose information about a person's criminal history and that the chief executive must destroy a written criminal history report as soon as practicable after considering a person's suitability.

In relation to criminal histories, it should be noted that the Bill does not abrogate the rehabilitation period and the non-disclosure rights provided in the Criminal Law (Rehabilitation of Offenders) Act 1986.

In relation to personal information generally, the chief executive and public service employees are required to comply with the Information Privacy Act 2009, Public Records Act 2002 and Right to Information Act 2009.

21. **Clause 149** would allow the minister or chief executive to make or issue public statements for the purposes of providing information or warnings, including statements identifying people.
22. Clause 149(1) would permit publication of public warning statements about:
 - contraventions of the code of conduct and people who commit them;
 - unfair business practices regulated under the legislation and people who engage in them; and
 - offences against the legislation and people who commit them.
23. Clause 149(2) states that a statement may identify particular contraventions, business practices, offences and persons.
24. The explanatory notes provide (at 11-2) justification for inconsistency with rights and liberties of individuals:

Clause 149 allows the Minister or chief executive to make or issue public warning statements or information statements that may identify individuals. These public statements may have an adverse affect on individuals. However, before making a statement, the Minister or chief executive must be satisfied that it is in the public interest to do so. Accordingly, the inconsistency with the fundamental legislative principle is justified on the grounds that it is in the public interest to allow the making of warning and information statements for the protection of consumers.

A particular concern may be raised in relation to public statements about business practices regulated under the Bill that are unfair and naming persons who engage in the unfair practices. This is because, unlike making a public statement about disciplinary proceedings or the commission of an offence, determining what constitutes unfair business practices is subjective and has greater potential to adversely affect an individual. Additionally, information about disciplinary proceedings by QCAT and court convictions are already publicly available, whereas information concerning 'unfair business practices' is not. Nevertheless, the Minister or chief executive (noting that this power can not be delegated pursuant to clause 152) will only make a public statement if satisfied it is in the public interest to do so.

It should be noted that this power is common in consumer protection legislation. It is a vital power as public warning statements can protect consumers from committing large amounts of money or entering into transactions in which they would suffer detriment, while information statements play an educative role in informing consumers about particular conduct or behaviour that may place consumers at risk. The power also alerts licensees to non-compliant behaviours. The public exposure of non-compliant licensees also provides a compliance incentive to other licensees wishing to avoid such negative publicity.

It is a reserve power, not able to be delegated, and used only in the rarest of circumstances where it becomes apparent to the Minister or chief executive there is a demonstrable, tangible pattern of conduct or behaviour that may cause widespread detriment to consumers. An example of where its use may be considered is where the Minister or chief executive has strong evidence that consumers may suffer financial detriment and such loss may be considerable if a public warning statement is not issued.

Clause 150 provides that nothing in the Bill affects or limits any civil remedy that a person may have against a licensee or another person for any matter. Accordingly, the Minister and chief executive will not have immunity from legal liability in relation to public statements and this is a matter that is taken into consideration in deciding to issue a statement that identifies a person.

Right to work and work-related rights

25. **Clauses 15, 17 and 85-6** would require a person working as a commercial agent to be licensed or to have a registration certificate and would impose restrictions on people who may be issued with licences or registration certificates.

26. Clauses 15 and 85 would provide that a person would be unsuitable to hold a licence if:
- convicted of a serious offence in the past five years, in Queensland or elsewhere;
 - disqualified from holding a licence or registration certificate; or
 - the chief executive decided under clause 17 that he or she was not a suitable person to hold a licence.
27. In addition, clause 15 would exclude a person from obtaining registration, on the grounds of unsuitability, if the person was an insolvent under administration.
28. Clauses 17 and 86 would prescribe the matters the chief executive must consider when deciding whether a person was suitable to hold a licence.
29. The explanatory notes state (at 5-6):
- Part 2, Division 3 replicates Chapter 2, Part 4 of the PAMD Act which provides that the chief executive must consider the suitability of a person including their criminal history, their character and the character of the person's business associates when determining their suitability to hold a licence.*
30. **Clauses 28, 48, 93 and 104** would allow the chief executive to impose conditions upon, or to suspend, licences and registration certificates:
- clause 28 – issue of licence on conditions the chief executive considers necessary or desirable for the proper performance of the activities authorised by the licence;
 - clause 48 – immediate suspension of licence on prescribed grounds;
 - clause 93 – issue of registration certificate on conditions the chief executive considers necessary or desirable for the proper performance of the activities authorised by the licence or for another purpose consistent with the achievement of the objects of the Act or the Agents Financial Administration Act (currently the Agents Financial Administration Bill 2010); and
 - clause 104 – immediate suspension of registration certificates on prescribed grounds.
31. The explanatory notes state (at 6):
- The Bill also allows the chief executive to place conditions on licences and registration certificates (clauses 28 and 93), and to suspend licences and registration certificates (clauses 48 and 104). While this may adversely affect the rights and liberties of individuals, the imposition of conditions and the suspension of licences and registration certificates protect consumers.*

Rights of children, teenagers and young people

32. **Clauses 24 and 91** would make people aged under 18 ineligible for a commercial agent's licence or registration as a commercial subagent.
33. Clause 24(1)(a) would provide that a person would be eligible to obtain a licence only if her or she was 'at least 18 years'. Similarly, clause 91 would impose an equivalent restriction for registration.
34. These provisions would override section 7(f) of the *Anti-Discrimination Act 1991* which prohibits discrimination on the basis of age.
35. The explanatory notes include (at 6) the following justification for the effect of clauses 24 and 91 upon rights and liberties of people below the age of 18:
- Part 2, Division 4 and Part 4, Division 5 provide that the chief executive must consider the eligibility of a person to hold a licence and registration certificate, including whether the person is over the age of 18. This age discrimination is justified on the basis that it provides protection for consumers by ensuring that commercial agents and commercial subagents have adequate judgement and capacity to carry out their authorized activities. Like the criteria for determining if a person is suitable to hold a licence, the criteria for determining eligibility are explicitly defined and necessary to ensure that licensees and commercial subagents can adequately perform their duties.*

Administrative power

36. 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.
37. **Clauses 10, 17, 25, 33, 36, 41, 44, 48, 82, 92-3, 95, 98, 101 and 104** may make rights to licences and registration dependent on administrative power which may be insufficiently defined.

38. Part 2 would regulate licensing of commercial agents and part 4 would provide for employee registration. Each part, examined also under the heading 'Rights and liberties', provides for the chief executive to make decisions regarding the issue of licences and registration certificates; for example:
- clauses 17 and 86 – suitability of applicants;
 - clauses 24 and 91 – eligibility;
 - clauses 25 and 92 – issue of licence/registration certificate.
 - clauses 28 and 93 – conditions on licence/registration certificate.
39. Under the legislation, three issues arise which may provide for administrative discretions conferred on the chief executive to be quite broad in scope.
40. First, within part 2, clause 10(3) states that:
In deciding the person's application the chief executive must have regard, among other things, to—
- (a) the person's suitability to hold a licence under this Act; and
 - (b) the person's eligibility to hold the licence.
41. In part 4, clause 82 is in similar terms to clause 10. However, neither clause, nor the legislation generally, appears to define the term 'among other things', allowing the chief executive a wide discretion regarding matters for consideration in deciding applications.
42. Second, part 2, division 3 would identify the matters for consideration as to the suitability to hold a licence of persons (natural persons) and entities (for corporations). In relation to suitability for a licence, clause 17 states that the chief executive must, when deciding the suitability of a person, consider specified matters including the 'character' of the person and the person's business associates. For registration certificates, clause 86 also requires consideration of 'character'. Again, however, the term 'character' is not defined and could be interpreted broadly.
43. Third, clause 25(1) states that the chief executive 'may issue' a licence to an applicant only if the chief executive was satisfied as to suitability and eligibility and if the application was 'properly made' (see clause 25(3)). Although the chief executive 'may issue' a licence if those criteria were met, clause 25 does not state that the chief executive 'must' issue the licence in those circumstances. For registration certificates, clause 92 also says the chief executive 'may issue' these. Accordingly, clauses 25 and 92 may widen the scope of the administrative discretion also.
44. Clauses 33 and 95, in similar terms, may confer the chief executive with a wide discretion to refuse to renew a licence or registration certificate.
45. The explanatory notes indicate (at 6) that the administrative powers conferred on the chief executive by parts 2 and 4 are defined and subject to appropriate review, stating:
- ... the legislation provides express and relevant criteria for the chief executive to make a decision about a person's suitability. Part 4, Division 4 also sets out express and relevant criteria that the chief executive must consider in determining if a person is a suitable person to be registered as a commercial subagent.*
- Like the criteria for determining if a person is suitable to hold a licence, [in clause 92] the criteria for determining eligibility are explicitly defined and necessary to ensure that licensees and commercial subagents can adequately perform their duties.*
- The administrative powers of the chief executive to consider applications for licences and registration certificates are sufficiently defined and reviewable by QCAT.*
46. However, the explanatory notes do not address specifically the issues identified above.
47. **Clauses 49 and 105** may make rights and liberties subject to administrative power which is not subject to appropriate review.
48. Clause 49 would provide for the immediate cancellation of a licence if a licensee was:
- convicted of a serious offence;
 - an insolvent under administration; or
 - a corporation that was wound up or struck off under the *Corporations Act 2001* (Cth).
49. Clause 105 would provide that a registration certification would be cancelled immediately when a commercial subagent was convicted of a serious offence.
50. In respect of a cancellation under clause 49 or clause 105, no right of external administrative review would be provided by the legislation (schedule 2; see explanatory notes, 7). Accordingly, this provision

may be inconsistent with section 4(3)(a) of the *Legislative Standards Act*. However, the explanatory notes indicate (at 7) that sufficient regards would be had to rights and liberties of individuals:

The happening of any of the events goes to the very core of a licensee's or registered employee's ability to perform the activities authorised by the licence or registration certificate. The immediate cancellation of the licence or registration certificate prevents the likelihood of detriment, or further detriment, to consumers.

It should also be noted that the cancellation of a licence or registration certificate does not prevent the licensee or employee from applying for a new licence or registration certificate. However, the person must meet the suitability and eligibility requirements. Additionally, the Bill does not prevent a licensee or registered employee from seeking judicial review of the decision.

Natural justice

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

52. **Clauses 48-9 and 104-5** may be inconsistent with principles of natural justice.

53. Clause 48 would allow the chief executive to suspend immediately a licence. The period of suspension would be not more than 28 days. The clause would apply if a receiver were appointed under the Agents Financial Administration Act over property held by or for the licensee, or if the chief executive reasonably considered that:

- a licensee's licence was issued, renewed or restored on the basis of materially incorrect or misleading information;
- an irregularity or deficiency existed in a licensee's trust account; or
- the licensee had contravened, was contravening or was likely to contravene the legislation or Administration Act.

54. Clause 104 would allow the chief executive to suspend immediately a registration certificate on grounds the same as those in clause 48.

55. Clauses 49 and 105 are outlined above under the heading, 'Administrative power'.

56. The principles of natural justice require that a person be given a fair hearing and an opportunity to present his or her case, that a decision be made by an unbiased and disinterested decision-maker and be based on logically probative evidence. At common law, a person denied 'procedural fairness' may seek review of an administrative decision affecting his or her rights.

57. The explanatory notes acknowledge that clauses 49 and 105 would be inconsistent with principles of natural justice but state (at 6-7, see above under the heading 'Administrative power' also) that the need for consumer protection provides justification:

Clauses 49 and 105 provide the chief executive with the power to cancel a licence or registration certificate without giving the holder an opportunity to make representations as to why the licence or certificate should not be cancelled. The clauses do not provide for prior notification of cancellation or a 'show cause' process. Additionally, there is no right of review to QCAT.

Immediate cancellation denies the holder of the licence or registration certificate natural justice. However, the inconsistency with the fundamental legislative principle is justified on the grounds that immediate cancellation is limited to the most serious of instances that could cause the greatest detriment to consumers. In particular, a licence may only be cancelled under clause 49 if the licensee is convicted of a serious offence; where the licensee is an individual, if the licensee is an insolvent under administration; or where the licensee is a corporation, if the licensee has been wound up or struck off under the Corporations Act. For a registration certificate, the certificate may only be cancelled if the employee is convicted of a serious offence.

58. In relation to clauses 48 and 104, similar justification is provided (at 7):

Inconsistency with the principles of natural justice may also be raised in relation to the immediate suspension of licences and registration certificates (clauses 48 and 104) as there is no prior notification or 'show cause' process. However, a right of review is available to QCAT. Immediate suspension of a licence or registration certificate is limited to specific circumstances and is considered necessary to prevent the likelihood of detriment, or further detriment, to consumers.

Onus of proof

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

60. Legislation provides for the 'reversal' of the 'onus of proof' where it declares the proof of a particular matter to be a defence or when it refers to acts done without justification or excuse, the proof of which lies on the accused.
61. **Clauses 138, 142-3 and 145-6** may impose evidential burdens on a person charged with an offence under the legislation.
62. Clause 138(1) would make it an offence for a licensee to ask for, or receive, a commission or reward for a transaction greater than the amount allowed under a regulation. The maximum penalty for the offence would be 200 penalty units or one year's imprisonment. In respect of clause 138, the explanatory notes state (at 7-8) that the reversal of onus is justified:
- The provision reverses the onus of proof by requiring the licensee to establish, on the balance of probabilities, that expenditure was lawfully incurred, where the licensee alleges that an amount is lawfully incurred. The reversal of the onus of proof is justified as the fact to be proved (i.e. that the expenditure was lawfully incurred) is peculiarly within the knowledge of the licensee and would be difficult to establish otherwise.*
63. Clause 142 states evidentiary provisions which would apply to proceedings under the legislation. The provisions would facilitate proof by the prosecution of:
- the appointment or power of an inspector (subject to a party requiring proof, upon reasonable notice) (clause 142(2));
 - a signature purporting to be the signature of the chief executive (clause 142(3)); and
 - a certificate purporting to be signed by the chief executive, a member of QCAT or the registrar stating a specified matter (clause 142(4)).
64. Clause 143 states that any entry in a document of a licensee is evidence that they entry has been made by or with the authority of the licensee. The explanatory notes indicate (at 8):
- The provision reverses the onus of proof by requiring the licensee to prove that an entry in a document has not been made by the licensee or with the authority of the licensee. However, it is a reasonable assumption made for the purpose of procedural efficacy to assume that entries in documents in the possession of the licensee or belonging to the licensee have been made with the authority of the licensee, particularly given that evidence related to the authorship of entries in documents is likely to be within the knowledge of the licensee.*
65. Clause 145 would provide that:
- if relevant in proceedings under the legislation to prove a person's state of mind about a particular act or omission, it would be enough to show –
 - the act was or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
 - the representative had the relevant state of mind (clause 145(2); and
 - an act done or omitted to be done for a person by a representative, within the scope of the representative's authority, would be taken to have been done or omitted to be done by the person, unless the person proved he or she could not, by the exercise of reasonable diligence, have prevented the act or omission (clause 145(3)).
66. In respect of the consistency of clause 145 with fundamental legislative principles, the explanatory notes say (at 8):
- The reversal of the onus of proof is justified on the grounds that the information relating to the exercise of reasonable diligence would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.*
67. Clause 146(1) would require executive officers of a corporation to ensure that the corporation complied with the legislation. Evidence that the corporation had been convicted of an offence would be evidence that each of the executive officers committed the offence of failing to ensure compliance (clause 146(2)). However, clause 146(3) would provide alternate defences for an executive officer; namely, that he or she took all reasonable steps to ensure compliance and that he or she was not in a position to influence the conduct of the corporation. The explanatory notes provide justification (at 8):
- The reversal of the onus of proof is justified because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, be accountable. This provides an incentive for the executive officers of a corporation to ensure that the corporation is compliant. The clause also provides that it is sufficient for the executive officer to prove that the act or omission that constituted the offence was done or made without the officer's knowledge, despite the officer having taken all reasonable steps to ensure the corporation complied with the provision.*

Sufficient regard to the institution of Parliament

Delegation of legislative power

68. 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.
69. **Clauses 70-1, 110 and 138** may allow the delegation of legislative power in inappropriate cases.
70. These proposed provisions would delegate legislative power to prescribe specified matters for offences. The matters to be prescribed by regulation would be:
- clause 70 – particulars to be stated in advertisement by commercial agent (maximum penalty for offence, 100 penalty units);
 - clause 71 – particulars to be included in employment register by commercial agent (two offences, maximum penalty in each case, 200 penalty units);
 - clause 110 – change in circumstances of which chief executive must be notified (maximum penalty for offence, 100 penalty units); and
 - clause 138 – maximum amount allowed to a licensee for the performance of activities for a transaction (maximum penalty, 200 penalty units or one year's imprisonment).
71. The explanatory notes do not provide information regarding the appropriateness of the delegation of legislative power in these proposed provisions.
72. **Clause 155** does not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.
73. Clause 155 would delegate power to make subordinate legislation regarding specified matters. Although a regulation could be made about 'fees, including the refunding of fees payable under this Act', clause 155 does not confine the power to the setting of an appropriate fee.
74. 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). 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.*
75. The explanatory notes do not address the delegation of legislative power in respect of fees, but state generally (at 12):
- The Bill replicates the relevant heads of regulatory power under the PAMD Act. The matters to be prescribed under regulation are those matters usually prescribed under regulations, i.e. fees, qualification requirements, minor offences. As these are mostly administrative matters that can be subject to changes over time, it is appropriate that they are provided for in a regulation, rather than primary legislation. The regulation will comply with the requirements of section 4(5) of the Legislative Standards Act 1992.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

76. 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)).
77. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

5. CRIMINAL CODE AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced:	24 November 2010
Responsible minister:	Hon CR Dick MP
Portfolio responsibility:	Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

- In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - clauses 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
- The committee invites the minister to provide information about whether **clause 11** would adversely affect rights and liberties retrospectively.

BACKGROUND

- The legislation would amend the Criminal Code and other Acts within the Justice portfolio.

LEGISLATIVE PURPOSE

- The bill is intended to amend the (explanatory notes, 1):
 - Criminal Code to –
 - clarify criminal responsibility regarding an event that occurs by ‘accident’;
 - alter the partial defence to murder of provocation;
 - increase the existing maximum penalty and create a new summary offence in respect of interference with graves and similar structures, such as memorials; and
 - alter rules regarding joinder of offences on indictments;
 - Appeal Costs Fund Act 1973* to allow a convicted person to recover from the Fund additional costs incurred on appeal where the appeal related to the giving or review of a guideline judgment; and
 - Retail Shop Leases Act 1994* to ensure rent reviews may not be avoided under ‘ratchet’ clauses preventing decreases in rent.
- In addition, the bill would amend the *Summary Offences Act 2005* by inserting an offence regarding interference with graves.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

- 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

7. **Clauses 8 and 30** would create offence provisions and amend existing provisions. The proposed offences and respective maximum penalties are identified below.

Clause	Amended / new section	Proposed offence	Proposed maximum penalty
<i>Criminal Code</i>			
8	469(2)	Wilful damage [onus of proof placed on defendant for punishment in special cases - cemeteries]	Punishment in special cases – Cemeteries etc – seven years' imprisonment
<i>Summary Offences Act 2005</i>			
30	New 26A(1)	Interference with graves etc	One year's imprisonment

8. Regarding clause 8, the following information is provided in explanatory notes (at 3-4 and 13):

The offence of wilful damage is provided in section 469 of the Criminal Code and applies to any person who wilfully and unlawfully destroys or damages property...

In recognition of the community's outrage at the abhorrent conduct of damaging or destroying gravestones and like property such as war memorials, the Bill amends section 469 to provide for an increased maximum penalty in certain circumstances and inserts a new offence into the Summary Offences Act to apply to a person who unlawfully interferes with such property...

Subclause (2) inserts a new punishment in special cases in relation to the damage or destruction of: a grave, vault, niche or memorial in a cemetery or at a crematorium; a war memorial; or property at a place of religious worship. In such cases a maximum penalty of seven years applies.

9. In respect of the consistency of clause 30 with fundamental legislative principles, the explanatory notes say (at 9):

The Bill inserts a new offence in to the Summary Offences Act of interfering with: a grave and like property; a war memorial; or a thing fixed in a place of worship and accordingly, will affect the rights and liberties of individuals. The new offence will capture less serious examples of interference with such property where actual damage is not caused and therefore section 469 (Wilful damage) of the Criminal Code does not apply. Such conduct is abhorrent and should not go without sanction. The increase in the maximum penalty for wilful damage of certain property reflects the seriousness with which the community views such behaviour.

Right to a fair trial and fair and just legal process

10. **Clause 5** would alter the scope of the partial defence of provocation in a number of respects.

11. The amendments would provide that:

- the partial defence of provocation could not be -
 - founded on words alone, other than in circumstances of a most extreme and exceptional character (new section 304(2)); or
 - relied on by a defendant, other than in circumstances of a most extreme and exceptional character, if a domestic relationship existed between the defendant and the deceased and the provocation was based on anything done by the deceased (or anything the defendant believed the deceased had done) to end or change the nature of the relationship (new section 304(3));
- where the domestic relationship was an intimate personal relationship under the *Domestic and Family Violence Protection Act* the persons' lives need not be enmeshed (new section 304(4));
- in relation to anything done to end a relationship, it would not be material that the relationship had in fact ended before the sudden provocation and killing occurred (new section 304(5));
- for proof of circumstances of a most extreme and exceptional character regard might be had to any history of violence that was relevant, for example, a history of domestic violence between the deceased and the defendant (new section 304(6));
- the defendant would bear the onus of proof of the partial defence of provocation (new section 304(7), see discussion below under the heading 'Reversal of onus'); and
- when two or more people unlawfully killed another, successful reliance upon the partial defence by one would not affect the question of whether the other was guilty of murder (new section 304(8)).

12. Accordingly, clause 5 may affect rights and liberties of individuals charged with unlawful killing and seeking to rely upon the partial defence of provocation. The explanatory notes do not address specifically the consistency of the proposed provision with fundamental legislative principles, but state (at 2-3):

The Queensland Law Reform Commission's (QLRC) final Report entitled, "A review of the excuse of accident and the defence of provocation" was tabled in Parliament on 1 October 2008...

A person who is otherwise guilty of murder may instead be convicted of manslaughter, if the jury decides that the murder was committed while the accused was provoked. This partial defence is found in section 304 of the Criminal Code and applies where a person does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool. If raised on the evidence, the onus is upon the prosecution to negative the defence beyond a reasonable doubt.

As outlined in the QLRC report at page 225, it is not uncommon for men who kill their intimate partners to raise the defence of provocation on the basis that they were provoked to kill by their partner's infidelity, insults or threats to leave the relationship. Further, at page 465 the QLRC states that the "defence operates in favour or those in positions of strength at the expense of the weaker. The application of the defence has produced different outcomes in cases that involve comparable circumstances. In accordance with authority, trial judges play their role as 'gate-keeper' with caution. And it is at least arguable that the defence has been left to the jury, contrary to authority, in those cases in which the provocative conduct consisted only of words."

The QLRC recommended that the defence be recast to address its bias and flaws, in particular: to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence cannot be based on words alone or conduct that consists substantially of words; to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship; and to place the onus of proof upon a defendant seeking to rely on the partial defence.

The amendments will: remove insults and statements about relationships from the scope of the defence; recognise a person's right to assert their personal or sexual autonomy; and will reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy.

The reversal of the onus of proof takes into account:

- the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the deceased;*
- it will lead to more clearly articulated claims of provocation, which is fairer to all concerned including the jury;*
- it enhances the capacity of the trial judge to prevent unmeritorious claims being raised; and*
- an analogy with diminished responsibility, which also reduces murder to manslaughter, and where the defendant bears the onus.*

13. **Clause 10** would allow multiple offences to be joined in the one charge on an indictment.
14. Generally, an indictment must charge only offence (section 567 of the Criminal Code), but section 568 of the Criminal Code identifies cases in which several charges may be joined.
15. Clause 10 would insert a new section 568(5A) of the Criminal Code to allow multiple offences of obtaining or dealing with identification information (section 408D) to be joined on an indictment.
16. The explanatory notes do not address specifically the effect of the amendment upon rights and liberties of people defending joined charges under section 408D, but provide (at 4-5) information to indicate that clause 10 is justified:

Section 567 of the Criminal Code provides the basic rule that an indictment must charge only one offence unless the charges are: founded on the same facts; form part of a series of offences of the same or similar character; or a series of offences committed in the prosecution of a single count. Where more than one offence is charged in the same indictment, each offence charged must be set out as a separate count.

Section 568 of the Criminal Code provides an exception to the ordinary drafting rules. It allows a single count to combine several instances of property offences, as long as they are of the same legal offence. Specific provision is made for the offences of stealing, receiving, fraud, forgery and uttering. The reason for allowing this departure is that in the case of property offences, it is not uncommon to have a high volume of the same type of offence committed by a single offender. Such cases can present evidentiary challenges in relation to the particularisation of charges.

In practice, section 568 is used when the offender has indicated a willingness to plead guilty. In the case of a trial, the preferred practice would be to indict a separate count for each transaction as best as can be established on the evidence. Section 568 has the effect of streamlining the process.

Section 408D (Obtaining or dealing with identification information) of the Criminal Code can be conveniently added to the list of matters in section 568 that may be joined in a single count on an indictment in certain circumstances, for the following reasons:

- *the offence falls under the ambit of Part 6 of the Code and is arguably a 'property' type offence consistent with the existing offences represented in section 568;*
- *the offence is of a nature where a single offender may commit a high volume of this type of offence;*
- *depending upon the timeframe across which the offending occurred, the frequency of the offending and the number of entities affected – the particularisation of certain matters may be problematic.*

Administrative power

17. 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.
18. **Clauses 16-7** would confer administrative power but state that no appeal would lie against an exercise of the power.
19. The *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* conferred on the Court of Appeal the power to issue and review guideline judgments to be taken into consideration by sentencing courts in Queensland.
20. Clause 16 would insert new part 4, divisions 2 and 3 of the *Appeal Costs Fund Act*. The new divisions would confer the Court of Appeal with power to grant an indemnity certificate (allowing a convicted person to recover from the fund costs incurred on appeal) in respect of the part of the appeal relating to the review of a guideline judgment.
21. Clause 17 would amend section 21 of the *Appeal Costs Fund Act* to state that:
The grant or refusal of an indemnity certificate lies in the discretion of the Court of Appeal, the Supreme Court or the District Court, as the case may be, and no appeal lies against any such grant or refusal.
22. The explanatory notes provide (at 10) justification for clauses 16-7:
The Bill amends the Appeal Costs Fund Act to provide the Court of Appeal with the authority to grant an indemnity certificate to a convicted person whose appeal against sentence is dealt with as or as part of a guideline proceeding. The indemnity certificate will allow the convicted person to apply to the Appeal Costs Fund to recover any additional costs they incurred as a consequence of the appeal being heard as a guideline proceeding. Clause 21 stipulates that an appeal can not be made against any decision to grant or refuse to grant an indemnity certificate.
The removal of the right to appeal the court's decision regarding the grant of an indemnity certificate is justified so as to maintain consistency with section 21 of the Appeal Costs Fund Act, which confers discretion to grant an indemnity certificate to the courts and stipulates that an appeal can not be made regarding the exercise of that discretion.

Onus of proof

23. 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.
24. 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.
25. **Clauses 8 and 30** would impose evidential burdens upon people defending charges of wilful damage to cemeteries or the summary offence of interference with graves.
26. Clause 8 would amend section 469 of the Criminal Code (Wilful damage) and would reverse the onus of proof in two respects:
 - under new section 469(2), other than damage in special cases, the destruction or damage of cemeteries would be presumed to be done without the owner's consent until the contrary was proven; and
 - under new section 469(3), for the purposes of punishment in special cases, until the contrary was proved, the destruction or damage of cemeteries would be presumed to be done –
 - without the owner's consent; and

- without the lawful consent of administering authorities or without a reasonable belief such lawful consent had been given.

27. Clause 30 would reverse the onus in a similar respect in the new summary offence of interference with graves etc.
28. The explanatory notes identify the reversal of the onus of proof in each provision, but indicate (at 9-10, see also 3-4) that it is justified:

The Bill amends the offence of wilful damage by placing the onus of proof upon the defendant with regards proving the damage/destruction of property that falls within expanded section 566(11) occurred with the owner's consent (or in the case of property fixed in a cemetery or at a crematorium, without the consent of the administering authority). Placing the onus of proof upon the defendant in this limited manner is justified because, in circumstances where the owner of the property is not readily identifiable, it is the defendant who is best positioned to place evidence before the court as to whether they acted with the consent of the owner of the damaged/destroyed property.

To avoid creating an anomaly with the amendments to the offence of willful damage in the Criminal Code to reverse the onus of proof in terms of proving 'absence of consent', a reverse onus is also applied to the new simple offence in the Summary Offences Act.

29. **Clause 5** would place the evidential onus of proving the partial defence of provocation upon a defendant seeking to rely upon it.
30. Where an unlawful killing amounts to murder, section 304 of the Criminal Code reduces the criminal responsibility of a defendant to manslaughter where the accused does the act which causes death in the heat of passion, caused by sudden provocation and before there is time for passion to cool.
31. Clause 5 would amend section 304, including by inserting a new section 304(7) stating:

On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.

32. In respect of the consistency of clause 5 with section 4(3)(d) of the *Legislative Standards Act*, the explanatory notes provide (at 9) the following information:

The Bill amends the partial defence of provocation by placing the onus of proof upon the defendant. Before provocation arises, the prosecution must prove that the defendant intentionally killed the deceased. The QLRC considered that once murder has been proved, the defendant should bear the onus of proof (on the balance of probabilities) for establishing that he or she should be not be convicted of murder because of provocation. Reversing the onus takes into account:

- (a) *the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the deceased;*
- (b) *it will lead to more clearly articulated claims of provocation, which is fairer to all concerned including the jury;*
- (c) *it enhances the capacity of the trial judge to prevent unmeritorious claims being raised; and*
- (d) *an analogy with diminished responsibility, which also reduces murder to manslaughter, and where the defendant bears the onus.*

Retrospective operation

33. 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.
34. **Clause 11** may affect the criminal responsibility of individuals as some of the proposed amendments to the Criminal Code would be given retrospective operation.
35. Clause 4 would amend section 23 of the Criminal Code (Intention – motive) to omit the term 'accident' and instead provide that a person would not be 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.
36. Clause 6 would amend section 304B (Killing in an abusive domestic relationship). First, the heading would be amended to read, 'Killing for preservation in an abusive domestic relationship'. In addition, clause 6 would omit section 304B(2) which provides definitions of:
- the existence of a domestic relationship between two people; and
 - an act of domestic violence in a domestic relationship.

37. New section 304B(7) would provide a new definition of 'domestic violence' but would not define the existence of a domestic relationship between two people.
38. Clause 11 would insert new section 728 of the Criminal Code, a transitional provision. New section 728 states:
- 728 Application of amendment Act**
- (1) This Code, as amended by the amendment Act, sections 4 and 6, applies to proceedings for an offence started after the commencement of the sections, whether the act or omission constituting the offence happened before or after the commencement of the sections.
- (2) Subsection (1) does not apply to proceedings for an appeal from a conviction or sentence that happened before the commencement of the amendment Act, sections 4 and 6.
- (3) This Code, as amended by the amendment Act, sections 5, 7 and 8, applies to proceedings for an offence only if the act or omission constituting the offence happened after the commencement of the sections.
39. Accordingly, the committee notes that new section 728 would operate to provide clauses 4 and 6 with retrospective operation, that is, proceedings, other than appeals, in respect of acts or omissions happening before commencement. However, clauses 5, 7 and 8 would not be provided with retrospective operation.
40. Retrospective operation of clauses 4 and 6 may affect rights and liberties of individuals seeking to rely upon the excuse of 'accident' or the partial defence of killing for preservation in an abusive domestic relationship.
41. The committee examines legislation that would have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:
- the retrospective operation would be adverse to people other than the government; and
 - people have relied on and would have legitimate expectations based on the existing law.
42. However, the explanatory notes do not address these matters, stating (at 13) only that:
Clause 11 deals with the transitional application of the amendments and is self-explanatory.
43. The committee invites the minister to provide information about whether clause 11 would adversely affect rights and liberties of individuals retrospectively.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

44. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:
- the policy objectives of the bill and reasons for them;
 - how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
 - if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
 - assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
 - consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
 - the extent to which consultation was carried out in relation to the bill;
 - explanation of the purpose and intended operation of each clause of the bill; and
 - a bill substantially uniform or complementary with legislation of the Commonwealth or another State.
45. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

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

Explanation of purpose and intended operation of each clause

47. Under the heading, 'Retrospective operation', the committee examined the possible effect upon rights and liberties of individuals of clause 11. However, the committee notes that, for that clause, the explanatory notes did not explain its purpose or intended operation, but merely stated (at 13):

Clause 11 deals with the transitional application of the amendments and is self-explanatory.

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

Date introduced:	24 November 2010
Responsible member:	Mr LJ Springborg MP
Portfolio responsibility:	Shadow Minister for State Development, Major Projects, Infrastructure and Planning, Shadow Minister for Trade
Nature of bill:	Private member's bill

ISSUES ARISING FROM EXAMINATION OF BILL

- In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - clauses 6 and 11** allowing confiscation of wealth and property; and
 - clause 6** imposing a persuasive onus on a respondent to an unexplained wealth application.
- 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.

BACKGROUND

- The legislation is intended to prevent organised crime by introducing 'unexplained wealth provisions' to complement existing criminal confiscation legislation.

LEGISLATIVE PURPOSE

- The bill is designed to 'strip organised crime groups of their unexplained wealth and give the State the power to seek an unexplained wealth order against a person' (explanatory notes, 2).
- It would amend the:
 - Criminal Proceeds Confiscation Act 2002*; and
 - Drugs Misuse Act 1986*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

- 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 fair and just legal process

- Clauses 6 and 11**, allowing confiscation of wealth and property from people, may have insufficient regard to rights and liberties of individuals to a fair and just legal process.
- In this context, the committee notes that:
 - clause 6 would allow unexplained wealth declarations (part 1), including –
 - independent of a conviction for a criminal offence;
 - in respect of any wealth acquired within six years prior to the declaration; and
 - without notice having been given to a respondent to an application (new section 216E(5) of the *Criminal Proceeds Confiscation Act*,

- clause 6 would allow recovery of unexplained wealth, even if a dependent or an innocent party were to be affected by the recovery (see new sections 216P – 216U of the *Criminal Proceeds Confiscation Act*); and
- clause 11 would require a court to declare a person convicted of a relevant offence to be a drug trafficker, resulting in forfeiture to the State of all property acquired within six years prior to the declaration (new section 43AA of the *Drugs Misuse Act*, as provided by new section 216O of the *Criminal Proceeds Confiscation Act* (inserted by clause 6)).

9. The explanatory notes do not specifically state whether the legislation would have sufficient regard to rights and liberties of individuals, but provide the following general information (at 2):

This Bill is designed to strip organized crime groups of their unexplained wealth and give the State the power to seek an unexplained wealth order against a person. This Bill is designed to compliment the existing criminal confiscation legislation.

Onus of proof

10. 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.
11. 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.
12. **Clause 6** would impose a persuasive onus of proof on a respondent to an unexplained wealth application.
13. Clause 6 would insert new chapter 5A of the *Criminal Proceeds Confiscation Act*. Two new sections, sections 216F(2) and 216L(2), would be evidentiary provisions, creating statutory presumptions and altering the evidentiary requirements otherwise operating in proceedings.
14. New section 216F(1) would require the Supreme Court to declare, if the Court found it more probable than not that the respondent’s wealth met the prescribed formula, that a respondent had ‘unexplained wealth’ (defined in new section 216C).
15. New section 216F(2) would state:
- Any property, benefit or benefit derived that together make up the respondent’s wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.
16. Generally, evidentiary provisions have the effect only of casting an evidentiary burden on an accused or respondent, with the prosecution retaining the onus of establishing to the standard required the ingredients of the offence. However, new section 216F(2) requires the respondent to ‘establish to the contrary’ that wealth was lawfully acquired. It would impose the persuasive onus on the respondent to the standard required. With the standard not identified, as the proceedings would be civil proceedings, the standard of proof would be on the balance of probabilities.
17. In relation to new section 216F(2), the explanatory notes state (at 4):
- Sub clause 2 places an onus of proof onto the respondent to establish that their wealth was lawfully acquired. It is much easier for a person to prove wealth was lawfully acquired rather than the State to establish to the contrary. This provision goes to the heart of the objectives of the Amendments. The ability of the Public Interest Monitor to appear at any such hearing and test the evidence and make submissions balances the significant impact that this subclause has.*
18. New section 216L(3) would allow the Supreme Court to declare available for payment to the State property not owned by a respondent. Under new section 216L(1), property might be the subject of such a declaration if the Supreme Court found it more probable than not that the property was:
- under the effective control of the respondent at a material time; or
 - the respondent gave the property away.
19. New section 216L(2) would contain a statutory presumption as to the matters on which the Supreme Court would be required to reach a finding, unless the respondent established to the contrary. Again, a persuasive burden, on the balance of probabilities, would be imposed on a respondent.

20. For new section 216L(2), the explanatory notes indicate (at 6):
- Subclause 2 places an onus of proof onto the respondent to establish that the property was not under their effective control at the material time or after giving the property away. The ability of the Public Interest Monitor to appear at any such hearing to test the evidence and make submissions balances the significant impact that this subclause has.*
21. In relation to whether the legislation does not reverse the onus of proof in criminal proceedings without adequate justification, the explanatory notes provide the following information (at 2):
- The Bill places a reverse onus on the respondent to make them explain how their wealth was acquired and this does breach fundamental legislative principles but the amendments are weighed against the need to tackle serious and organised crime. The introduction of an active role for the Public Interest Monitor within the scheme is felt to provide sufficient safeguards to ensure that the public interest is able to be represented fully at any hearing held under the provision of this Bill. This approach is far less intrusive than that proposed in any form of anti-association laws and offers greater scrutiny.*

Sufficient regard to the institution of Parliament

Institution of Parliament

22. 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*.
23. **Clauses 6 and 11** may be incompatible with the Supreme Court's institutional integrity.
24. Clause 6 would amend the *Criminal Proceeds Confiscation Act* to provide for:
- unexplained wealth declarations by the Supreme Court (part 1); and
 - forfeiture to the State of the property of a declared drug trafficker (part 2).
25. Clause 11 would amend the *Drugs Misuse Act* to require a court convicting a person of a relevant offence, on the application of the prosecuting authority, to declare the person to be a drug trafficker.
26. Proposed provisions to be inserted by clauses 6 and 11 might authorise the Executive to enlist the Court in implementing decisions of the Executive in a manner incompatible with the Supreme Court's institutional integrity (*Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51; *South Australia v Totani* [2010] HCA 39). In *Fardon v Queensland* (2004) 210 ALR 50 at [15], Gleeson CJ provided the following statement of the restriction on State power arising from the *Kable* principle:
- The decision in Kable established the principle that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.*
27. Matters noted by the committee in this context include that under:
- new section 216E(5) of the *Criminal Proceeds Confiscation Act*, if requested by the Director of Public Prosecutions, the Court would be required to consider an application without notice being given to a respondent;
 - new section 216F(1) of the *Criminal Proceeds Confiscation Act*, if the prescribed statutory formula were met, the Supreme Court 'must' issue an unexplained wealth declaration; and
 - new section 43AA of the *Drugs Misuse Act*, a court must declare a person convicted of a relevant offence to be a drug trafficker, resulting in forfeiture to the State of all property acquired within six years prior to the declaration as provided by new section 216O of the *Criminal Proceeds Confiscation Act*.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

28. 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)).

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

7. ELECTORAL REFORM BILL 2010

Date introduced: 24 November 2010
Responsible member: Mr A McLindon MP
Nature of bill: Private member’s bill

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clauses 10 and 12** creating new offences; and
 - **clauses 5 and 14** requiring a person to prove identity prior to voting.

BACKGROUND

2. The legislation is to introduce voluntary voting, by way of compulsory allocation of preferences, and to make a number of administrative reforms to the electoral system.

LEGISLATIVE PURPOSE

3. The bill is intended to amend the (explanatory notes, 1):
 - *Electoral Act 1992* to introduce a compulsory preferential method of voting, a voluntary voting system, prohibiting the distribution of how-to-vote cards and the prohibiting of displaying political material on land occupied by the State;
 - Electoral Regulation 2002 to require identification be sighted by an issuing officer in order to obtain a ballot paper;
 - State Penalties Enforcement Regulation 2000 to omit the current regulations which would no longer need to be enforced.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

5. **Clauses 10 and 12** would insert new offences into the *Electoral Act*, as identified in the table below.

New section	Proposed offence	Proposed maximum penalty
161AA	Distributing or displaying a how-to-vote card on polling day	20 penalty units (\$2000) for an individual; 85 penalty units (\$8500) for a corporation
169(1A)	Displaying political statements in certain places	1 penalty unit (\$100)

6. The explanatory notes provide (at 8) information regarding the proposed offence in clause 10:
The distribution of how-to-vote cards at polling booths can often be an intimidating and in some cases, offensive, process for the voting public...
Importantly, the absence of how-to-vote cards will be an incentive for all candidates to actively campaign across each electorate to ensure the voter is well informed prior to an election.

The environmental impact of the production and wastage of how-to-vote cards is notable, particularly as each voter can be given multiple how-to-vote cards. The abolition of how-to-vote cards would significantly reduce the amount of paper used on election day.

7. In relation to the proposed offence in clause 12, the following information is provided (at 9):

On election day, all voters should be afforded the opportunity to cast an informed vote, in a neutral, impartial environment without any undue pressure or influence.

The displaying of political material and promotion of government projects on State property is inappropriate. There is an increasing trend of prominent and permanent government signage displayed at locations including primary and secondary schools, which remain as fixtures on election day. Whilst this signage does not display the individual political party as a matter of protocol, these signs promote and market the government of the day, and arguably have the capacity to influence electors prior to casting their vote.

Further, the absence of any political party material on election day will also allow the enforcement of polling booth rules much easier to regulate.

Right to vote

8. **Clauses 5 and 14** would require a person to prove identity prior to voting.
9. Clause 5 would amend section 102 of the *Electoral Act* to require a person requesting a ballot paper from an issuing officer to show proof of identity documents. Clause 14 would insert new section 5A of the *Electoral Regulation* to identify the 'proof of identity documents'.
10. Queensland law governs the rights of Queensland people to enrol and vote in elections, with the rules for voting in Queensland State elections appearing in the *Electoral Act* and the *Electoral Regulation*.
11. Article 25 of the International Covenant on Civil and Political Rights states that everyone has the right to participate in public affairs, to vote and stand for election.⁵
12. Regarding proposed identification requirements, the explanatory notes say (at 9-10):

Manual voting methods presents challenges in relation to the potential for people to vote more than once, in addition to assuming another person's identity at the polling booth.

Currently, no proof of identity is required and as such there is no method of determining the true identity of the voter. This can create uncertainty, and in some instances, alter the actual outcome of an election result.

The requirement for voters to present photo identification prior to receiving their ballot paper will greatly diminish the opportunity made available to unscrupulous individuals. Further, the compulsory requirement to provide photo identification will act as a deterrent to potential offenders. Importantly it will provide a higher level of security and confidence in the current manual voting method.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

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

⁵ Available at: www2.ohchr.org/english/law/ccpr.htm.

8. ENVIRONMENTAL PROTECTION AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 24 November 2010
Responsible minister: Hon KJ Jones MP
Portfolio responsibility: Minister for Climate Change and Sustainability

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clauses 28, 37, 49, 64, 77, 79 and 87-8** amending existing offences and creating new ones;
 - **clause 89** expanding the range of court orders available for environmental offences and making them applicable to more offences;
 - **clause 55** dissolving the coastal protection advisory council;
 - **clauses 30 and 32** which may make rights and liberties dependent on administrative power which may not be subject to appropriate review;
 - **clause 99** conferring very general delegations of administrative power;
 - **clauses 81-2** extending the powers of authorised people to enter land without consent or warrant;
 - **clause 100** conferring persons acting under the *Marine Parks Act* with immunity from prosecution; and
 - **clauses 71 and 73** which may not be drafted in a sufficiently clear and precise way.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee invites the minister to provide information regarding the delegation of legislative power in **clause 105**.

BACKGROUND

3. The legislation would implement a range of environmental measures and make minor and technical amendments for improved administration of environmental legislation.

LEGISLATIVE PURPOSE

4. The principal objectives of the bill are to amend the (explanatory notes, 1-2):
 - *Coastal Protection and Management Act 1995* to clarify provisions regarding the allocation of quarry materials from tidal waters and to implement –
 - a new Queensland Coastal Plan;
 - recommendations of the Webbe-Weller review of statutory bodies;⁶ and
 - the Government’s planning reform agenda;
 - *Environmental Protection Act 1994* to:
 - expand the range of court orders available and apply them to a broader range of environmental offences;
 - introduce a requirement for operators of mobile and temporary activities to keep a work diary;
 - expand powers of some authorised officers; and
 - introduce new offences for providing false, misleading or incomplete information;
 - *Queensland Heritage Act 1992* to improve the process for amending and updating details of places on the Queensland Heritage Register;

⁶ *Brokering Balance: A Public Interest Map for Queensland Government Bodies – An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, available at: www.premiers.qld.gov.au/Government/Boards_and_committees/Review/.

- *Recreation Areas Management Act 2006* to amend –
 - the maximum term of commercial activity agreements; and
 - provisions regarding commercial filming and photography activities; and
 - a number of other Acts to provide for flexibility in the execution of warrants.
5. Accordingly, other Acts to be amended would be the:
- *Aboriginal Cultural Heritage Act 2003*;
 - *Forestry Act 1959*;
 - *Marine Parks Act 2004*;
 - *Mineral Resources Act 1989*;
 - *Nature Conservation Act 1992*;
 - *Sustainable Planning Act 2009*;
 - *Torres Strait Islander Cultural Heritage Act 2003*;
 - *Transport Infrastructure Act 1992*;
 - *Urban Land Development Authority Act 2007*; and
 - *Water Supply (Safety and Reliability) Act 2008*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

7. **Clauses 28, 37, 49, 64, 77, 79 and 87-8** would amend existing offence penalties and create new offences. These proposed provisions, as identified in the table below, have potential to affect rights and liberties of individuals.

Clause	Amended/new section	Offence	Proposed maximum penalty
<i>Coastal Protection and Management Act</i>			
28	80	Allocation holder failing to give written notice to chief executive about quantity of quarry material [new requirement to give written notice]	50 penalty units (\$5000)
37	101(1)	Removing quarry material from tidal water without holding allocation notice ['tidal water rather than 'high water mark'; references to 'dredge management plans' removed]	1665 penalty units (\$166 500)
37	101(2)	Contravening of condition of allocation notice [as above]	1665 penalty units (\$166 500)
49	New 120CA	Holder of exemption certificate failing to comply with condition	165 penalty units (\$16 500)
<i>Environmental Protection Act</i>			
64	New 73PB(1)	Registered operator failing to keep work diary	100 penalty units (\$10 000)
64	New 73PB(3)	Registered operator failing to record required particulars	100 penalty units (\$10 000)
64	New 73PB(4)	Registered operator failing to retain work diary	100 penalty units (\$10 000)
64	New 73PC(1)	Registered operator failing to notify chief executive if work diary lost or stolen	50 penalty units (\$5000)
77	New 432A	Contravening condition of approval of transitional environmental program	835 penalty units (\$83 500)

Clause	Amended/new section	Offence	Proposed maximum penalty
79	440D	Depositing litter [removal of 'unlawfully'; insertion of new 440D(1A) stating that section does not apply in specified circumstances]	165 penalty units (\$16 500) if the offence involves depositing 200L or more of litter; 40 penalty units (\$4000) if the offence involves dangerous littering or involves depositing more than 20L but less than 200L of litter; 30 penalty units (\$3000) if the offence involves depositing litter from a vehicle; or 20 penalty units (\$2000) otherwise
87	480	Providing false or misleading documents [currently, 'false or incomplete documents']	1665 penalty units (\$166 500) or two years' imprisonment
88	New 480A	Providing incomplete documents	1665 penalty units (\$166 500) or two years' imprisonment

8. For clause 79, the explanatory notes state (at 51-2) that the proposed amendments to the existing offence would have sufficient regard to rights and liberties of individuals:

New section 440D(1A) clearly states that the section does not apply to a person who deposits litter on a road. The amendment raises the Fundamental Legislative Principle in relation to whether the legislation has sufficient regard to the rights and liberties of individuals by providing that littering in a litter bin or similar container on a road is no longer automatically exempt from the offence.

The amendment is justified on the basis of the need to remove uncertainty with the current provision, and that a reasonable excuse would still apply to provide an appropriate defence. It is currently arguable under section 440C that a person who litters from a vehicle on a road is an 'occupier of a place'. This was never the policy intent, particularly as the person may not exercise lawful authority or control in relation to the road, and the amendment addresses this issue. A reasonable excuse for littering on a road may include any of the reasons in section 440D(1A). The number of instances of a person who is acting appropriately having to raise a reasonable excuse is likely to be limited.

9. In respect of clauses 28, 37, 49, 64 and 77, the explanatory notes provide the following information regarding the proposed offences and penalties (at 31, 42-3 and 50):

Section 120CA requires a person who holds an exemption certificate to comply with the conditions imposed on the exemption certificate. The maximum penalty of 165 penalty units applying to breaches of the exemption certificate conditions is consistent with the maximum penalty for breaches of compliance permits for section 576 (Compliance with compliance permit or compliance certificate) of the Sustainable Planning Act 2009...

Section 73PB(1) establishes an offence if a registered operator for a mobile and temporary environmentally relevant activity does not keep a work diary in the approved form.

The maximum penalty for the offence is 100 penalty units which is consistent with other similar offences under the Environmental Protection Act 1994 including section 83 which requires operators of agricultural environmentally relevant activities to keep records of their activities...

Section 73PB(3) provides that a registered operator must record the information required under the approval form within 1 day after the day the operator vacates each location at which the activity is carried out. This ensures accurate compliance checks can be made if necessary. Section 73PB(3) includes a maximum penalty of 100 penalty units which is consistent with other similar offences under the Environmental Protection Act 1994.

Section 73PB(4) states that the diary must be kept for 2 years after the day on which the operator vacates the last location at which the activity was carried out unless the operator has a reasonable excuse. Section 73PB(4) includes a maximum penalty of 100 penalty units which is consistent with other similar offences under the Environmental Protection Act 1994.

The clause commences on a date to be set by proclamation...

New section 73PC provides that a registered operator who becomes aware that the operator's work diary has been lost or stolen must, within 7 business days, give the chief executive written notice that the diary has been lost or stolen, unless the operator has a reasonable excuse.

This offence has a maximum penalty of 50 penalty units. This penalty unit amount is based on other similar offences in the Environmental Protection Act 1994 in relation to providing written notice about a matter (for example, refer to sections 371, 363, 348, 444A).

New section 432A introduces a new offence that a person must not contravene a condition of an approval of a transitional environmental program. A maximum penalty of 835 penalty units is provided. This penalty is consistent with the penalty for breaching a requirement of a transitional environmental program under section 432. The potential environmental harm for contravening a program is consistent with that for contravening a condition of a program.

10. In relation to clause 87 (amended section 480), the explanatory notes provide (at 55-6) the following explanation of its purpose and intended operation:

This clause amends section 480 of the Environmental Protection Act 1994 to insert a new offence where a person 'ought reasonably to know' that a document is false or misleading. Consequently, someone who made their best efforts to ensure they were giving correct information would not be prosecuted...

The new offence retains the maximum penalty of 1665 penalty units. Being a new offence, it raises the fundamental legislative principle in relation to whether the legislation has sufficient regard to the rights and liberties of individuals, however the offence is necessary to improve the operation of the Environmental Protection Act 1994 and the penalty is appropriate for the nature and severity of the breach. in comparison to other equivalent offences.

This section also removes the reference to "incomplete" documents from this section since this aspect of the offence has been moved to a new offence provision in the new section 480A. New section 480A provides a separate offence for providing incomplete documents to the administering authority or authorised person which was previously contained in section 480. These sections have been separated due to ease of drafting.

11. The explanatory notes provide (at 56) the following about clause 88 (new section 480A):

The new section retains the current intent of section 480 in relation to incomplete documents and inserts a new offence if a person 'ought reasonably to know' if a document is incomplete...

The maximum penalty for this new offence is 1665 penalty units which is equivalent to the existing penalty for providing false, misleading or incomplete information.

The new offence and penalty raise the fundamental legislative principle in relation to whether the legislation has sufficient regard to the rights and liberties of individuals, however the offence is necessary to improve the operation of the Environmental Protection Act 1994 and the penalty is appropriate for the nature of the offence in comparison to other equivalent offences.

12. The committee received a submission about the bill from the Queensland Law Society. The committee has, in accordance with section 50(2) of the *Parliament of Queensland Act*, authorised the tabling and publication of the submission. Copies are available from the committee's website and the Queensland Parliament's tabled papers site.⁷
13. The submission of the Queensland Law Society identifies a number of ways in which amended section 480 and new sections 408A of the *Environmental Protection Act* may have insufficient regard to rights and liberties of individuals. These proposed sections are examined below, also, under the heading, 'Onus of proof'.
14. In respect of the proposed offences, the submission from the Queensland Law Society details (at 1-2) concerns about whether the provisions would have sufficient regard to rights and liberties of individuals, including because:
- the maximum penalties would include a maximum two years' imprisonment;
 - provisions of the *Environmental Protection Act* requiring the preparation of documents can be complex and ambiguous and provide short time frames; and
 - a range of offences might more appropriately reflect the criminal responsibility in differing circumstances.
15. **Clause 89** would expand the range of court orders available for environmental offences and make them applicable to more offences.

⁷ Available at: <http://www.parliament.qld.gov.au/view/legislativeAssembly/tailedPapers/home.asp> and www.parliament.qld.gov.au/slc.

16. It would replace section 502 of the *Environmental Protection Act* with new sections 502 and 502A. New section 502(2) would allow the court, on the application of the prosecution, to make one or more of the following orders:
- a rehabilitation or restoration order;
 - a public benefit order;
 - an education order;
 - a monetary benefit order; and
 - a notification order.
17. Each order is defined in new section 502(7). The explanatory notes provide (at 57-9) information regarding the intended operation of new sections 502 and 502A and indicate (at 59) that the proposed provisions would be consistent with fundamental legislative principles:

The introduction of these new court orders following prosecution raises the fundamental legislative principle that consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation. The legislation does not require the imposition of these orders but leaves it up to the Court's discretion to determine whether the order is proportionate and relevant to the actions which the consequences are applied.

For instance, a company may choose to breach its environmental authority and dispose of hazardous material illegally and accept a \$100,000 fine, rather than dispose of the material properly and in an environmentally responsible way which would have been much more expensive. In these circumstances, a monetary benefit order that accounted for the money saved by the company would have provided a much greater deterrent from this inappropriate practice.

Another example for which these court orders may be beneficial is where a person undertaking a large residential subdivision has released sediment to waters as a result of insufficient sediment and erosion control practices. This type of offence might be appropriate for the Court to issue an Education Order that requires the defendant to undertake an education campaign promoting the importance of installing appropriate erosion and sediment control devices as part of good building practices.

These new court orders may only be applied by the Court where the Court determines that imposition of the orders is appropriate. The orders have a reasonable connection to the type and severity of the breach for which they are imposed and only apply to offences where the penalty is 165 penalty units or more.

18. The submission received from the Queensland Law Society identifies concerns as to whether clause 89 would have sufficient regard to rights and liberties of individuals, stating (at 3):

The QLS is not opposed to the new 'monetary benefit orders', 'notification orders' or 'rehabilitation orders', but is opposed to 'education orders' and has concerns about 'public benefit orders'...

[T]hese proposed education orders are not currently available in other Australian States. It is not clear what the explanatory notes mean by 'other environmental jurisdictions', and we have not searched legislation beyond Australia.

The QLS would have no difficulty with the administering agency using funds collected from penalties for educational purposes. However, we have a concern that innocent citizens have done nothing to justify being inflicted with advertising or 'educational campaigns' by environmental offenders and that the proposed type of order does not have sufficient regard to the rights and liberties of the general public.

It is noted that 'public benefit orders' are already available under environmental legislation in other States, but it does not necessarily follow that Queensland should simply copy from other States without due scrutiny. While the QLS would support rehabilitation and restoration orders, which relate to the environment which was adversely affected by the offence, it is not clear why 'public benefit' orders should be available in addition to, or as an alternative to, rehabilitation and restoration orders. These 'public benefit' orders would be for the purpose of restoring or enhancing public places (or other places for the public benefit), which are unrelated to the offence. This type of order seems to be getting too far away from the damage caused by the offence. In other words, if an offence caused damage to a place, it makes sense for that place to be restored, not some other place where the administering authority has a shortfall of funds to carry out 'enhancements'. If the offence did not cause damage (for example, a record-keeping offence), then the appropriate sentence would presumably be a fine, rather than a 'public benefit order'. Apart from this, it is unclear whether the administering authority has thought through the legal difficulties of ordering people to carry out works on land they do not own, such as the need to obtain consents and approvals which are not under the control of the offender.

In noting that the proposed new orders raise a question of fundamental legislative principles, the explanatory notes seek to justify this by arguing that: 'The legislation does not require the imposition of these orders but leaves it up to the Court's discretion to determine whether the order is proportionate and relevant to the actions which the consequences are applied.' Logically, this is not a sufficient justification for creating the discretion in the first place to impose orders, where there is a concern that these may either be in breach of fundamental legislative principles or otherwise the implications have not been fully worked through.

Right to work and work-related rights

19. **Clause 55** would dissolve the coastal protection advisory council.
20. New section 198 states that, upon commencement:
- the coast protection advisory council established under section 20 would be dissolved; and
 - any person who had held office as a member of the council would go out of office and would not be entitled to compensation because of the operation of the section.
21. The explanatory notes indicate (at 36) that new section 198 would have sufficient regard to rights and liberties of individuals:

The Coastal Protection Advisory Council is being abolished in accordance with the recommendations of the Webbe and Weller Report 2009 "Brokering Balance: A Public Interest Map for Queensland Government Bodies - An Independent Review of Queensland Government Boards, Committees and Statutory Authorities", as a primary part of their role was the provision of advice regarding regional coastal management plans, which are also being abolished. Members of the council were paid sitting fees and travel allowances on a fee for service basis for the period of their term in accordance with a schedule set by the Governor in Council. There are no provisions under the current Act for members to be compensated in the event of changes to the term of service. This is consistent with the Fundamental Legislative Principles as Council members will not be called upon to undertake any further service. In addition, the contract for current members expires on 31 December 2010 and it is proposed that the provisions to abolish the Council will commence after this time.

Administrative power

22. 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.
23. **Clauses 30 and 32** may make rights and liberties dependent on administrative power which may not be subject to appropriate review.
24. Each would amend the *Coastal Protection and Management Act* in respect of decisions made by the chief executive regarding applications to:
- transfer of an allocation of quarry materials (clause 30, new section 82A); and
 - renewal of an allocation of quarry materials (clause 32, new section 83A).
25. The explanatory notes indicate that legislation would not provide a right to seek administrative review of decisions made under new sections 82A and 83A, but indicate (at 24-5) that sufficient regard would be had to rights and liberties of individuals:

This clause inserts a new section 82A into the Coastal Protection and Management Act 1995 which sets out the requirements for the chief executive to decide the application to transfer an allocation. Note there are no merits based appeals or reviews available for decisions made under this provision and this raises a question regarding the fundamental legislative principle about whether the legislation has sufficient regard to the rights and liberties of individuals. This approach has been taken as it is a decision about a resource that the State owns and the amendment is consistent with the other existing provisions for other similar decisions, such as a decision to grant an allocation...

Section 83 sets out the requirements for the chief executive to decide the application to renew an allocation which mirrors the process for deciding an initial application for an allocation of quarry materials. Note there are no merits based appeals or reviews available for decisions made under this provision and this raises a question regarding the fundamental legislative principle about whether the legislation has sufficient regard to the rights and liberties of individuals. This approach has been taken as it is a decision about a resource that the State owns and the amendment is consistent with the other existing provisions for other similar decisions, such as a decision to grant an allocation.

26. In addition, the committee notes that judicial review may be available under the *Judicial Review Act 1991*.

Delegation of administrative power

27. Section 4(3)(c) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.
28. **Clause 99** would confer very general delegations of administrative power.
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29. It would insert new sections 145A and 145B into the *Marine Parks Act*.
30. New section 145A would state that the chief executive may do any thing he or she considers necessary to administer, or achieve the object of, the Act. The explanatory notes appear to indicate (at 67) that the wide delegation in new section 145A is appropriate:

New section 145A relates to departmental officers undertaking marine park management activities, for example conducting turtle monitoring, in a marine park. This section makes it clear that the chief executive does not require an authority under the Marine Parks Act 2004 to enable marine park management activities to be undertaken that support achieving the object of the Act. This section would also apply to persons acting on behalf of the chief executive. This section does not remove the requirement for persons not acting on behalf of the chief executive from obtaining a marine park permit.

31. Similarly, new section 145B would confer an authorised person with power to enter or use a part of a marine park, without permission or notice to the chief executive, in order to carry out activities relating to the management of the park. For this section, the explanatory notes state (at 67):

Similar to section 145A, new section 145B relates to authorised officers undertaking marine park management activities in a marine park. This section supports section 145A through confirming that an authorized officer under the Marine Parks Act 2004 does not require permission and is not required to give notice to the chief executive to undertake day-to-day management activities within the park. For example, this provision provides that turtle research can be conducted by authorised officers under the Marine Parks Act 2004 without the need to obtain a permission.

Onus of proof

32. Section 4(3)(d) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.
33. Legislation provides for the 'reversal' of the 'onus of proof' where it declares the proof of a particular matter to be a defence or when it refers to acts done without justification or excuse, the proof of which lies on the accused.
34. **Clauses 87-8** may appear to alter the onus of proof in for offences under the *Environmental Protection Act* but, rather, facilitate the making of a complaint to commence proceedings.
35. The new offences are outlined above under the heading, 'Rights and liberties'. New sections 480(3) and 480A(4) each state that it would be 'enough' for a complaint for an offence to state that the person knew, or ought reasonably to have known (either that the document was false or misleading, or that it was incomplete), without specifying whether the person had actual knowledge or ought reasonably to have done so.
36. In respect of clauses 87 and 88, the explanatory notes provide (at 55-6) the following information about the effect upon the rights and liberties of individuals:

This clause amends section 480 of the Environmental Protection Act 1994 to insert a new offence where a person 'ought reasonably to know' that a document is false or misleading. Consequently, someone who made their best efforts to ensure they were giving correct information would not be prosecuted.

This places a greater onus on individuals to check information before it is passed onto the administering authority or authorised person. A penalty may apply in cases where due diligence has not been carried and false or misleading information is consequently provided to the administering authority or authorised person. The prosecution however would still be required to prove that the person knew or ought reasonably to have known the information was false or misleading...

New section 480A provides a separate offence for providing incomplete documents to the administering authority or authorised person which was previously contained in section 480. These sections have been separated due to ease of drafting.

The new section retains the current intent of section 480 in relation to incomplete documents and inserts a new offence if a person 'ought reasonably to know' if a document is incomplete.

This places a greater onus on individuals to check information before it is passed onto the administering authority or authorised person. A penalty may apply in cases where due diligence has not been carried and false or misleading information is consequently provided to the administering authority or authorised person. The prosecution however would still be required to prove that the person knew or ought reasonably to have known the document is incomplete. Consequently, someone who made their best efforts to ensure they were giving complete information would not be prosecuted.

Power to enter premises

37. 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.
38. **Clauses 81-2** would expand powers conferred on an authorised person to enter onto land without consent or warrant.
39. Currently, section 453 of the *Environmental Protection Act* confers authorised people with powers to enter land where:
- unlawful environmental harm has been caused; and
 - entry is for the purpose of finding out or confirming the source of the release of the contaminant.

40. Clause 81 would replace section 453(1) to allow an authorised person to enter land where he or she had a reasonable belief that unlawful environmental harm had been caused by the release of a contaminant into the environment.

41. In relation to consistency with fundamental legislative principles, the explanatory notes state (at 7-8):

The amendment to section 453 raises the FLP that legislation should confer power to enter premises, and for or seize documents or other property, only with a warrant issued by a judge or other judicial officer, unless appropriate safeguards are provided.

The amendment of section 453 extends the power of an authorised person to enter land not only when unlawful environmental harm has been caused by the release of a contaminant, but when an authorised person believes on reasonable grounds that unlawful environmental harm has been caused by the release of a contaminant. The entry provision enables the authorized person to gain entry to land without consent or a warrant. However, to obtain entry without consent, five business days written notice must be given under section 455, and the provisions do not apply to land where a building is erected.

In addition, the entry is constrained to determining the source of a contaminant without the need to first prove that environmental harm has been caused. The amendment is necessary to ensure that environmental harm does not impact on the community, including the health of the community. The amendment enables an authorised person to enter land on the belief that harm has been caused and enables samples to be taken to support and confirm whether environmental harm has been caused.

42. Clause 82 would amend section 455 of the *Environmental Protection Act*. That section allows an authorised person to enter land, without warrant or consent, for the purposes of gaining access to land the person is authorised to enter under specified provisions of the Act. As amended, section 455 would allow access for the purposes of entering land under amended section 453. The explanatory notes provide the following information (at 53):

This clause amends section 455 of the Environmental Protection Act 1994 so that it also applies to entry of land under section 453.

Currently, an authorised person can cross the land (access land) for the purpose of entering other land (primary land) only if they are exercising the powers of entry to the primary land under sections 452. The entry provision enables the authorised person to gain entry to land without consent or a warrant. However, the fundamental legislative principle is not breached because there are appropriate safeguards in place. To obtain entry without consent, five business days written notice must be given under section 455, and the provisions do not apply to land where a building is erected.

This amendment provides that an authorised person may enter access land to get to primary land for the purpose of section 453 (Entry of land-search, test, sample etc. for release of contaminant).

This provides consistent application of section 455 for entry under section 452 and 453.

Immunity from proceeding or prosecution

43. 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.
44. **Clause 100** would confer persons acting under the *Marine Parks Act* with immunity from prosecution.
45. New section 147A would protect from prosecution when:
- an inspector was –
 - undertaking an action directed by the minister or chief executive; or

- exercising a function under the Act; or
- a person was acting under the director of the minister, chief executive or inspector.

46. The explanatory notes state (at 68):

This does not change the status quo, since actions for carrying out statutory functions do not normally create liability. However, this section provides certainty to staff members and volunteers of the protection that is afforded to their actions. In particular, uncertainty about the position under the Marine Parks Act 2004 arises because the Nature Conservation Act 1992 has a provision conferring the immunity while the Marine Parks Act 2004 does not.

These provisions potentially conflict with the fundamental legislative principle that legislation should not confer immunity from proceeding or prosecution without adequate justification. However, immunity is justified in these circumstances since actions taken in carrying out statutory functions do not normally attract liability. This section expressly provides for that protection to clarify the matter and to assure authorised persons, rangers and volunteer workers that the immunity is in place so they can carry out marine park duties with assurance, particularly if urgent action is required for conservation or safety reasons. The amendment mirrors the existing section 143 in the Nature Conservation Act 1992 and will provide consistent protection for staff operating across national park and marine park boundaries.

Clear meaning

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

48. **Clauses 71 and 73** may not be drafted in a sufficiently clear and precise way.

49. Clause 71 would replace section 331 of the *Environmental Protection Act* which prescribes the content for a transitional environmental program. The explanatory notes state (at 46):

New section 331 replaces the current section 331 to provide greater transparency and certainty about what is required in a transitional environmental program.

50. The submission of the Queensland Law Society identifies (at 4) concerns about the consistency of new section 331 with section 4(3)(k) of the *Legislative Standards Act*, stating in part:

In principle, the QLS supports clarification of the content requirements and assessment of TEPs.

However, we have some concerns about drafting issues, in particular, in relation to the fundamental legislative principle set out in Section 4(3)(k) of the Legislative Standards Act 1992, requiring that legislation 'is unambiguous and drafted in a sufficiently clear and precise way'. We have previously raised these concerns directly with the Department of Environment and Resource Management.

In particular, we refer to proposed section 331 (c) 'state how any environmental harm that may be caused by the activity will be prevented or minimised, including any interim measures that are to be implemented.'

The term 'activity', in the context of the Environmental Protection Act 1994, normally refers to the 'environmentally relevant activity', for example, dredging, mining or chemical manufacturing; it does not refer to the condition or other standard which is proposed to be temporarily overridden by a TEP. The term 'environmental harm' includes all types of environmental impacts from the project, including lawful impacts and trivial impacts. Accordingly, the question of 'any environmental harm that may be caused by the activity' is not sufficiently specific as a content requirement.

51. Clause 73 would replace section 339 of the *Environmental Protection Act* which provides for the administering authority to make a decision about a draft transitional environmental program. An explanation of the purpose and intended operation of the proposed amendment is given (at 48) in the explanatory notes:

New section 339 replaces the existing section 339 to more clearly set out the options available to the administering authority when making a decision about the program, including imposing any conditions.

52. However, the submission of the Queensland Law Society states (at 4-5) that the proposed amendment is not drafted in a sufficiently clear and precise way, suggesting rather that:

- *Assessment criteria should be stated, specifically with regard to satisfying the content requirements of TEPs, rather than just the 'standard criteria' under the Act.*
- *The power to impose 'any other conditions the administering authority considers appropriate' has always been too broad and ambiguous, in terms of fundamental legislative principles. It is suggested that these should be reasonable or relevant requirements, similar to the Sustainable Planning Act 2009.*
- *The power to state any period at all for the TEP under s339(3) is too broad, and could potentially create absurdities in the TEP if the period is different from that proposed.*

Sufficient regard to the institution of Parliament

Delegation of legislative power

53. 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.
54. **Clause 105** may delegate legislative power other than in an appropriate case.
55. Section 175 of the *Nature Conservation Act* provides a general regulation-making power for that Act. Clause 105 would insert a new section 175(2)(o) to provide that the Governor in Council may make regulations regarding:

...the matters in respect of which royalties are payable under this Act, the amounts of the royalties, the persons who are liable to pay the royalties, when the royalties are payable, and the recovery of any amount of the royalties not paid.
56. The explanatory notes provide (at 69) the following information regarding the intended operation of the new section 175(2)(o):

This clause amends section 175 of the Nature Conservation Act 1992 to remove any doubt that a regulation may be made regarding the payment of royalties and the recovery of unpaid royalties. The Nature Conservation (Protected Areas Management) Regulation 2006 already contains a royalty provision in relation to gravel extraction from resource reserves.
57. The committee notes that section 28 of the *Nature Conservation (Protected Areas Management) Regulation* appears to have been made pursuant to power delegated by section 175 in its current form. The committee invites the minister to provide information regarding the power that allowed the *Nature Conservation (Protected Areas Management) Regulation* to be made.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

58. 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)).
59. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

9. MINES AND ENERGY LEGISLATION AMENDMENT BILL 2010

Date introduced:	25 November 2010
Responsible minister:	Hon S Robertson MP
Portfolio responsibility:	Minister for Natural Resources, Mines and Energy and Minister for Trade

ISSUES ARISING FROM EXAMINATION OF BILL

- 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.

BACKGROUND

- The legislation is to improve the energy efficiency of gas appliances, enhanced safety and health measures for Queensland's resource industry and introduce a statutory requirement for the provision of royalty revenue estimates.

LEGISLATIVE PURPOSE

- The bill is intended to (explanatory notes, 1-2):
 - delegate legislative power regarding –
 - specification and enforcement of minimum energy performance standards for gas appliances and equipment; and
 - collection of royalty estimates to be used in the compilation of the State Budget;
 - vary the Gladstone Power Station State Agreement;
 - strengthen safety and health measures in Queensland's mining, explosives and petroleum and gas industries; and
 - correct minor drafting errors in existing legislation and align it with current drafting practices.
- The bill would amend the:
 - *Clean Energy Act 2008*;
 - *Coal Mining Safety and Health Act 1999*;
 - *Explosives Act 1999*;
 - *Geothermal Energy Act 2010*;
 - *Gladstone Power Station Agreement Act 1993*;
 - *Greenhouse Gas Storage Act 2009*;
 - *Mineral Resources Act 1989*;
 - *Mining and Quarrying Safety and Health Act 1999*; and
 - *Petroleum and Gas (Production and Safety) Act 2004*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

6. **Clauses 11-2, 24, 31, 81 and 112** would amend existing offence penalties or create new offences. These proposed provisions, as identified in the table below, have potential to affect rights and liberties of individuals.

Clause	Amended / new section	Offence	Proposed maximum penalty
<i>Coal Mining Safety and Health Act 1999</i>			
11	68(4)	Coal mine operator failing to ensure mine record available at all reasonable times for inspection	200 penalty units (\$20 000)
11	New 68(5)	Former coal mine operator failing to provide new operator with mine record	200 penalty units (\$20 000)
12	New 69A	Coal mine operator for another coal mine failing to comply with a request by site senior executive for the other coal mine to provide copy of other coal mine's safety and health management system	200 penalty units (\$20 000)
24	New 272A	Site senior executive allowing person under the age of 16 to operate or maintain plant at coal mine	100 penalty units (\$10 000)
<i>Explosives Act 1999</i>			
31	18(1)	Authority holder failing to comply with conditions prescribed under regulation for each authority issued to the authority holder	200 penalty units (\$20 000)
31	18(2)	Authority holder failing to comply with conditions imposed by chief inspector	200 penalty units (\$20 000)
<i>Mining and Quarrying Safety and Health Act 1999</i>			
81	59(4)	Operator failing to ensure mine record available at all reasonable times for inspection	200 penalty units (\$20 000)
81	59(5)	Former operator failing to provide new operator with mine record	200 penalty units (\$20 000)
<i>Petroleum and Gas (Production and Safety) Act 2004</i>			
112	New 678A(1)	Failing to have resulting records for safety management plan	1500 penalty units (\$150 000)

7. The explanatory notes address the levels of new penalties proposed in the bill (at 11-3):

Insertion of New Section 69A into the *Coal Mining Safety and Health Act 1999*

The findings of a recent coronial inquest into the fatality of a miner resulted in the recommendation the coal mining industry should adopt a system with the intent of improving the portability and accuracy of records containing details of miners' competencies and experience. Inserting section 69A into the Coal Mining Safety and Health Act 1999 is in response to this. A maximum penalty of 200 penalty units is considered necessary to deter non-compliance in order to improve safety outcomes.

Children Under 16 Not to Operate or Maintain Plant and Equipment

Mining and petroleum and gas industries are widely recognised as high risk industries. The risks are magnified if children are permitted to operate machinery. The maximum penalty of 100 penalty units should provide sufficient deterrence in those, fortunately rare, instances where it is contemplated that children might be permitted to operate or maintain plant and equipment on a mine site or at an operating plant.

Amendment to Section 18 of the *Explosives Act 1999*

The existing section 18 includes a maximum penalty of 200 penalty units for cases where the authority holder does not comply with conditions imposed on the authority. The amendment inserts a new subsection into section 18 to provide that holders must comply with conditions prescribed under a regulation. The maximum penalty proposed is the same as the penalty under the existing section. Conditions placed on license and permit holders are designed to ensure that there is an optimal level of safety in situations when and where explosives are used and when explosives are being transported by road. The conditions of licenses and permits contain mandatory requirements to cover fundamental safety requirements. In view of the workplace and penalty public safety risk exposure created by non-compliance a sufficient deterrent is required.

Amendment to Section 68 of the *Coal Mining Safety and Health Act 1999* and Section 59 of the *Mining and Quarrying Safety and Health Act 1999*

The availability of sufficient mine safety history is of significant assistance in the management of safety at a mine. It is not a significant impost on the mine operator to make such records available. There has been at least one instance of mine history not being passed on to the new operator at the time the ownership of the mine changed and an incident occurred soon after. The mine in question had experienced a difficult safety history and the incoming site senior executive was denied invaluable information. This failure to pass on the mine safety history contained in the mine record is considered counter to the safety culture developed across the industry in the past decade. Such actions are entirely unacceptable and sufficient deterrence, being a maximum of 200 penalty units, is required.

Insertion of New Section 678A into the *Petroleum and Gas (Production and Safety) Act 2004*

The new section requires operators of operating plants under the Petroleum and Gas (Production and Safety) Act 2004 to make and keep records to demonstrate the safety management plan has been properly implemented and monitored. A penalty of 1500 penalty units is included for non-compliance. This penalty is similar to related offences of not implementing a plan with all the section 675 content details in section 674 or for not revising a plan in section 678. These records are critical to the implementation of the plan as they form part of the auditable documentation in support of a safety management plan as part of the greater auditable system.

Right to privacy

8. **Clauses 25, 40, 94 and 119** may adversely affect individuals' rights to privacy.
9. The proposed provisions would insert respectively new sections:
 - 275AC of the *Coal Mining Safety and Health Act*,
 - 126C of the *Explosives Act*;
 - 254C of the *Mining and Quarrying Safety and Health Act*; and
 - 851A of the *Petroleum and Gas (Production and Safety) Act*.
10. Each would allow the minister, chief executive, commissioner or chief inspector to make or issue public statements about:
 - the commission of offences against the Act and people who commit them;
 - investigations conducted under the Act;
 - action taken to enforce the Act; and
 - suspension or cancellation of authority under the Act.
11. The explanatory notes indicate (at 4) that the proposed provisions are to implement an Ombudsman recommendation:

In June 2008, the Ombudsman released a report titled "The Regulation of Mine Safety in Queensland: A Review of the Queensland Mines Inspectorate". One of the recommendations called for amendments to the Coal Mining Safety and Health Act 1999 and Mining and Quarrying Safety and Health Act 1999 to authorise the issuing of public statements identifying and giving information about breaches of the Acts and persons involved in those matters, investigation of incidents and enforcement activities if it is in the public interest to make or issue those statements. The reason for this is to encourage compliance and promote safety in mines. Similar amendments are proposed for the Petroleum and Gas (Production and Safety) Act 2004 and Explosives Act 1999 to encourage compliance and promote safety in those industries.
12. In relation to the potential of the proposed provisions to affect rights to privacy of personal information, the explanatory notes state (at 11):

This amendment is a result of a recommendation from the Ombudsman's report. The amendment is aimed at encouraging compliance and promoting safety in the relevant industries. The amendments provide that the Minister, Chief Executive and others must not issue a public statement unless it is in the public interest to do so.

Onus of proof

13. 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.
14. 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.
15. **Clauses 22, 91 and 117** may alter evidential burdens otherwise operating for some proceedings under amended legislation.
16. In each case, an amendment would be made to allow evidentiary certificates to state that an incident or accident occurred within the boundaries of land the subject of a mining tenure or petroleum authority:
 - clause 22 would amend section 252 of the *Coal Mining Safety and Health Act*;
 - clause 91 would amend section 231 of the *Mining and Quarrying Safety and Health Act*; and
 - clause 117 would amend section 834 of the *Petroleum and Gas (Production and Safety) Act*.
17. The explanatory notes say (at 10):

Legislation may reasonably facilitate the process of proving a fact by providing for a certificate to be evidence of a fact. The Bill will amend the Coal Mining Safety and Health Act 1999, Mining and Quarrying Safety and Health Act 1999 and the Petroleum and Gas (Production and Safety) Act 2004 to include the power to provide evidence of the location of an incident by certificate, when the state location is within the boundaries of land that is the subject of a stated mining tenure. The amendment will remove the need for a surveyor and registrar to attend court to confirm the location of mining tenures and petroleum authorities.

Power to enter premises

18. 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.
19. **Clause 73** would expand powers to enter land without consent or a warrant in specified circumstances and impose additional conditions upon such entry.
20. Currently, section 344 of the *Mineral Resources Act* allows an authorized person to access an abandoned mine to carry out 'rehabilitation activities' (defined in section 344(1)).
21. Clause 73 would replace section 344 with a new part 10, division 2AA regarding access to abandoned mines. The new provisions would expand the current legislation by providing:
 - conditions for entry to land adjacent to an abandoned mine site (new section 344B); and
 - additional conditions of entry to both primary and adjacent land (new sections 344B-344D).
22. Accordingly, an authorized person could gain entry to land without consent or a warrant, at any time, under certain circumstances. However, the committee notes that the provisions would impose greater statutory controls on entry than currently provided under the legislation and would not authorize entry to a part of land where a person resided (new section 344B(3)).
23. The committee notes with approval that new section 344C would require a written notice of entry be provided to give the owner and occupier of land entered notice that the land had been entered for specified purposes. In October 2010, the committee wrote to the Premier of Queensland to suggest that such a requirement might be an important safeguard of rights and liberties of individuals. By letter dated 15 December 2010, the Premier of Queensland responded to the committee, stating:

The role of the Scrutiny of Legislation Committee in reviewing Bills that have been introduced into Parliament for the purpose of determining compliance with the Act is a critically important function. I appreciate the committee's advice about matters that it will consider in reviewing legislative provisions that confer a power on an authorised officer to enter places without consent or a warrant.

I have written to all Ministers reminding them of the requirements of provisions of the Act, and have taken the liberty of forwarding a copy of your letter to them to ensure that this specific issue is taken into account in drafting legislation within their respective portfolios.

24. The explanatory notes provide the following information (at 11) regarding the consistency of clause 73 with fundamental legislative principles:

The Bill will amend the Mineral Resources Act 1989 to allow authorized officers to enter (without a warrant) land that is adjacent to an abandoned mine in order to access the abandoned mine for the purpose of carrying out investigation or rectification work. The amendment requires that prior notice to be given to any affected occupier or owner unless the entry is made to preserve life, in which case notice after the fact is required. The amended provision also casts a positive duty on authorised officers to take all reasonable steps to ensure they cause as little inconvenience, and do as little damage as is practicable when exercising the entry power.

Protection against self-incrimination

25. 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.
26. **Clauses 19 and 88** may not provide appropriate protection against self-incrimination.
27. Clause 19 would amend section 201 of the *Coal Mining Safety and Health Act*. Under section 201(1), when a serious accident or high potential incident occurs, the site senior executive must investigate and prepare a report. A failure to do so creates liability to an offence attracting a maximum penalty of 100 penalty units (\$10 000).
28. Under new section 201(3), a site executive defending proceedings brought under section 201(1) would not be able to rely upon a defence that the carrying out of an investigation, preparation of a report or forwarding the report might tend to incriminate the site senior executive or make him or her liable to a penalty.
29. New section 201(4), however, would state that a report prepared under section 201(1) could not be used as evidence against a site senior executive or any other coal mine worker mentioned in a report in any criminal proceeding other than proceedings about the falsity or misleading nature of the report.
30. Clause 88 would amend section 198 of the *Mining Quarrying Safety and Health Act* in similar terms.
31. Generally, the committee draws to the attention of the Parliament provisions which would deny common law protections against self-incrimination other than in potentially justifiable circumstances; namely where:
- the questions posed would concern matters peculiarly within the knowledge of the person to whom they would be directed and would be difficult or impossible for the Crown to establish by any alternative evidentiary means;
 - the legislation prohibits use of the information obtained in prosecutions against the person; and
 - the 'use indemnity' would not require the person to fulfil any conditions before being entitled to it (such as formally claiming the right).
32. In the Queensland Law Reform Commission report 59, *The Abrogation of the Privilege of Self-Incrimination* (2004), the Commission suggested that denying the benefit of the self-incrimination rule in relation to documents required to be kept under a statute might be less problematic than in other contexts: where a person obtained a licence or other form of registration in order to engage in an activity regulated by statute, the licence could be regarded as conditional on acceptance of the enforcement regime incorporated in the statute.
33. The explanatory notes provide (at 11) the following information regarding consistency of clauses 19 and 88 with section 4(3)(f) of the *Legislative Standards Act*:
- The Bill will amend the Coal Mining Safety and Health Act 1999, section 201, and Mining Quarrying Safety and Health Act 1999, section 198 to clarify that the privilege against self-incrimination is not a defence to the obligation of a site senior executive to prepare or forward a report about an accident. However, the report itself can not be used against the executive (other than in a proceeding about the falsity of the report) nor can the report be used against any other worker mentioned in the report.*
34. The committee notes that investigations and reports required under the respective provisions of the *Coal Mining Safety and Health Act* and the *Mining Quarrying Safety and Health Act* are to be provided following a serious accident or a high potential accident; that is, to ensure prevention of future injury or loss of life. However, the committee notes also that the legislation does not appear to contain transitional provisions regarding clauses 19 and 88. As these provisions may operate in respect of investigations carried out and reports prepared prior to commencement of the amendments, the committee invites the minister to provide information as to whether clauses 19 and 88 would have

sufficient regard to rights and liberties of individuals who may have investigated or reported on past accidents.

35. **Clauses 13-4, 16-7, 33, 82, 85-6 and 88** would also relate to protection against self-incrimination. These provisions are to clarify that a corporation may not claim privilege against self-incrimination, to ensure warnings when production of documents would be required and to remove requirements to claim privilege. As the proposed amendments would appear to relate to corporate and not natural persons, they do not raise issues as to sufficient regard to rights and liberties of individuals.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

36. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).
37. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

10. MOTOR DEALERS AND CHATTEL AUCTIONEERS BILL 2010

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

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clause 214** excluding specified people from making a claim against the claim fund;
 - **the large number of clauses** creating offence provisions;
 - **clause 250** imposing time limits from the commencement of proceedings for offences and allowing the prosecution to elect for an indictable offence to be heard summarily or on indictment;
 - **clauses 251-2** which may impose liability for the acts or omissions of others;
 - **the large number of clauses** which may affect rights of individuals to privacy;
 - **clause 255** allowing the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people;
 - **parts 2 and 5** which may prevent some people from working as motor dealers and chattel auctioneers;
 - **clauses 28-9 and 191** making people aged under 18 ineligible for a motor dealer licence or registration as a motor salesperson or trainee chattel auctioneer;
 - **clauses 14, 21, 24, 32, 35, 40, 43, 48, 51, 55, 182, 186, 192-3, 195, 198 and 210** making rights to licences and registration dependent on administrative power which may be insufficiently defined;
 - **clauses 56 and 205** making rights and liberties subject to administrative power which may not be subject to appropriate review;
 - **clauses 51, 55-6, 201, 204-5** which may be inconsistent with principles of natural justice; and
 - **clauses 82, 149, 236-7, 242, 246-9, 251-2 and 254** which may impose evidential burdens on a person charged with an offence under 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:
 - **the large number of clauses** which may allow the delegation of legislative power in inappropriate cases;
 - **clause 261**, which may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system; and
 - **the large number of clauses** which may authorise amendment of the Act by regulation.

BACKGROUND

3. The legislation is to regulate the activities, licensing and conduct of motor dealers and chattel auctioneers and their employees and to provide related consumer protections.

LEGISLATIVE PURPOSE

4. The main object of the bill is to provide a system (clause 7):
 - for –
 - licensing and regulating persons as motor dealers and chattel auctioneers; and
 - registering and regulating persons as registered employees;
 - that achieves an appropriate balance between –
 - the need to regulate for the protection of consumers; and
 - the need to promote freedom of enterprise in the marketplace.

5. The bill is one of four introduced to divide the *Property Agents and Motor Dealers Act 2000*. The other three, examined in this *Legislation Alert* also, are the:
- Agents Financial Administration Bill 2010 (chapter 2);
 - Commercial Agents Bill 2010 (chapter 4); and
 - Property Agents Bill 2010 (chapter 11).
6. In addition, the bill would make minor and consequential amendments to the:
- *Criminal Organisation Act 2009*;
 - *Duties Act 2001*;
 - *Forestry Act 1959*;
 - *Motor Vehicles and Boats Securities Act 1986*;
 - *Police Powers and Responsibilities Act 2000*;
 - *Queensland Civil and Administrative Tribunal Act 2009*;
 - *Second-hand Dealers and Pawnbrokers Act 2003*; and
 - *Transport Operations (Road Use Management) Act 1995*.

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 214** would exclude specified people from making a claim against the claim fund.
9. Clause 76 of the Agents Financial Administration Bill (the Administration Act) would provide for a claim fund against which a person might claim for financial loss due to contraventions of Administration Act provisions regarding trust accounts.
10. Clause 214 of the Motor Dealers and Chattel Auctioneers Bill would exclude identified people from making claims against the fund for identified financial losses.
11. The explanatory notes do not address consistency of clause 214 with fundamental legislative principles.
12. **A large number of clauses** would create offence provisions. The proposed offences and respective maximum penalties are identified below.

Clause	Proposed offence	Proposed maximum penalty
26	Disclosing confidential criminal history	100 penalty units (\$10 000)
46(2)	Failing to maintain and make available for inspection documents relating to substitute licensee	100 penalty units (\$10 000)
46(3)	Failing to make application for substitute licensee	200 penalty units (\$20 000)
47(3)	Failing to maintain and make available for inspection documents relating to substitute licence for employed licensee	100 penalty units (\$10 000)
47(4)	Failing to make application for substitute licence for employed licensee	200 penalty units (\$20 000)
49(2)	Licensee acting during appointment of substitute licensee	200 penalty units (\$20 000)
52(2)	Failing to produce licence for amendment	100 penalty units (\$10 000)
52(3)	Failing to return suspended or cancelled licence	100 penalty units (\$10 000)
55(6)	Failing to return suspended licence	100 penalty units (\$10 000)
56(2)	Failing to return cancelled licence	100 penalty units (\$10 000)
58	Failing to display licence	100 penalty units (\$10 000)

Clause	Proposed offence	Proposed maximum penalty
62(1)	Failing by licensee to notify of changes in circumstances	100 penalty units (\$10 000)
66(1)	Failing by natural person to be in charge of motor dealer's business at a place	200 penalty units (\$20 000)
66(2)	Failing by corporation to be in charge of commercial agent's business at a place	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation
67(2)	Failing to disclose to potential buyer or seller that acting as licensed motor dealer	400 penalty units (\$40 000)
68(1)	Acting as motor dealer other than pursuant to appointment	200 penalty units (\$20 000)
68(7)	Failing to provide client with copy of signed appointment	200 penalty units (\$20 000)
71(1)	Accepting unauthorised trade-ins	200 penalty units (\$20 000) or one year's imprisonment
72(2)	Claiming commission on amount more than actual sale price	200 penalty units (\$20 000)
73(2)	Recovery of unauthorised reward or expense	200 penalty units (\$20 000)
76(1)	Dealer obtaining option to purchase vehicle in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
76(2)	Salesperson obtaining option to purchase vehicle in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
76(3)	Unlawful sale by motor dealer of vehicle in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
77(2)	Motor dealer obtaining beneficial interest in proscribed vehicle	200 penalty units (\$20 000) or three years' imprisonment
77(3)	Motor salesperson obtaining beneficial interest in proscribed vehicle	200 penalty units (\$20 000) or three years' imprisonment
81(2)	Failing to give notice of written-off vehicle	200 penalty units (\$20 000)
81(3)	Failing to ask buyer to sign acknowledgement for written-off vehicle	200 penalty units (\$20 000)
81(4)	Failing to provide and keep copies of acknowledgement	200 penalty units (\$20 000)
82(2)	Failing to ensure buyer gains clear title to motor vehicle	200 penalty units (\$20 000)
82(4)	Failing to provide buyer with purchase documents	200 penalty units (\$20 000)
86(1)	Wrongly identifying vehicle as not being subject to cooling-off period	100 penalty units (\$10 000)
87(2)	Failing to give prospective buyer notice about used motor vehicle	200 penalty units (\$20 000)
87(5)	Failing to give prospective buyer notice immediately before contract signed	200 penalty units (\$20 000)
87(6)	Failing to keep copy of statement	100 penalty units (\$10 000)
88(3)	Giving an unlawful option to purchase	100 penalty units (\$10 000)
88(4)	Failing to give option holder written statement in approved form	200 penalty units (\$20 000)
88(7)	Failing to give option holder written statement immediately before option signed	200 penalty units (\$20 000)
88(8)	Failing to keep copy of statement	100 penalty units (\$10 000)
93	Harassment or coercion	200 penalty units (\$20 000) or two years' imprisonment
98(2)	Dealing in trade-in or other consideration during cooling-off period	200 penalty units (\$20 000) or one year's imprisonment
98(3)	Failing to return trade-in or other consideration when contract avoided	200 penalty units (\$20 000) or one year's imprisonment
103(1)	Failing to identify unwarranted or restorable vehicle when offered for sale	100 penalty units (\$10 000)

Clause	Proposed offence	Proposed maximum penalty
103(1)	Failing to identify unwarranted or restorable vehicle when offered for sale as prescribed by regulation	100 penalty units (\$10 000)
105(1)	Failing to give notice about purchase of warranted vehicle	100 penalty units (\$10 000)
105(2)	Failing to give notice about purchase of unwarranted vehicle	100 penalty units (\$10 000)
109	Failing by warrantor to record particulars of extension of warranty period	100 penalty units (\$10 000)
111(2)	Failing to repair defect	200 penalty units (\$20 000)
115(1)	Failing to notify of change in place of business	200 penalty units (\$20 000)
115(2)	Failing to notify of change in place of business	200 penalty units (\$20 000)
116(1)	Failing to display licensee's name	100 penalty units (\$10 000)
116(2)	Failing to include prescribed particulars in advertisement	100 penalty units (\$10 000)
117(1)	Failing to keep employment register	200 penalty units (\$20 000)
117(2)	Failing to record required particulars in an employment register	200 penalty units (\$20 000)
117(3)	Failing to update required particulars in an employment register	200 penalty units (\$20 000)
118(1)	Failing to keep transactions register	200 penalty units (\$20 000) or one year's imprisonment
118(2)	Failing to record prescribed particulars in transactions register	200 penalty units (\$20 000) or one year's imprisonment
119(1)	Failing to obtain statement from seller of vehicle	200 penalty units (\$20 000)
119(2)	Failing to keep and provide copies of seller's statement	200 penalty units (\$20 000)
120(1)	Failing to give statement to buyer of vehicle	200 penalty units (\$20 000)
120(2)	Failing to keep and provide copies of statement to seller	200 penalty units (\$20 000)
121(1)	Failing to enter into written contract of sale	200 penalty units (\$20 000)
121(2)	Failing to keep and provide copies of contract	200 penalty units (\$20 000)
122(1)	Acting as motor dealer without licence	400 penalty units (\$20 000) or two years' imprisonment
123(1)	Pretending to be a motor salesperson	200 penalty units (\$20 000)
124(1)	Acting for more than one party	200 penalty units (\$20 000)
125(1)	Failing to produce dealer licence for inspection	100 penalty units (\$10 000)
125(2)	Failing to produce salesperson's registration certificate for inspection	100 penalty units (\$10 000)
126(1)	Employment of person not holding registration certificate	200 penalty units (\$20 000)
126(2)	Employment of business associate	200 penalty units (\$20 000)
126(3)	Employment by corporation of executive officer as salesperson	200 penalty units (\$20 000) for individual; 1000 penalty units (\$100 000) for corporation
130(1)	Failing by licensee to be in charge of chattel auctioneer's business at a place	200 penalty units (\$20 000)
130(2)	Failing by corporate chattel auctioneer to ensure chattel auctioneer is in charge of business	200 penalty units (\$20 000) for individual; 1000 penalty units (\$100 000) for corporation
131(1)	Acting as chattel auctioneer without appointment	200 penalty units (\$20 000)
131(7)	Failing to give copy of signed appointment to client	200 penalty units (\$20 000)
134(2)	Charging unauthorised buyer's premium	200 penalty units (\$20 000)
135(2)	Claiming commission on amount more than actual sale price of goods	200 penalty units (\$20 000)

Clause	Proposed offence	Proposed maximum penalty
136(2)	Unauthorised recovery or retention of reward or expense	200 penalty units (\$20 000)
137(6)	Unauthorised recovery or retention of reward or expense above amount allowed	200 penalty units (\$20 000)
140(2)	Chattel auctioneer obtaining an option on goods in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
140(3)	Trainee chattel auctioneer obtaining an option on goods in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
140(4)	Chattel auctioneer selling goods when has beneficial interest in option to purchase	200 penalty units (\$20 000) or three years' imprisonment
141(2)	Chattel auctioneer otherwise obtaining beneficial interest in goods to be sold	200 penalty units (\$20 000) or three years' imprisonment
141(3)	Trainee chattel auctioneer otherwise obtaining beneficial interest in goods to be sold	200 penalty units (\$20 000) or three years' imprisonment
148(1)	Failing to announce before auction that vehicle is written-off	100 penalty units (\$10 000)
149(2)	Failing to ensure clear title	200 penalty units (\$20 000)
149(4)	Failing by selling agent to provide buyer with approved form	200 penalty units (\$20 000)
149(6)	Failing to provide and keep copies of approved form	200 penalty units (\$20 000)
154(1)	Failing to identify unwarranted and restorable vehicle when offered for sale	100 penalty units (\$10 000)
154(2)	Unauthorised offer for sale	100 penalty units (\$10 000)
156(1)	Failing to announce prior to auction that vehicle does not have statutory warranty	100 penalty units (\$10 000)
156(3)	Failing to announce prior to auction that is restorable vehicle	100 penalty units (\$10 000)
159(1)	Failing to give buyer notice about statutory warranty (warranted vehicle)	100 penalty units (\$10 000)
159(2)	Failing to give buyer notice about statutory warranty (unwarranted vehicle)	100 penalty units (\$10 000)
163	Failing to record particulars of warranty period	100 penalty units (\$10 000)
165(2)	Failing to repair defects	200 penalty units (\$20 000)
169(1)	Failing to notify of change in place of business	200 penalty units (\$20 000)
169(2)	Failing to notify of change in place of business	200 penalty units (\$20 000)
170(1)	Failing to display chattel auctioneer's name at place of business	100 penalty units (\$10 000)
170(2)	Failing to display chattel auctioneer's name at auction	100 penalty units (\$10 000)
170(3)	Failing to include prescribed particulars in advertisement	100 penalty units (\$10 000)
171(1)	Failing to keep employment register	200 penalty units (\$20 000)
171(2)	Failing to record required particulars in an employment register	200 penalty units (\$20 000)
171(3)	Failing to update required particulars in an employment register	200 penalty units (\$20 000)
173(1)	Failing to give statement to buyer of vehicle	200 penalty units (\$20 000)
173(2)	Failing to provide and keep copies of buyer statement	200 penalty units (\$20 000)
174(1)	Performing activity done under chattel auctioneer licence but without authority	200 penalty units (\$20 000) or two years' imprisonment
174(2)	Acting as chattel auctioneer without authority	200 penalty units (\$20 000) or two years' imprisonment
175(1)	Pretending to be trainee chattel auctioneer	200 penalty units (\$20 000)
176(1)	Acting for more than one party	200 penalty units (\$20 000)
177(1)	Failing to produce licence for inspection	100 penalty units (\$10 000)

Clause	Proposed offence	Proposed maximum penalty
177(2)	Failing to produce trainee's registration certificate for inspection	100 penalty units (\$10 000)
178	Employment of person not holding registration certificate	200 penalty units (\$20 000)
189(1)	Disclosing confidential history	100 penalty units (\$10 000)
202(2)	Failing to return registration certificate for amendment of conditions	100 penalty units (\$10 000)
204(5)	Failing to return suspended registration certificate	100 penalty units (\$10 000)
205(2)	Failing to return cancelled registration certificate	100 penalty units (\$10 000)
210(1)	Failing by registered employee to notify of changes in circumstances	100 penalty units (\$10 000)
211(1)	Failing by principal licensee to open and maintain a trust account	200 penalty units (\$20 000) or two years' imprisonment
223(5)	Contravening an order of the Queensland Civil and Administrative Tribunal	540 penalty units (\$54 000)
236(2)	Wrongful conversion or keeping false accounts	1000 penalty units (\$100 000) or five years' imprisonment
236(4)	Misrepresentation as to amount received	540 penalty units (\$54 000)
237(1)	False representation about property	540 penalty units (\$54 000)
238(4)	Failing to respond to request for substantiation of representations made by licensees or registered employees	100 penalty units (\$10 000)
239	False representations about mileage	540 penalty units (\$54 000)
240(1)	Tampering with odometers	200 penalty units (\$20 000) or two years' imprisonment
241(1)	Charging fee for providing documents	200 penalty units (\$20 000) or one year's imprisonment
242(1)	Asking for or receiving improper remuneration	200 penalty units (\$20 000) or one year's imprisonment
243(1)	Lending licence	200 penalty units (\$20 000) or two years' imprisonment
243(2)	Borrowing, hiring or buying licence	200 penalty units (\$20 000) or two years' imprisonment
244	False or misleading statements	200 penalty units (\$20 000) or two years' imprisonment
245(1)	Providing a false or misleading document	200 penalty units (\$20 000) or two years' imprisonment
245(3)	Making a false or misleading entry in a required document	200 penalty units (\$20 000) or two years' imprisonment
252(2)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual

13. In respect of the proposed offences in the table above, the committee notes that:

- a large number of detailed offence provisions would enforce the regulation of the activities of motor dealers and chattel auctioneers;
- a large number of offence provisions would have elements of the offence prescribed by regulation (see, below, under 'Delegation of legislative power');
- some of the offence provisions appear similar in acts or omissions, such as clauses 131(1), 174(1), 174(2) and 175(1); and
- when proposed maximum penalties are compared, offences with the same maximum monetary penalties may have quite different maximum terms of imprisonment.

14. **Clause 250** would govern proceedings for offences under the legislation and may affect rights and liberties of individuals. It would:
- impose time limits for the commencement of proceedings; and
 - regulate proceedings for offences under the legislation.
15. Clause 250(1) states that, other than proceedings for indictable offences to be dealt with on indictment, proceedings for offences under the legislation must be taken in a summary way within the later of:
- one year from the date of commission of the offence; and
 - six months after the commission of the offence comes to the complainant's knowledge but within two years after the commission of the offence.
16. Clause 250(2) would allow the prosecution to elect for an indictable offence to be heard summarily or on indictment.
17. Although clause 250 may affect rights and liberties of individuals, the explanatory notes do not provide information regarding the consistency of clause 250 with fundamental legislative principles.
18. **Clauses 251-2** may impose liability for the acts or omissions of others.
19. Under clause 251(3), an act or omission of a person's representative within the scope of the representative's authority would be taken to be an act or omission of the person, unless by the exercise of reasonable diligence, the person could not have prevented the act or omission. In respect of clause 251, the explanatory notes say (at 10-1):
- While the clause imposes liability for the actions of others, it is justified on the grounds that it follows the general law of agency in that the principal is liable for the actions of their agent. The clause is also consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees.*
20. Under clause 252, if a corporation committed an offence against the legislation, each of the executive officers would also commit an offence of failing to ensure that the corporation complied with the legislation.
21. The explanatory notes provide (at 11-2) lengthy information in respect of clause 252:
- While a corporation is a separate legal entity from its executive officers, 'piercing the corporate veil' is justified as it is in the interests of consumer protection that executive officers ensure the corporation complies with the Bill and they be held accountable. The inconsistency with the fundamental legislative principle is balanced by the defence provided in subclause (4). Subclause (4) provides that it is a defence for an executive officer to prove that—*
- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer took all reasonable steps to ensure the corporation complied with the provision; or*
- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.*
- To provide further justification, clause 252 is consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees. So too, should executive officers be liable for offences of a corporation, but only where the executive officer was in a position to influence the conduct of the corporation in relation to the offence. The clause is also consistent with the suitability requirements for applicants and licensees in clause 21. In deciding whether a corporation is suitable, the chief executive must have regard to whether an executive officer of the corporation has been convicted of an offence against this Bill, the other Agents Bills or the Agents Financial Administration Bill. If derivative liability was not imposed, an executive officer who had influence over an offence by a corporation, and the corporation's licence was cancelled, could continue the unlawful conduct under a new corporate entity.*
- Another issue that may be raised in relation to clause 252 is that derivative liability can potentially apply to any offence under the Bill. However, it is not considered appropriate to limit derivative liability to certain offences, such as more serious offences. This is because there is potential for the commission of relatively minor offences in a manner that is systematic and widespread.*
- It is noted that the Council of Australian Governments is undertaking a review of provisions imposing liability on executive officers. The object of the review is to ensure there is sufficient justification for making directors liable for corporate fault. As the review has not yet been finalised, it is anticipated that any further assessment around the appropriateness of derivative liability for executive officers in the Bill be undertaken once the review is completed.*

Right to privacy

22. **A large number of clauses** may affect rights of individuals to privacy.
23. In Queensland, the *Information Privacy Act 2009*, *Public Records Act 2002* and *Right to Information Act 2009* regulate the fair collection, handling and publication of personal information for public purposes.
24. Proposed provisions which may require dealings with personal information for the purposes of the legislation include clauses 14-5, 17, 21, 24, 27, 39, 42, 46-7, 183-4, 186-7. These clauses would require dealings with a range of material likely to contain personal information, such as:
- names and addresses of business associates;
 - material regarding the character of a person and of his or her business partners or associates;
 - criminal histories;
 - insolvency information; and
 - information about whether a person would be capable of satisfactorily performing relevant activities.
25. Generally, the explanatory notes do not address the consistency with fundamental legislative principles of the provisions identified above, but provide (at 12-3) the following information about proposed provisions regarding criminal histories:

Clauses 24 and 187 allow the chief executive to obtain criminal history reports. The chief executive is then required to have regard to a criminal history of an individual in deciding their suitability to hold a licence or registration certificate.

Clause 24 also allows criminal history reports to be obtained for each business partner of the applicant or licensee, and each person with whom the applicant or licensee carries on or intends to carry on business. An argument may be raised that these business associates, being third parties, would not necessarily consent to criminal history checks. However, clause 24 makes it clear the chief executive may make investigations about such persons. Additionally, clause 15(1)(e) requires the applicant to state the names and addresses of the applicant's business associates. It is therefore submitted that the business associates of the applicant or licensee would give implied consent to criminal history checks, notwithstanding the legislative requirement in clause 24. The ability to investigate business associates goes toward protecting consumers, given the direct involvement of business associates in a licensee's business and their ability to influence the conduct of the business.

Overall, making investigations and obtaining criminal histories of applicants and licensees, and their business associates, allows the chief executive to make an informed opinion about whether an applicant or licensee will act in accordance with the law in performing their activities. This is essential to ensuring applicants and licensees are suitable under the Bill.

In order to protect the privacy and confidentiality rights of individuals, clauses 26 and 189 provide for the confidentiality and destruction of criminal history reports. It should also be noted that the Bill does not abrogate the rehabilitation period and the non-disclosure rights provided in the Criminal Law (Rehabilitation of Offenders) Act 1986. In relation to personal information generally, the chief executive and public service employees are required to comply with the Information Privacy Act 2009, Public Records Act 2002 and Right to Information Act 2009.

26. **Clause 255** would allow the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people.
27. Clause 255(1) would permit publication of public warning statements about:
- contraventions of a code of conduct and people who commit them;
 - unfair business practices regulated under the legislation and people who engage in them; and
 - offences against the legislation and people who commit them.
28. Clause 255(2) states that a statement may identify particular contraventions, business practices, offences and persons.
29. The explanatory notes provide (at 13-4) justification for inconsistency with rights and liberties of individuals:

Clause 255 allows the Minister or chief executive to make or issue public warning statements or information statements that may identify individuals. These public statements may therefore have an adverse affect on individuals. However, before making a statement, the Minister or chief executive must be satisfied that it is in the public interest to do so. Accordingly, the inconsistency with the fundamental legislative principle is justified on the grounds that it is in the public interest to allow the making of warning and information statements for the protection of consumers.

A particular concern may however, be raised in relation to public statements about business practices regulated under the Bill that are unfair and naming persons who engage in the unfair practices. This is because unlike making a public statement about disciplinary proceedings or the commission of an offence, determining what constitutes 'unfair business practices' is subjective and has greater potential to adversely affect an individual. Additionally, information about disciplinary proceedings by QCAT and court convictions are already publicly available, whereas information concerning 'unfair business practices' are not. Nevertheless, the Minister or chief executive (noting that this power can not be delegated pursuant to clause 258) will only make a public statement if satisfied it is in the public interest to do so.

It should be noted that this power is common in consumer protection legislation. Ultimately, public statements are made in the most serious of circumstances where it becomes apparent to the Minister or chief executive there is a demonstrable, tangible pattern of conduct or behaviour that may cause widespread detriment to consumers. Public warning statements can, for example, protect consumers from committing large amounts of money or entering into transactions where they may suffer detriment, while information statements play an educative role in informing consumers about particular conduct or behaviour that may place consumers at risk.

An individual would normally only be named in a situation where the individual has been convicted of an offence and/or disqualified from holding a licence by QCAT or a court. The public exposure of non-compliant licensees also provides a compliance incentive to other licensees wishing to avoid such negative publicity.

Clause 256 provides that nothing in the Bill affects or limits any civil remedy that a person may have against a licensee or another person for any matter. Accordingly, the Minister and chief executive will not have immunity from legal liability in relation to public statements and this is a matter that is taken into consideration in deciding to issue a statement that identifies an individual.

Right to work and work-related rights

30. **Part 2, divisions 5-7 and 9-10 and part 5, divisions 5-7 and 9-10** may prevent some people from working as motor dealers and chattel auctioneers.

31. Provisions in these divisions would, for example:

- require a person working as a motor dealer or chattel auctioneer to be licensed or to have a registration certificate;
- impose restrictions on people who may be issued with licences or registration certificates; and
- allow the chief executive to impose conditions upon, or to suspend or cancel, licences and registration certificates

32. The explanatory notes state (at 7):

The imposition of suitability and eligibility criteria ... seeks to ensure only suitable and eligible persons are licensed or registered. This goes toward fulfilling the consumer protection object of the Bill...

The Bill also allows the chief executive to place conditions on licences and registration certificates (clauses 35 and 193), and to suspend licences and registration certificates (clauses 55 and 204). While this may adversely affect the rights and liberties of individuals, the imposition of conditions and suspension of licences and registration certificates go toward protecting consumers.

33. Further, the committee notes that the proposed provisions may affect the rights and liberties of people who are currently licensed to work as auctioneers, as outlined in the explanatory notes (at 9):

The Bill may affect the rights and liberties of individuals, namely auctioneers who are currently licensed under the PAMD Act. Under the PAMD Act, auctioneers and pastoral houses may auction both real property and chattels. However, the auctioning of real property will be provided for in the Property Agents Bill while the auctioning of chattels is provided for in this Bill. This will impose additional costs (in terms of licensing fees) for individuals who wish to auction both real property and chattels as they will need to obtain two licences or registration certificates. This situation is unavoidable due to the splitting of the auctioneering functions and the Government's position to continue to regulate auctioneers in the interests of consumer protection.

34. Justification is provided (explanatory notes 9-10):

The potential adverse impacts will be mitigated through a number of ways. Existing auctioneer licences and certain pastoral house licence categories will be transitioned to a property agent licence (or property agent salesperson registration certificate) and a chattel auctioneer licence (or trainee auctioneer registration certificate) upon commencement of this Bill and the Property Agents Bill. Additionally, there will be reduced licensing fees, as is currently the case under the PAMD Act, for persons who hold more than one licence or registration certificate. It should also be noted that many licensed auctioneers under the PAMD Act also hold a real estate agent licence. Accordingly, such persons will continue to hold two licences when the Bill commences.

This Bill and the Property Agents Bill also make provision for a person to only be required to hold a single licence in certain circumstances. The Property Agents Bill will allow a property agent who is authorised to conduct auctions to also auction chattels if the auction of the chattels is directly connected with the auction of real property. Clause 4 of this Bill makes provision for the exemption of such sales from the application of the Bill in

order for the authorisation in the Property Agents Bill to operate effectively. This takes into consideration clearing sales and house and contents sales, and obviates the need for two licences.

Rights of children, teenagers and young people

35. **Clauses 28-9 and 191** would make people aged under 18 ineligible for a motor dealer licence or registration as a motor salesperson or trainee chattel auctioneer.
36. The clauses would provide that a person would be eligible to obtain a licence only if he or she was 'at least 18 years'. Accordingly, the proposed provisions would override section 7(f) of the *Anti-Discrimination Act 1991* which prohibits discrimination on the basis of age.
37. The explanatory notes include (at 6) the following justification for the effect upon rights and liberties of people below the age of 18:

The Bill provides that an individual must be at least 18 years to be eligible to obtain a motor dealer licence (clause 28) or chattel auctioneer licence (clause 29), or registration as a motor salesperson or trainee chattel auctioneer (clause 191). This age discrimination is justified on the grounds that consumers expect to deal with licensees and registered employees that have the necessary maturity, judgement and capacity given the pecuniary nature of the transactions involved in the sale of used motor vehicles and the auction of chattels. Accordingly, it is for the protection of consumers that individuals must be at least 18 years to be eligible to obtain a licence or registration certificate.

Administrative power

38. 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.
39. **Clauses 14, 21, 24, 32, 35, 40, 43, 48, 51, 55, 182, 186, 192-3, 195, 198 and 210** would make rights to licences and registration dependent on administrative power which may be insufficiently defined.
40. The relevant parts of the legislation are discussed above under the heading, 'Rights and liberties'. In relation to administrative power, it is noted that the proposed provisions would confer the chief executive with significant administrative powers regarding licences and registration certificates, including to:
 - examine a person's suitability and eligibility;
 - investigate and decide a person's suitability, including by examining the character and criminal history of the person and his or her business associates;
 - issue or refuse to issue a licence or registration certificate;
 - issue on conditions considered necessary or desirable for the proper performance of authorised activities;
 - renew or refuse to renew;
 - restore or refuse to restore;
 - appoint or refuse to appoint a substitute licensee/registrant;
 - amend conditions; and
 - immediately suspend or cancel.
41. Similar to issues examined regarding the Commercial Agents Bill (chapter 4), issues arise regarding the definition of the administrative powers to be conferred on the chief executive. These include:
 - for clauses 14 and 182, the use of the term 'among other things';
 - use of the broad, undefined term 'character' in defining the administrative power to determine suitability; and
 - conferral of apparently broad discretionary administrative powers on the chief executive in other respects, such as by stating that the chief executive 'may issue' licences or registration certificates if statutory conditions are met and by requiring an application to be 'properly made'.
42. The explanatory notes indicate (at 7) that the administrative powers conferred on the chief executive are defined appropriately, stating:

A person who does not meet the suitability and eligibility requirements can not obtain a licence or registration certificate under the Bill. This may therefore adversely affect the rights and liberties of individuals. The imposition of suitability and eligibility criteria however, seeks to ensure only suitable and eligible persons are licensed or registered. This goes toward fulfilling the consumer protection object of the Bill. Additionally, the administrative

powers of the chief executive to consider applications for licences and registration certificates are sufficiently defined and reviewable by QCAT.

The Bill also allows the chief executive to place conditions on licences and registration certificates (clauses 35 and 193), and to suspend licences and registration certificates (clauses 55 and 204). While this may adversely affect the rights and liberties of individuals, the imposition of conditions and suspension of licences and registration certificates go toward protecting consumers. Additionally, the administrative powers of the chief executive are sufficiently defined and are reviewable by QCAT.

43. **Clauses 56 and 205** may make rights and liberties subject to administrative power which is not subject to appropriate review.
44. Clause 56 would provide for the immediate cancellation of a licence if an individual licensee was:
- convicted of a serious offence; or
 - an insolvent under administration.
45. Clause 205 would provide that a registration certification of a registered employee would be cancelled immediately if the employee were convicted of a serious offence.
46. In respect of a cancellation under clauses 56 or 205, no right of external administrative review would be provided by the legislation (clause 220). Accordingly, this provision may be inconsistent with section 4(3)(a) of the *Legislative Standards Act*. However, the explanatory notes indicate (at 7-8) sufficient regard for rights and liberties of individuals (information edited to refer to 'Administrative review' only, see below under 'Natural justice' also):

Clauses 56 and 205 provide for the immediate cancellation of a licence and registration certificate in certain circumstances, such as where the licensee or registered employee is convicted of a serious offence... there is no right of review to QCAT.

... cancellation of a licence or registration certificate does not prevent the former licensee or employee from applying for a new licence or registration certificate. However, the person must meet the suitability and eligibility requirements. Additionally, the Bill does not prevent a licensee or registered employee from seeking judicial review of the decision.

Natural justice

47. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.
48. **Clauses 51, 55-6, 201, 204-5** may be inconsistent with principles of natural justice.
49. The principles of natural justice require that a person be given a fair hearing and an opportunity to present his or her case, that a decision be made by an unbiased and disinterested decision-maker and be based on logically probative evidence. At common law, a person denied 'procedural fairness' may seek review of an administrative decision affecting his or her rights.
50. Clause 51 would allow the chief executive to amend licence conditions, including on his or her own initiative. In the latter case, the chief executive must give the applicant an information notice about the decision (clause 51(4)). However, under clause 51(5), the chief executive need not issue an information notice if it is decided the licence must be amended urgently to avoid potential claims against the fund or to ensure compliance with the legislation. Clause 201, relating to registration certificates, is in similar terms. While the explanatory notes do not address the consistency of either provision with section 4(3)(b) of the *Legislative Standards Act*, the committee notes that clause 51(5) may itself identify the justification for any inconsistency with principles of natural justice.
51. Clauses 55-6 and 204-5 would allow the chief executive to suspend or cancel, with immediate effect, licences or registration certificates.
52. The explanatory notes acknowledge (at 7-8) that clauses 56 and 205 may be inconsistent with principles of natural justice, (information edited to refer to 'Natural justice' only, see above under 'Administrative power' also):

Clauses 56 and 205 provide for the immediate cancellation of a licence and registration certificate in certain circumstances, such as where the licensee or registered employee is convicted of a serious offence. The clauses do not provide prior notification of cancellation or a 'show cause' process.

This inconsistency with the fundamental legislative principle is justified on the grounds that immediate cancellation is limited to the most serious of instances that could create the greatest detriment to consumers. In particular, a licence may only be cancelled under clause 56 if the licensee is convicted of a serious offence; if the licensee is an individual, the licensee is affected by bankruptcy action; or if the licensee is a corporation, the licensee has

been wound up or struck off under the Corporations Act. For a registration certificate, the certificate may only be cancelled under clause 205 if the employee is convicted of a serious offence. The happening of any of the events goes to the very core of a licensee or registered employee's ability to perform the activities authorised by their licence or registration certificate. The immediate cancellation of the licence or registration certificate prevents the likelihood of detriment, or further detriment, to consumers.

53. In relation to clauses 55 and 204, justification is provided also (at 8):

Inconsistency with the principles of natural justice may also be raised in relation to the immediate suspension of licences and registration certificates (clauses 55 and 204) as there is no prior notification or 'show cause' process. However, a right of review is available to QCAT. Immediate suspension of a licence or registration certificate is only limited to certain circumstances and is considered necessary to prevent the likelihood of detriment, or further detriment, to consumers.

Onus of proof

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

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

56. **Clauses 82, 149, 236-7, 242, 246-9, 251-2 and 254** may impose evidential burdens on a person charged with an offence under the legislation.

57. Clauses 82 and 149 would require both a motor dealer and chattel auctioneer to ensure that a buyer of a used motor vehicle gained clear title to the vehicle. Failure to do so may create liability to an offence attracting a maximum penalty of 200 penalty units (\$20 000). Under clauses 82(3) and 149(3), it would be a defence for a defendant to prove he or she took all reasonable steps to ensure the requirement was complied with. The explanatory notes state (at 8):

The reversal of the onus of proof is justified on the grounds that knowledge about taking reasonable steps to ensure the requirement was complied with is information which is peculiarly within the knowledge of the person who made the representation, and would otherwise be difficult to establish.

58. Clause 237 would make it an offence for a person to make false or misleading representations about property, with a maximum penalty for the offence of 540 penalty units (\$54 000). Clause 237(4) would place upon a defendant the onus of 'establishing that the person had reasonable grounds for making the representation'. For clause 237, the explanatory notes say (at 8):

The reversal of the onus of proof is justified on the grounds that knowledge about the reasonableness or otherwise of the representation is information which is peculiarly within the knowledge of the person who made the representation, and would otherwise be difficult to establish.

59. Clause 242 would make it an offence for a licensee to ask for, or receive, a commission or reward for a transaction greater than the amount allowed under a regulation. The maximum penalty for the offence would be 200 penalty units or one year's imprisonment. In respect of clause 242, the explanatory notes state (at 8) that the reversal of onus is justified:

A licensee will not commit an offence if the licensee establishes to the court's satisfaction, on the balance of probabilities, that the expenditure was lawfully incurred. The reversal of the onus of proof is justified on the grounds that the information relating to the relevant expenditure would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.

60. Clause 251 would apply in a proceeding for an offence under the legislation. Clause 251(3) states that:

- if relevant in proceedings under the legislation to prove a person's state of mind about a particular act or omission, it would be enough to show –
 - the act was or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
 - the representative had the relevant state of mind (clause 251(2)); and
- an act done or omitted to be done for a person by a representative, within the scope of the representative's authority, would be taken to have been done or omitted to be done by the person, unless the person proved he or she could not, by the exercise of reasonable diligence, have prevented the act or omission (clause 251(3)).

61. The explanatory notes indicate (at 9) that the reversal of onus in clause 251 is justified:
- The reversal of the onus of proof is justified on the grounds that the information relating to the exercise of reasonable diligence would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.*
62. Clause 252 would require executive officers of a corporation to ensure that the corporation complied with the legislation (clause 252(1)). Evidence that the corporation had been convicted of an offence would be evidence that each of the executive officers committed the offence of failing to ensure compliance (clause 252(3)). However, clause 252(43) would provide alternate defences for an executive officer; namely, that he or she:
- took all reasonable steps to ensure compliance; or
 - was not in a position to influence the relevant conduct of the corporation.
63. The explanatory notes provide justification (at 9):
- The reversal of the onus of proof is justified as the provisions a corporation could contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation be accountable. Additionally, the information relating to the executive officer's influence on the conduct of the corporation would be peculiarly within the knowledge of the officer and would otherwise be difficult to establish.*
64. Clauses 236 and 246-9 would be evidentiary provisions, applying to proceedings under the legislation, and would facilitate proof of:
- ownership of an amount allegedly dishonestly converted (clause 236(3));
 - evidence of tampering by a motor dealer or chattel auctioneer (clause 246);
 - continuing false representation of tampering (clause 247);
 - the appointment or power of an inspector (clause 248(2));
 - a signature purporting to be the signature of the chief executive (clause 248(3));
 - a certificate purporting to be signed by the chief executive, a member of QCAT or the registrar stating a specified matter (clause 248(4)); and
 - entries in a licensee's documents being made by or with the authority of the licensee (clause 249).
65. The explanatory notes do not address the consistency of clauses 236 and 246-9 with fundamental legislative principles.

Sufficient regard to the institution of Parliament

Delegation of legislative power

66. 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.
67. **A large number of clauses** may allow the delegation of legislative power in inappropriate cases.
68. The clauses (58, 62, 82, 88, 103, 109, 116-21, 134, 149, 154, 163, 170-3, 210 and 242) would delegate legislative power to prescribe specified matters for offences. Proposed maximum penalties for the offences would range from 100 penalty units (\$10 000) to 200 penalty units (\$20 000) or one year's imprisonment (clauses 118 and 242).
69. In relation to whether the legislation has sufficient regard to the institution of Parliament, generally, the explanatory notes state (at 14):
- The Bill replicates the relevant heads of regulatory power under the PAMD Act. The matters to be prescribed under regulation are those matters usually prescribed under regulations, i.e. fees, qualification requirements, and minor offences. As these are mostly administrative matters that can be subject to changes over time, it is appropriate that they are provided for in a regulation, rather than primary legislation. The regulation will comply with the requirements in section 4(5) of the Legislative Standards Act 1992.*
70. However, the explanatory notes do not provide specific information regarding the appropriateness of the delegation of legislative power in these proposed provisions.
71. **Clause 261**, the general regulation-making power, would not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.

72. Clause 261(2)(a) would delegate power to make subordinate legislation regarding specified 'fees, including the refunding of fees payable under this Act'.
73. A similar regulation-making power in the Commercial Agents Bill regarding fees was examined in chapter 4. As in that chapter, the committee notes that, as drafted, the delegated power is not confined to recovery of costs related to the cost of administering the licensing system.

Amendment of Act other than by another Act

74. Section 4(4)(c) of the *Legislative Standards Act* states that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.
75. **A large number of clauses** may authorise amendment of the Act by regulation.
76. The clauses would allow a significant range of matters to be prescribed by regulation; for example:
 - clause 13(2)(a) would allow a regulation to prescribe the activities that may be performed under a 'limited motor dealer licence';
 - clause 107 would identify defects in a warranted vehicle not covered by statutory warranty and these would include 'a defect in something else prescribed by regulation'; and
 - the clauses identified above under the heading 'Delegation of legislative power'.
77. 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;
 - transitional arrangements; and
 - the application of national schemes of legislation.
78. 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.
79. While the committee notes the statement in the explanatory notes (at 14) that 'The matters to be prescribed under regulation are those matters usually prescribed under regulations', the committee draws to the attention of the Parliament the significant number and substantive nature of matters to be prescribed by regulation. In respect of the latter issue, the committee notes that the clauses identified above, for example, do not appear to fall within the categories of Henry VIII provisions considered excusable by the committee.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

80. 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)).
81. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

11. NEIGHBOURHOOD DISPUTES RESOLUTION BILL 2010

Date introduced:	25 November 2010
Responsible minister:	Hon CR Dick MP
Portfolio responsibility:	Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clauses 37-8** which may be inconsistent with principles of natural justice;
 - **clauses 88 and 94** allowing entry onto premises without warrant or consent; and
 - **clause 26** applying to damage to or destruction of a dividing fence, whether before or after commencement.
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 8, 42 and 45** which may raise issues regarding the amendment of an Act by subordinate legislation.
3. The committee invites the minister to provide information about whether **clause 88** would have sufficient regard to rights and liberties of individuals.

BACKGROUND

4. Following a Review of Neighbourly Relations, the legislation is to provide rules about neighbours' responsibilities for dividing fences and trees and to facilitate the resolution of any disputes which may arise.

LEGISLATIVE PURPOSE

5. The objects of the legislation are to (clause 3):
 - provide rules about each neighbour's responsibility for dividing fences and for trees so that neighbours are generally able to resolve issues about fences or trees without a dispute arising; and
 - facilitate the resolution of any disputes about dividing fences or trees that do arise between neighbours.
6. The bill would repeal the *Dividing Fences Act 1953* and amend the:
 - *Animal Management (Cats and Dogs) Act 2008*;
 - *Body Corporate and Community Management Act 1997*;
 - *Building Act 1975*;
 - *Building Units and Group Titles Act 1980*;
 - *Land Act 1954*;
 - *Land Protection (Pest and Stock Route Management) Act 2002*;
 - *Queensland Civil and Administrative Tribunal Act 2009*;
 - *South Bank Corporation Act 1989*; and
 - *Stock Act 1915*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Natural justice

7. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.
8. **Clauses 37-8** may not be consistent with principles of natural justice.
9. Under clause 33, the Queensland Civil and Administrative Tribunal would have jurisdiction to hear and determine disputes regarding dividing fences. Clause 37(1) would allow:
 - an owner to apply to QCAT for an order authorising the carrying out of fencing work; and
 - an application to be made in the absence of the adjoining owner.
10. Clause 37(2) would enable QCAT to make an order if satisfied that the owner could not locate the adjoining owner after making all reasonable inquiries.
11. The committee notes that the content of the 'fair hearing rule' will depend upon the circumstances in which it is to be applied, but requires generally:⁸
 - adequate notice of a decision adverse to an individual's interests;
 - disclosure of relevant information on which the decision is based in sufficient detail to enable a meaningful hearing on the critical issues arising for decision;
 - the opportunity to make relevant submissions and adduce relevant evidence; and
 - sufficient time to prepare for the hearing.
12. Parliament may enact legislation inconsistent with principles of natural justice, but 'plain words of necessary intendment' are required.⁹ The courts will not 'impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language'.¹⁰
13. The committee notes that the explanatory notes provide (at 7) the following information to assist consideration of the above:

This clause provides for the making of a judicial order without the adjoining owner being heard. An order under this section may only be made if QCAT is satisfied the applicant has made reasonable inquiries to locate the adjoining owner. If the applicant later locates the adjoining owner, the applicant may give a copy of the order to the respondent and seek a contribution for the work done. The respondent, if given a copy of the order may apply for a variation of the order. The protections contained in the provision provide safeguards for the respondent. It will be a matter for QCAT to determine whether the applicant has made an adequate attempt to locate the respondent based on the facts of the particular case. A similar provision was contained in the Dividing Fences Act 1953.

This is justified on the basis that QCAT must be satisfied that the owner could not locate the adjoining owner. If a copy of the order is not given to the adjoining owner by the applicant in accordance with the clause the adjoining owner is unable to recover contribution.
14. Under clause 38(1), an owner who believes on reasonable grounds that an adjoining owner intends to construct or demolish a dividing fence without authorisation may apply to QCAT for an order. Clause 38(2) requires the owner to give the adjoining owner a minimum of one days' notice of the application.

⁸ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008) 135.

⁹ *Annetts v McCann* (1990) 170 CLR 596, 598; for example, in *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41, Gibbs J at [20] considered the intention to be attributed to the Parliament in relation to section 13(7) of the *Valuation of Land Act* (since amended).

¹⁰ *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 492.

15. In relation to the application of the principles of natural justice, the explanatory notes indicate (at 7) that:

This Clause anticipates the situation where an adjoining owner is constructing or demolishing an existing fence on the common boundary without the permission of the other owner.

The clause provides for the owner to apply for an order to remove, modify or rectify the fence. The owner must give the adjoining owner a copy of the application at least 1 day before the application is heard. The short period of notice is justified because of the urgent nature of an application under this provision particularly where the existing fence is being demolished without permission.

Power to enter premises

16. 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.
17. **Clauses 88 and 94** would allow entry onto premises without warrant or consent.
18. Clause 88 would permit an appropriately qualified person authorised by the local government to enter a tree-keeper's land in order to:
- inspect the tree to determine if the work has been carried out as required by the order; and
 - carry out the work if the work has not been carried out as required by the order.
19. Clause 88(4) states that before an authorised person entered the tree-keeper's land, the local government must give the tree-keeper at least seven days' notice' of the intention to enter the land. However, under clause 88(5), notice would not be required if:
- the tree-keeper consented to entry;
 - entry to the land was required because of the existence or likelihood of a serious risk to safety; or
 - entry was required urgently and the chief executive of the local government had authorised, in writing, entry without notice.
20. In relation to the above, the explanatory notes state (at 6) that:
- The Bill includes provision for an authorised officer from a local government to enter private land to determine if work has been carried out as required by a QCAT order and, if the work has not been carried out, to carry it out. The cost of the work is then recoverable by the local government from the person responsible for the tree. This is justified on the basis that the powers to enter contain several safeguards around the system of entry which adequately protect the rights of the landowner.*
21. Although the legislation does contain some safeguards of rights and liberties, the committee notes a number of matters regarding the possible effects upon rights and liberties of individuals of the proposed entry and post-entry powers. First, the power of entry conferred by clause 88 does not appear to be limited. While under clause 88 an authorised person seeking consent to enter a place would be required to provide an occupier with information regarding the purpose of the entry, clause 88 does not impose a similar requirement for entry without consent.
22. Second, if a place were to be entered in the absence of an occupier, the legislation does not appear to require written advice of entry without consent, the identity of the person who entered, the purposes of entry or the date and time of entry. In this regard, the committee notes the correspondence from the Premier of Queensland, referred to in chapter 9 regarding the Mines and Energy Legislation Amendment Bill 2010. The committee invites the minister to provide information about whether clause 88 would have sufficient regard to rights and liberties of individuals.
23. Clause 94 would permit a person to enter land owned by another owner if:
- the person had agreed with the other owner to carry out fencing work or work relating to trees; or
 - QCAT had ordered that the relevant work be carried out by the person.
24. Clause 94(2) would require at least seven days' notice prior to entry upon the other owner's land. Written notice need be given to the other owner and any lessee of the land of whom the person was aware.
25. Clause 94(4) states that the person must enter the other's land only at a reasonable time and only to a reasonable extent needed to carry out the relevant work.

26. In relation to the consistency of clause 94 with fundamental principles, the explanatory notes state (at 6) that:

This clause provides for a person (including the person's employees or agents) who carries out work under the Act to enter the other owner's land at a reasonable time for the purpose of carrying out the work under the Bill. This right is conditional upon the person giving the land owner and any lessee of the land at least 7 days notice of the intention to enter. The right does not authorise the person to enter premises on the land. This is justified on the basis that there are adequate protections provided for the landowner in the provision. This clause does not apply if a neighbour gives permission to the treekeeper (or their contractor) to enter in the Notice for particular overhanging branches.

Retrospective operation

27. 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.
28. **Clause 26** would apply to damage to or destruction of a dividing fence, whether before or after commencement.
29. It would apply where the damage or destruction was due to a negligent or deliberate act or omission of:
- an owner of land; or
 - a person who had entered the owner's land with the express consent of the owner.
30. Under clause 26(2), the owner would be required to restore the dividing fence to a reasonable standard, having regard to its state before the damage or destruction.
31. The committee examines legislation that would have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:
- the retrospective operation would be adverse to people other than the government; and
 - people have relied on and would have legitimate expectations based on the existing law.
32. The bill provides (at 8) the following justification for any retrospective operation of clause 26:
- Given that an object of the Act is to minimise disputes between neighbours, the retrospective operation of this provision is justified on the basis that it will prevent any ongoing disputation that might occur between neighbours about who should pay for the damage or destruction of the dividing fence in circumstances contemplated by this clause.*

Sufficient regard to the institution of Parliament

Amendment of Act other than by another Act

33. Section 4(4)(c) of the *Legislative Standards Act* states that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.
34. **Clauses 8, 42 and 45** may authorise the amendment of an Act other than by another Act.
35. Chapter 2 relates to dividing fences. Clause 8(1) provides that chapter 2 applies to prescribed land. Clause 8(2)(d) provides that chapter 2 does not apply to:
- ... land prescribed under a regulation.
36. A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as an 'Henry VIII' clause. 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;

- transitional arrangements; and
 - the application of national schemes of legislation.
37. 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.
38. Clause 8(2)(d), enabling a definition of a term to be altered by regulation, generally would not be considered to be a 'Henry VIII' clause. Further, the explanatory notes indicate (at 8) it would appropriately delegate legislative power:
- Clause 8 sets out the land to which Chapter 2 applies. Clause 8 (2)(d) provides that the Bill does not apply to land prescribed under regulation. This is justified because it allows for flexibility to deal with interests that might arise which need to be excluded from the Bill.*
39. Chapter 3 is to facilitate the resolution of any disputes about trees arising between neighbours. Under clause 42(2), a regulation could be made to exclude the application of chapter 3, or a stated provision in chapter 3, in respect of trees situated on land within a stated local government area.
40. Clause 42 does not appear to fall within the categories of Henry VIII provisions considered excusable by the committee, nor do the explanatory notes provide information in this regard. The explanatory notes state (at 8) that:
- This clause is justified because there may be trees or other tree like vegetation which are not considered in the current Bill. The use of the regulation in this section allows for unidentified trees to be removed quickly and efficiently from the framework of the Bill.*
41. Clause 45 also raises two issues regarding possible amendment of an Act by subordinate legislation.
42. First, the definition of 'tree' in clause 45(1) would include (clause 45(1)(d)):
- ... a plant prescribed under a regulation to be a tree for this chapter.
43. Second, clause 45(2) provides an inclusive meaning of 'tree', but clause 45(3) then states:
- However, *tree* does not include a plant prescribed under a regulation not be a tree for this chapter.
44. It is noted, as stated above, that generally the committee does not consider provisions enabling regulations to extend definitions of terms to fall within 'Henry VIII' clauses. Further, the explanatory notes indicate (at 8) that clause 45 would represent an appropriate delegation of legislative power that:
- Clause 45 defines the meaning of tree. Sub-clauses (1)(d) and Clause 45 (3) provide for regulations to include plants or exclude plants from being a tree under the Bill. These are based on the New South Wales experience under the Trees (Disputes Between Neighbours) Act 2006 NSW, and are justified because cases may arise involving plants that have not been contemplated by the Act, but about which an application to QCAT should properly be made.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

45. 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)).
46. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

12. PROPERTY AGENTS BILL 2010

Date introduced:	24 November 10
Responsible minister:	Hon PJ Lawlor MP
Portfolio responsibility:	Minister for Tourism and Fair Trading

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clause 193** excluding specified people from making a claim against the claim fund;
 - **the large number of clauses** creating offences;
 - **clause 253** imposing time limits for the commencement of proceedings and regulating proceedings for offences under the legislation;
 - **clauses 254-5** which may impose liability for the acts or omissions of others;
 - **the large number of clauses** which may affect rights of individuals to privacy;
 - **clause 259** allowing the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people;
 - **clause 72** which may affect rights and liberties of people wishing to work as pastoral agents;
 - **parts 2 and 5** which may prevent some people from working as property agents;
 - **clauses 35-6 and 142** making people aged under 18 ineligible for a licence or registration;
 - **clauses 27, 40, 44, 49, 52, 57, 60, 64, 137, 143-4, 146, 149, 152 and 155** which may make rights to licences and registration dependent on administrative power which may be insufficiently defined;
 - **clause 201 and schedule 1** which may make rights and liberties subject to administrative power which is not subject to appropriate review;
 - **clauses 60, 64-5, 152, 155-6 and 212** which may be inconsistent with principles of natural justice;
 - **clauses 169, 213, 230, 235, 238, 246, 254-5, 258** which may impose evidentiary burdens on defendants to proceedings; and
 - **clause 209** abrogating protections of the privilege against self-incrimination.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
 - **the large number of clauses** which may allow the delegation of legislative power in inappropriate cases; and
 - **clause 265**, which may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.

BACKGROUND

3. The legislation would regulate the activities, licensing and conduct of property agents and their employees and protect consumers against particular undesirable practices associated with the promotion of residential property.

LEGISLATIVE PURPOSE

4. The objects of the bill are to provide (clause 8):
 - a system for licensing and regulating people as property agents or resident letting agents and for registering and regulating people as registered employees (property agent salespersons) that achieves an appropriate balance between –
 - the need to regulate for the protection of consumers; and
 - the need to promote freedom of enterprise in the marketplace; and

- a way of protecting consumers against particular undesirable practices associated with the promotion of residential property.
5. Clause 8(2) identifies the measures by which the objects are to be achieved.
 6. The bill is one of four giving effect to the splitting of the *Property Agents and Motor Dealers Act 2000*. The other three, examined in this *Legislation Alert* also, are the:
 - Agents Financial Administration Bill 2010 (chapter 2);
 - Commercial Agents Bill 2010 (chapter 4); and
 - Motor Dealers and Chattel Auctioneers Bill 2010 (chapter 10).
 7. In addition, the bill would make minor and consequential amendments to the:
 - *Body Corporate and Community Management Act 1997*;
 - *Building Act 1975*;
 - *Building Units and Group Titles Act 1980*;
 - *Integrated Resort Development Act 1987*;
 - *Land Sales Act 1984*;
 - *Legal Profession Act 2007*;
 - *Personal Property Securities (Ancillary Provisions) Act 2010*;
 - *Retirement Villages Act 1999*;
 - *Sanctuary Cove Resort Act 1985*;
 - *Second-hand Dealers and Pawnbrokers Act 2003*; and
 - *South Bank Corporation Act 1989*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

Right to equal application and equal protection of the law

9. **Clause 193** would exclude specified people from making a claim against the claim fund.
10. Clause 76 of the Agents Financial Administration Bill would provide for a claim fund against which a person might claim for financial loss due to contraventions of that Act regarding trust accounts.
11. Clause 193 would exclude identified people from making claims against the fund for identified financial losses.
12. The explanatory notes do not address consistency of clause 193 with fundamental legislative principles.
13. **A large number of clauses** would create offence provisions. The proposed offences and respective maximum penalties are identified below.

Clause	Proposed offence	Proposed maximum penalty
33(1)	Disclosing confidential criminal history	100 penalty units (\$10 000)
55(2)	Principal licensee failing to ensure availability of appointment of substitute licensee	100 penalty units (\$10 000)
55(3)	Principal licensee failing to ensure extension of appointment of substitute licensee	200 penalty units (\$20 000)
56(3)	Principal licensee failing to ensure availability of appointment of employed licensee as substitute licensee	100 penalty units (\$10 000)
56(4)	Principal licensee failing to ensure extension of appointment of employed licensee as substitute licensee	200 penalty units (\$20 000)

Clause	Proposed offence	Proposed maximum penalty
58(2)	Acting as licensee during appointment of substitute licensee	200 penalty units (\$20 000)
61(2)	Licensee failing to return licence for amendment of conditions	100 penalty units (\$10 000)
61(3)	Licensee failing to return licence when suspended or cancelled	100 penalty units (\$10 000)
64(6)	Licensee failing to return licence when given notice	100 penalty units (\$10 000)
65(2)	Licensee failing to return licence when cancelled	100 penalty units (\$10 000)
67	Failing to display licence	100 penalty units (\$10 000)
71(1)	Failing to notify of change in circumstances	100 penalty units (\$10 000)
75(1)	Licensee failing to be in charge of property agent's business	200 penalty units (\$20 000)
75(2)	Licensee failing to be in charge of corporate property agent's business	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation
75(3)	Being in charge of property agent's business at more than one place	200 penalty units (\$20 000)
76(1)	Acting as a property agent without appointment	200 penalty units (\$20 000)
76(8)	Failing to give client copy of appointment	200 penalty units (\$20 000)
78	Failing to give pre-appointment advice	200 penalty units (\$20 000)
79(1)	Failing to give pre-appointment advice about sole and exclusive agencies	200 penalty units (\$20 000)
81(3)	Property agent being reappointed for sale of residential property	200 penalty units (\$20 000)
84(1)	Failing make required disclosures to prospective buyer	200 penalty units (\$20 000)
85(2)	Charging buyer's premium	200 penalty units (\$20 000)
86(2)	Claiming commission for other than actual amounts	200 penalty units (\$20 000)
87(2)	Recovering reward or expense without proper authorisation	200 penalty units (\$20 000)
88(6)	Recovering reward or expense above amount allowed	200 penalty units (\$20 000)
91(2)	Property agent obtaining option to purchase property in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
91(3)	Property agent salesperson obtaining option to purchase property in which has beneficial interest	200 penalty units (\$20 000) or three years' imprisonment
91(4)	Property agent selling property in which has beneficial interest in option to purchase	200 penalty units (\$20 000) or three years' imprisonment
92(2)	Property agent obtaining beneficial interest in property	200 penalty units (\$20 000) or three years' imprisonment
92(3)	Property agent salesperson obtaining beneficial interest in property	200 penalty units (\$20 000) or three years' imprisonment
96(1)	Failing to give proposed buyer notice about vacant land	200 penalty units (\$20 000) or two years' imprisonment
96(2)	Failing to give proposed buyer notice about vacant land before signing of contract	200 penalty units (\$20 000) or two years' imprisonment
96(5)	Failing to keep and make available copy of statement about vacant land before signing of contract	200 penalty units (\$20 000) or two years' imprisonment

Clause	Proposed offence	Proposed maximum penalty
97(4)	Failing to repay amount paid under the contract	200 penalty units (\$20 000)
100(1)	Failing to give notice about sale of resident letting agent's business	200 penalty units (\$20 000)
100(6)	Failing to keep and make available copy of statement about sale of resident letting agent's business	200 penalty units (\$20 000)
101(2)	Charging buyer's premium on goods sold	200 penalty units (\$20 000)
105(1)	Property agent who is principal licensee failing to notify of change in place of business	200 penalty units (\$20 000)
105(2)	Property agent who is employed licensee failing to notify of change in place of business	200 penalty units (\$20 000)
106(1)	Failing to display licensee's name	100 penalty units (\$10 000)
106(2)	Failing to publish licensee's name in advertisement	100 penalty units (\$10 000)
107(1)	Property agent who is principal licensee failing to keep employment register	200 penalty units (\$20 000)
107(2)	Property agent failing to record details in employment register	200 penalty units (\$20 000)
107(3)	Property agent failing to update employment register	200 penalty units (\$20 000)
108(1)	Performing act that might be done by property agent without authorisation	200 penalty units (\$20 000) or two years' imprisonment
108(2)	Acting as property agent without authorisation	200 penalty units (\$20 000) or two years' imprisonment
109(1)	Pretending to be property agent salesperson	200 penalty units (\$20 000)
110(1)	Property agent acting for more than one party to a transaction	200 penalty units (\$20 000)
111(1)	Failing to produce licence	100 penalty units (\$10 000)
111(2)	Failing to produce registration certificate	100 penalty units (\$10 000)
112(1)	Employing person without registration certificate	200 penalty units (\$20 000)
112(2)	Engaging independent contractor without licence	200 penalty units (\$20 000)
112(3)	Employing business associate	200 penalty units (\$20 000)
112(4)	Corporation employing executive officer as property agent salesperson	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation
114(2)	Resident letting agent failing to reside in building complex	200 penalty units (\$20 000)
114(3)	Corporation failing to ensure resident letting agent resides in building complex	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation
115(1)	Failing to be in charge of letting agent's business at place	200 penalty units (\$20 000)
115(2)	Corporation failing to ensure resident letting agent or property agent in charge of business at place	200 penalty units (\$20 000) for a natural person; 1000 penalty units (\$100 000) for a corporation

Clause	Proposed offence	Proposed maximum penalty
		a corporation
115(3)	Resident letting agent with more than one business failing to ensure person in charge of business	200 penalty units (\$20 000)
115(4)	Being in charge of business at more than one place	200 penalty units (\$20 000)
116(1)	Acting as resident letting agent without appointment	200 penalty units (\$20 000)
116(8)	Failing to give client copy of appointment	200 penalty units (\$20 000)
119(2)	Claiming commission other than on actual amount	200 penalty units (\$20 000)
120(7)	Recovering unauthorised reward or expense	200 penalty units (\$20 000)
125 (1)	Resident letting agent failing to notify of change in place of business	200 penalty units (\$20 000)
125(2)	Failing to notify of change in body corporate's approval to carry on business	200 penalty units (\$20 000)
125(3)	Resident letting agent who is employed licensee failing to notify of change in place of business	200 penalty units (\$20 000)
126(1)	Resident letting agent who is employee failing to display name at place of business	100 penalty units (\$10 000)
126(2)	Resident letting agent who is employee failing to publish in advertisement prescribed particulars	100 penalty units (\$10 000)
127(1)	Resident letting agent failing to keep employment register	200 penalty units (\$20 000)
127(2)	Resident letting agent failing to enter prescribed particulars in employment register	200 penalty units (\$20 000)
127(3)	Resident letting agent failing to update employment register	200 penalty units (\$20 000)
129(1)	Acting as resident letting agent without authority	200 penalty units (\$20 000) or two years' imprisonment
130(1)	Acting as resident letting agent for more than one party to a transaction	200 penalty units (\$20 000)
131	Failing to produce licence	100 penalty units (\$10 000)
140(1)	Disclosing confidential criminal history	100 penalty units (\$10 000)
153(2)	Failing to return registration certificate for amendment of conditions	100 penalty units (\$10 000)
155(5)	Failing to return registration certificate upon suspension	100 penalty units (\$10 000)
156(2)	Failing to return cancelled registration certificate	100 penalty units (\$10 000)
161(1)	Property agent salesperson failing to notify of changes in circumstances	100 penalty units (\$10 000)
166(1)	Property developer marketing residential property failing to make required disclosures to prospective buyer	200 penalty units (\$20 000)
167(2)	Seller failing to give buyer copy of valuation before contract	200 penalty units (\$20 000)
169(6)	Failing to give warning statement with proposed relevant contract	200 penalty units (\$20 000)
171(3)	Failing to attach warning statement to relevant contract	200 penalty units (\$20 000)
175(6)	Seller failing to refund deposit paid under relevant contract	200 penalty units (\$20 000)

Clause	Proposed offence	Proposed maximum penalty
176(4)	Seller failing to refund money paid under relevant contract terminated during cooling-off period	200 penalty units (\$20 000)
178(2)	Property developer failing to pay part payment to particular person	200 penalty units (\$20 000) or one year's imprisonment
182(1)	Advertising sale of residential dwelling without including information about sustainability declaration	100 penalty units (\$10 000)
182(2)	Giving document advertising sale of residential dwelling without copy of sustainability declaration	100 penalty units (\$10 000)
183(1)	Generally opening residential dwelling for inspection without copy of sustainability declaration	100 penalty units (\$10 000)
183(2)	Otherwise opening residential dwelling for inspection without copy of sustainability declaration	100 penalty units (\$10 000)
184	Failing to give copy of sustainability declaration	100 penalty units (\$10 000)
189(1)	Failing to open and maintain trust account	200 penalty units (\$20 000) or two years' imprisonment
209(3)	Failing to answer particular questions during public examination	500 penalty units (\$50 000)
210(5)	Contravening an order of QCAT prohibiting a marketeer from engaging in conduct	540 penalty units (\$54 000)
212(6)	Otherwise contravening an order of QCAT	540 penalty units (\$54 000)
227(6)	Failing to comply with court order for preservation of assets	540 penalty units (\$54 000)
232(2)	Wrongfully converting amount or falsely accounting for money	1000 penalty units (\$100 000) or five years' imprisonment
232(4)	Falsely representing receipt of money	540 penalty units (\$54 000)
233	Misleading conduct	Civil penalty up to limit of District Court's civil jurisdiction
234	Unconscionable conduct	Civil penalty up to limit of District Court's civil jurisdiction
235	False representations and other misleading conduct relating to residential property	Civil penalty up to limit of District Court's civil jurisdiction
237(1)	Offensive conduct relating to residential property	540 penalty units (\$54 000)
238(1)	Falsely representing anything relating to the letting, exchange or sale of property	540 penalty units (\$54 000)
238(2)	False or misleading representation about value of land etc	540 penalty units (\$54 000)
239(2)	Failing to give written notice regarding reserve price	200 penalty units (\$20 000)
239(3)	Failing to obtain written notice regarding reserve price	200 penalty units (\$20 000)
239(4)	Helping seller decide reserve price	540 penalty units (\$54 000)
240(2)	Disclosing reserve price to bidder	540 penalty units (\$54 000)

Clause	Proposed offence	Proposed maximum penalty
241(2)	Unauthorised representation of price of property	540 penalty units (\$54 000)
242(2)	Disclosing reserve price to potential buyer	540 penalty units (\$54 000)
242(3)	Disclosing reserve price to potential buyer contrary to instructions	540 penalty units (\$54 000)
243(4)	Failing to comply with notice for substantiation of representations made by licensees or property agent salespersons	100 penalty units (\$10 000)
244(4)	Failing to comply with notice for substantiation of representations made by marketeers	540 penalty units (\$54 000)
245(1)	Charging fee for providing documents	200 penalty units (\$20 000) or one year's imprisonment
246(1)	Asking for, or receiving, excess or improper remuneration	200 penalty units (\$20 000) or one year's imprisonment
247(1)	Lending or hiring licence	200 penalty units (\$20 000) or two years' imprisonment
247(2)	Borrowing, hiring or buying licence	200 penalty units (\$20 000) or two years' imprisonment
248	Making false or misleading statement	200 penalty units (\$20 000) or two years' imprisonment
249(1)	Providing official with false or misleading information	200 penalty units (\$20 000) or two years' imprisonment
249(3)	Making false or misleading entry in document	200 penalty units (\$20 000) or two years' imprisonment
250(1)	Supplying particulars of residency	200 penalty units (\$20 000) or one year's imprisonment
250(3)	Unauthorised and unsolicited invitation to property information session	200 penalty units (\$20 000) or two years' imprisonment
255(2)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual

14. In respect of the proposed offences in the table above, the committee notes that:
- a large number of detailed offence provisions would enforce the regulation of the activities of property agents;
 - a large number of offence provisions would have elements of the offence prescribed by regulation (see, below, under 'Delegation of legislative power');
 - some of the offence provisions appear similar in acts or omissions, such as clauses 61(3) and 65(2); and
 - when proposed maximum penalties are compared, offences with the same maximum monetary penalties may have quite different maximum terms of imprisonment.
15. **Clause 253** would govern proceedings for offences under the legislation and may affect rights and liberties of individuals. It would:
- impose time limits for the commencement of proceedings; and
 - regulate proceedings for offences under the legislation.

16. Clause 253(1) states that, other than proceedings for indictable offences to be dealt with on indictment, proceedings for offences under the legislation must be taken in a summary way within the later of:
- one year from the date of commission of the offence; and
 - six months after the commission of the offence comes to the complainant's knowledge but within two years after the commission of the offence.
17. Clause 253(2) would allow the prosecution to elect for an indictable offence to be heard summarily or on indictment.
18. **Clauses 254-5** may impose liability for the acts or omissions of others.
19. Under clause 254(3), an act or omission of a person's representative within the scope of the representative's authority would be taken to be an act or omission of the person, unless by the exercise of reasonable diligence, the person could not have prevented the act or omission. In respect of clause 251, the explanatory notes say (at 11):
- While the clause imposes liability for the actions of others, it is justified on the grounds that it follows the general law of agency in that the principal is liable for the actions of their agent. The clause is also consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees.*
20. Under clause 255, if a corporation committed an offence against the legislation, each of the executive officers would also commit an offence of failing to ensure that the corporation complied with the legislation. The explanatory notes provide lengthy information in respect of clause 255. The information is similar to the information provided for clause 252 of the Motor Dealers and Chattel Auctioneers bill, examined in chapter 10, and is not included again.

Right to privacy

21. **A large number of clauses** may affect rights of individuals to privacy.
22. In Queensland, the *Information Privacy Act 2009*, *Public Records Act 2002* and *Right to Information Act 2009* regulate the fair collection, handling and publication of personal information for public purposes.
23. Proposed provisions which may require dealings with personal information for the purposes of the legislation include clauses 19, 20, 23, 27, 31, 34, 40, 48-9, 51-2, 133-5, 137-8 and 141. These clauses would require dealings with a range of material likely to contain personal information, such as:
- names and addresses of business associates;
 - material regarding the character of a person and of his or her business partners or associates;
 - criminal histories;
 - insolvency information; and
 - information about whether a person would be capable of satisfactorily performing relevant activities.
24. Generally, the explanatory notes do not address the consistency with fundamental legislative principles of the provisions identified above, but provide (at 12-3) the following information about proposed provisions regarding criminal histories:

Clauses 31 and 138 allow the chief executive to obtain criminal history reports. The chief executive is then required to have regard to a criminal history of an individual in deciding their suitability to hold a licence or registration certificate. Obtaining criminal history reports is therefore essential to ensuring a person is suitable under the Bill.

Clause 31 also allows criminal history reports to be obtained for each business partner of the applicant or licensee, and each person with whom the applicant or licensee carries on or intends to carry on business. An argument may be raised that these business associates, being third parties, would not necessarily consent to criminal history checks. However, clause 24 makes it clear the chief executive may make investigations about such persons. Additionally, the application form for a licence requires the applicant to provide details of their business associates. It is therefore submitted that the business associates of the applicant or licensee would give implied consent to criminal history checks, notwithstanding the legislative power in the Bill. The ability to investigate business associates goes towards ensuring the applicant for a licence or licensee is suitable and therefore goes towards protecting consumers.

In order to protect the privacy and confidentiality rights of individuals, clauses 26 and 189 provide for the confidentiality and destruction of criminal history reports. It should also be noted that the Bill does not abrogate the rehabilitation period and the non-disclosure rights provided in the Criminal Law (Rehabilitation of Offenders)

Act 1986. In relation to personal information generally, the chief executive and public service employees are required to comply with the Information Privacy Act 2009, Public Records Act 2002 and Right to Information Act 2009.

In the Property Agents Bill 2010, consumer protection becomes an even more integral concern, as the Bill seeks to regulate conduct and activities in the buying and selling of property.

Purchasing a property is among the most significant transactions a consumer will enter into in their life. The transaction is complex, incorporating provisions from a number of statutes and there is, consequently, a high risk that consumers who do not regularly participate in real estate transactions will be at a disadvantage in the transactions as a result. Moreover, the agents involved in these transactions are in the business of marketing properties that can be worth millions of dollars and, consequently, are in the business of holding large amounts of money in trust.

For these reasons, it is reasonable for governments to regulate for real estate transactions to an extent that is more extensive and detailed than in other types of transactions and in other industry sectors. This reasoning extends to requiring details about property agents' associates. Under the Bill, applicants must provide the names of their business associates. These are persons with whom the applicant or licensee carries on, or intends carrying on, business under the licence. Given the direct involvement of business associates in a licensee's business, and their ability to influence business behaviour, investigations into the propriety of these people is a necessary step in ensuring the business operates in accordance with the law and limits the risk of consumers being subject to any detriment in their dealings with the business.

25. **Clause 259** would allow the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people.
26. Clause 259(1) would permit publication of public warning statements about:
 - contraventions of a code of conduct and people who commit them;
 - unfair business practices regulated under the legislation and people who engage in them; and
 - offences against the legislation and people who commit them.
27. Clause 259(2) would provide that a statement might identify particular contraventions, business practices, offences and persons.
28. The explanatory notes provide (at 14-5) justification for inconsistency with rights and liberties of individuals:

These public statements may have an adverse affect on individuals. However, before making a statement, the Minister or chief executive must be satisfied that it is in the public interest to do so. Accordingly, the inconsistency with the fundamental legislative principle is justified on the grounds that it is in the public interest to allow the making of warning and information statements for the protection of consumers.

A particular concern may however be raised in relation to public statements about business practices regulated under the Bill that are unfair and naming persons who engage in the unfair practices. This is because unlike making a public statement about disciplinary proceedings or the commission of an offence, determining what constitutes 'unfair business practices' is subjective and has greater potential to adversely affect an individual. Additionally, information about disciplinary proceedings by QCAT and court convictions are already publicly available, whereas information concerning 'unfair business practices' are not. Nevertheless, the Minister or chief executive (noting that this power can not be delegated pursuant to clause 263) will only make a public statement if satisfied it is in the public interest to do so.

It should be noted that this power is common in consumer protection legislation. It is a vital power as public warning statements can protect consumers from committing large amounts of money or entering into transactions in which they would suffer detriment, while information statements play an educative role in informing consumers about particular conduct or behaviour that may place consumers at risk. The power also alerts licensees to non-compliant behaviours. The public exposure of non-compliant licensees also provides a compliance incentive to other licensees wishing to avoid such negative publicity.

It is a reserve power, not able to be delegated, and used only in the rarest of circumstances where it becomes apparent to the Minister or chief executive there is a demonstrable, tangible pattern of conduct or behaviour that may cause widespread detriment to consumers. An example of where its use may be considered is where the Minister or chief executive has strong evidence that consumers may suffer financial detriment and such loss may be considerable if a public warning statement is not issued.

Clause 261 provides that nothing in the Bill affects or limits any civil remedy that a person may have against a licensee or another person for any matter. Accordingly, the Minister and chief executive will not have immunity from legal liability in relation to public statements and this is a matter that is taken into consideration in deciding to issue a statement that identifies a person.

Right to work and work-related rights

29. **Clause 72** may affect rights and liberties of people wishing to work as pastoral agents.

30. Clause 72(1) identifies the activities licensed by a property agent's licence and would include activities undertaken by pastoral house licensees at present.
31. Clauses 267 and 268 would allow for 'transitioned licences' to be issued to people holding pastoral house licences or pastoral house director's licences. However, the explanatory notes state (at 6) that the legislation may affect rights and liberties of people wishing to work in these occupations in the future and provide justification for the proposed legislation:

This Bill may affect the rights and liberties of individuals, namely auctioneers who are currently licensed under the PAMD Act.

The inclusion of the activities currently undertaken by pastoral house licensees in the property agents licence category could be seen to adversely affect the rights of individuals who wish to be licensed to undertake these activities in the future. While existing pastoral house licensees will be transitioned to a property agents licence (with appropriate restrictions where necessary) without the need to undertake further qualifications, new applicants will need to hold qualifications consistent with undertaking all the activities of a property agents licensee. However the current restriction on pastoral house licensees selling and auctioning only rural property will be removed and they will be able to service a wider market.

32. **Parts 2 and 5** may prevent some people from working as property agents.
33. Provisions in these divisions would, for example:
- require a person working as a property agent, resident letting agent or property agent salesperson to be licensed or to have a registration certificate;
 - impose restrictions on people who may be issued with licences or registration certificates, including suitability and eligibility requirements; and
 - allow the chief executive to impose conditions upon, or to suspend or cancel, licences and registration certificates

34. The explanatory notes indicate (at 7-8) consistency with fundamental legislative principles:

The Bill imposes suitability and eligibility criteria for the issue of a licence or registration certificate (Part 2, Divisions 5 and 6 and Part 5, Division 4 and 5). In particular, a person must be at least 18 years of age in order to be eligible to hold a licence or registration certificate. A person who does not meet the suitability and eligibility requirements can not obtain a licence or registration certificate under the Bill. This therefore may adversely affect the rights and liberties of individuals. The imposition of suitability and eligibility criteria however, seeks to ensure only suitable and eligible persons are licensed or registered. This goes toward fulfilling the consumer protection object of the Bill.

35. Further, the committee notes that the proposed provisions may affect the rights and liberties of people who are currently licensed to work as auctioneers, as outlined in the explanatory notes (at 9):

The Bill may affect the rights and liberties of individuals, namely auctioneers who are currently licensed under the PAMD Act. Under the PAMD Act, auctioneers and pastoral houses may auction both real property and chattels. However, the auctioning of real property will be provided for in the Property Agents Bill while the auctioning of chattels is provided for in this Bill. This will impose additional costs (in terms of licensing fees) for individuals who wish to auction both real property and chattels as they will need to obtain two licences or registration certificates. This situation is unavoidable due to the splitting of the auctioneering functions and the Government's position to continue to regulate auctioneers in the interests of consumer protection.

Rights of children, teenagers and young people

36. **Clauses 35-6 and 142** would make people aged under 18 ineligible for a licence or registration.
37. The clauses would provide that a person would be eligible to obtain a licence only if he or she was 'at least 18 years'. Accordingly, the proposed provisions would override section 7(f) of the *Anti-Discrimination Act 1991* which prohibits discrimination on the basis of age.
38. The explanatory notes include (at 7) the following justification for the effect upon rights and liberties of people below the age of 18:

The Bill provides that an individual must be at least 18 years to be eligible to obtain a property agent licence (clause 35) or a resident letting agent licence (clause 36), or registration as a property agent salesperson (clause 142). This age discrimination is justified on the grounds that consumers expect to deal with licensees and registered employees that have the necessary maturity, judgement and capacity given the pecuniary nature of the transactions involved in the purchase, sale, exchange and letting of property. Accordingly, it is for the protection of consumers that individuals are at least 18 years to be eligible to obtain a licence or registration certificate.

Administrative power

39. 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.
40. **Clauses 27, 40, 44, 49, 52, 57, 60, 64, 137, 143-4, 146, 149, 152 and 155** may make rights to licences and registration dependent on administrative power which may be insufficiently defined.
41. The relevant parts of the legislation are discussed above under the heading, 'Rights and liberties'. In relation to administrative power, it is noted that the proposed provisions would confer the chief executive with significant administrative powers regarding licences and registration certificates, including to:
- examine a person's suitability and eligibility;
 - investigate and decide a person's suitability, including by examining the character and criminal history of the person and his or her business associates;
 - issue or refuse to issue a licence or registration certificate;
 - issue on conditions considered necessary or desirable for the proper performance of authorised activities;
 - renew or refuse to renew;
 - restore or refuse to restore;
 - appoint or refuse to appoint a substitute licensee/registrant;
 - amend conditions; and
 - immediately suspend or cancel.
42. The explanatory notes state (at 7-8) that the administrative powers are appropriately defined and subject to appropriate review:
- The Bill imposes suitability and eligibility criteria for the issue of a licence or registration certificate (Part 2, Divisions 5 and 6 and Part 5, Division 4 and 5)... The imposition of suitability and -eligibility criteria however, seeks to ensure only suitable and eligible persons are licensed or registered. This goes toward fulfilling the consumer protection object of the Bill. Additionally, the administrative powers of the chief executive to consider applications for licences and registration certificates are sufficiently defined and reviewable by QCAT.*
- The Bill also allows the chief executive to place conditions on licences and registration certificates (clauses 44 and 144), and to suspend licences and registration certificates (clauses 64 and 155). While this may adversely affect the rights and liberties of individuals, the imposition of conditions and suspension of licences and registration certificates go toward protecting consumers. Additionally, the administrative powers of the chief executive are sufficiently defined and are reviewable by QCAT.*
43. In respect of the power to impose conditions on licences, the explanatory notes state (at 7):
- This Bill may affect the rights and liberties of individuals by providing the chief executive the discretion to issue a licence with conditions and limitations on the activities a licensee may perform.*
- This may be viewed as a breach of fundamental legislative principles if a regulation with criteria explaining the reasons for a limited licence is not included. The administrative power to grant a limited licence is justified through the convenience it allows the licensee, in addition to maintaining a high standard of consumer protection. If a licensee only wishes to undertake certain activities prescribed under a regulation, they may be excused from undertaking particular educational requirements necessary to attain a full licence.*
44. **Clause 201 and schedule 1** may make rights and liberties subject to administrative power which is not subject to appropriate review.
45. Clause 65 would provide for the immediate cancellation of a licence if an individual licensee was:
- convicted of a serious offence; or
 - an insolvent under administration.
46. Under clause 156, a registration certification of a property agent salesperson would be cancelled immediately if the employee were convicted of a serious offence.
47. Clause 201 states that a person dissatisfied with a decision of the chief executive made under a provision mentioned in schedule 1 may apply to the Queensland Civil and Administrative Tribunal to have the decision reviewed. However, as schedule 1 does not include clauses 65 or 156, no right of external administrative review would be provided by the legislation in respect of these decisions.

Accordingly, the legislation may be inconsistent with section 4(3)(a) of the *Legislative Standards Act*. However, the explanatory notes do not specifically address this issue.

Natural justice

48. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.
49. **Clauses 60 and 152** may be inconsistent with principles of natural justice.
50. The principles of natural justice require that a person be given a fair hearing and an opportunity to present his or her case, that a decision be made by an unbiased and disinterested decision-maker and be based on logically probative evidence. At common law, a person denied 'procedural fairness' may seek review of an administrative decision affecting his or her rights.
51. Clause 60 would allow the chief executive to amend licence conditions, including on his or her own initiative. In the latter case, the chief executive must give the applicant an information notice about the decision (clause 60(4)). However, under clause 60(5), the chief executive need not issue an information notice if it is decided the licence must be amended urgently to avoid potential claims against the fund or to ensure compliance with the legislation. Clause 152, relating to registration certificates, is in similar terms. While the explanatory notes do not address the consistency of either provision with section 4(3)(b) of the *Legislative Standards Act*, the committee notes that clauses 60(5) and 152(5) may identify justification for any inconsistency with principles of natural justice.
52. **Clauses 64-5 and 155-6** would allow the chief executive to suspend or cancel, with immediate effect, licences or registration certificates.
53. The explanatory notes acknowledge (at 8) that these provisions may be inconsistent with principles of natural justice but provide justification:

This provision replicates Chapter 2, Part 10 and Chapter 3, Part 10 of the PAMD Act, which grants the chief executive with the power to immediately suspend a person without giving them the opportunity to make representations. The exercise of this administrative power could be viewed as inconsistent with the fundamental legislative principle of having sufficient regard to the rights and liberties of individuals. Immediate suspension does not allow a person to contest the issue before the action is taken, therefore it denies the suspended person natural justice.

While the rights of an individual to contest an issue are important, immediate suspension of a licence or registration certificate is justified in cases of serious misconduct where it is of principal importance to uphold consumer protection and licensing standards. Immediate suspension applies if the chief executive reasonably considers that a licence or registration certificate was obtained because of incorrect or misleading information, or if the licence holder has contravened the Property Agents Bill or the Administration Bill. Consumer protection must not be jeopardized and immediate suspension of a licence or registration certificate serves as an effective and necessary method to enforce the principles established in the Property Agents Bill.

54. **Clause 212** may be inconsistent with principles of natural justice, allowing the Queensland Civil and Administrative Tribunal to make an order without notice to a person.
55. It would allow the Queensland Civil and Administrative Tribunal to make an order to stop a contravention of the legislation without notice to the person who was doing or about to do a prohibited act. The explanatory notes state (at 10):

The Bill replicates section 528C of the PAMD Act which allows QCAT, on the application of the chief executive, to prohibit a marketeer from engaging in conduct that is or is likely to be a contravention of clauses 234, 235 or 236 (misleading or unconscionable conduct by a marketeer). QCAT may make the order without providing notice to the marketeer but, in that case, must allow the marketeer a reasonable opportunity to show cause why the order should not be confirmed...[Inconsistency with fundamental legislative principles] is justified because of the serious nature of a marketeer engaging in misleading or unconscionable conduct or making false representations. These are instances in which a purchaser can stand to suffer losses of hundreds of thousands of dollars. If a marketeer misleads consumers, provisions must be enforced to provide consumer protection by stopping any conduct that contravenes this Bill. Therefore, it is justifiable that the onus of proof falls upon the marketeer to provide evidence and dispute any orders made by QCAT.

Onus of proof

56. 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.

57. 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.
58. **Clauses 169, 213, 230, 235, 238, 246, 254-5, 258** may impose evidentiary burdens on defendants to proceedings under the legislation. These provisions are examined in turn below.
59. First, clause 169 would apply when a proposed relevant contract was given to a proposed buyer by a seller, for signature (clause 169(1)). It would require a seller or seller's agent to give a warning statement (and direct the buyer's attention to the warning statement) and, if the property was a unit, an information sheet would need to be attached to the proposed relevant contract (clause 169(2)). A failure to do so would create liability to an offence, but under clause 169(7), it would be a defence for the seller or agent to prove that notice was given to the proposed buyer.
60. Second, clause 235(1) would provide that, in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of residential property in Queensland, a marketeer must not represent in any way to someone else anything that was false or misleading. Under clause 235(5), the onus of establishing that a person had reasonable grounds for making a representation would be on the person.
61. Clause 238(1) would provide that a licensee or property agent salesperson would commit an offence (maximum penalty, 540 penalty units) if he or she represented in any way to someone else anything that was false or misleading in relation to the letting, exchange or sale of property. Again, clause 238(5) would state that the onus of establishing that a person had reasonable grounds for making a representation would be on the person.
62. The explanatory notes provide justification for reversal of the onus (apparently in these provisions, although reference is made to replication of section 574 of the *Property Agents and Motor Dealers Act*, not to specific clauses), stating that:
- The Bill replicates section 574 of the PAMD Act, which prohibits a person from making false or misleading representations about property, and places the onus of proving that the person who made the representation had reasonable grounds to do so, on that person. The reversal of the onus of proof is justified on the basis that knowledge about the reasonableness or otherwise of the representation is information which is peculiarly within the knowledge of the person who made the representation, and would otherwise be difficult to establish.*
63. Third, clause 246(1) would provide that it would be an offence for a licensee to ask for, or receive, a commission or reward for the transaction greater than the amount allowed under a regulation.
64. Clause 246(2) states that if, in a proceeding, an amount was alleged to be payable to the licensee for recouping expenditure lawfully incurred by the licensee in connection with the transaction, the licensee must establish to the court's satisfaction, on the balance of probabilities, that the expenditure was lawfully incurred. Regarding clause 246(2), the explanatory notes state (at 9):
- The Bill replicates section 579 of the PAMD Act, which makes it an offence for a licensee to ask for or receive a commission or reward greater than the maximum amount prescribed under a regulation. A licensee will not commit an offence if the licensee establishes to the court's satisfaction, on the balance of probabilities, that the expenditure was lawfully incurred. The reversal of the onus of proof is justified on the basis that the information relating to the relevant expenditure would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.*
65. Fourth, for proceedings for an offence against the legislation, clause 254 would provide that an act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority was taken to have been done or omitted to be done also by the person, unless the person proved he or she could not, by the exercise of reasonable diligence, have prevented the act or omission. Justification for the reversal of the onus is provided (at 9):
- The Bill replicates section 590 of the PAMD Act which provides that an act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by the person, unless the person proves the person could not, by the exercise of reasonable diligence, have prevented the act or omission. The reversal of the onus of proof is justified on the grounds that the information relating to the exercise of reasonable diligence would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.*
66. Fifth, clause 255(1) would require the executive officers of a corporation to ensure that the corporation complied with the legislation and, if a corporation committed an offence, each of the executive officers of the corporation would commit the offence of failing to ensure that the corporation complied with the provision (clause 255(2)).

67. It would be a defence for an executive officer to prove he or she:

- took all reasonable steps to ensure compliance; or
- was not in a position to influence the relevant conduct of the corporation.

68. Again, the explanatory notes provide justification regarding the provision (at 10):

The Bill replicates section 591 of the PAMD Act which provides that if a corporation commits an offence against a provision of the Bill, each of the chief executive officers of the corporation also commit an offence, namely, the offence of failing to ensure that the corporation complies with the provision. It is a defence for an executive officer to prove that the officer took all reasonable steps to ensure the corporation complied with the provision, or that the officer was not in a position to influence the conduct of the corporation in relation to the offence. The reversal of the onus of proof is justified because the provisions that a corporation could contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation be accountable. Additionally, the information relating to the executive officer's influence on the conduct of the corporation in relation to the offence would be peculiarly within the knowledge of that person.

69. Sixth, clause 213 states the orders that might be made by QCAT in a marketeer proceeding. If QCAT ordered a corporation to pay an amount and the corporation did not have enough financial resources to pay, under clause 213(5), the executive officers of the corporation would be jointly and severally liable to pay any amount not paid by the corporation. Clause 213(6) would provide that it would be a defence to liability for an executive officer to prove that, for the conduct in question, the officer:

- took all reasonable steps to ensure the corporation did not contravene the legislation; or
- was not in a position to influence the conduct of the corporation.

70. Clause 230 would make similar provision in respect of an order of the District Court requiring payment to the State of a money penalty up to the limit of the court's monetary jurisdiction.

71. In respect of clauses 213 and 230, the explanatory notes state (at 10):

The Bill replicates section 528C of the PAMD Act which allows QCAT, on the application of the chief executive, to prohibit a marketeer from engaging in conduct that is or is likely to be a contravention of clauses 234, 235 or 236 (misleading or unconscionable conduct by a marketeer). QCAT may make the order without providing notice to the marketeer but, in that case, must allow the marketeer a reasonable opportunity to show cause why the order should not be confirmed. This constitutes a reversal of the onus of proof. In this case, the reversal is justified because of the serious nature of a marketeer engaging in misleading or unconscionable conduct or making false representations. These are instances in which a purchaser can stand to suffer losses of hundreds of thousands of dollars. If a marketeer misleads consumers, provisions must be enforced to provide consumer protection by stopping any conduct that contravenes this Bill. Therefore, it is justifiable that the onus of proof falls upon the marketeer to provide evidence and dispute any orders made by QCAT.

72. Finally, clause 258 would provide that, in a proceeding for an offence involving a false or misleading statement, representation or entry, or false or misleading information, it would be enough for a charge to state that the statement, representation, entry or information was 'false or misleading'. For this provision, justification is provided also (at 10-1):

The Bill replicates section 588 of the PAMD Act which reverses the onus of proof, providing that a licensee must disprove the validity of entries in the licensee's documents. The onus of proof is on the licensee, if a licensee disputes an entry in a document belonging to the licensee or found on the licensee's premises. It is reasonable to expect that a licensee would be responsible for entries in documents belonging to a licensee or found in the licensee's premises. Therefore a reverse of the onus of proof is justified.

Protection against self-incrimination

73. 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.

74. **Clause 209** would abrogate common law and statutory protections of the privilege against self-incrimination.

75. Clause 207 would allow the Queensland Civil and Administrative Tribunal to conduct a public examination of the conduct of a marketeer to consider whether the legislation had been contravened.

76. Clause 209(2) would provide that, where a person being examined at a public examination refused to answer any question and QCAT required the person to answer the question, the Tribunal must provide advice that:
- if the answer might incriminate the person, the person might claim, before giving the answer, that giving the answer might incriminate him or her; and
 - the effect that making such a claim would have on the admissibility of the answer in any proceeding against the person.
77. However, under clause 209(3), the person must answer the question, unless he or she had a reasonable excuse. Failure to do answer would raise liability to an offence with maximum penalty of 500 penalty units (\$50 000). The fact that answering the question might tend to incriminate the person would not be a reasonable excuse (clause 209(4)).
78. Clause 209(5) would provide that the answer would not be admissible in any criminal or civil proceeding against the person, other than:
- the public examination of a person;
 - a proceeding to review a reviewable decision;
 - an appeal against QCAT's decision to require the answer; or
 - a perjury proceeding.
79. The explanatory notes state (at 8-9) that the legislation provides appropriate protection against self-incrimination:
- The Bill replicates section 528BA of the PAMD Act, which abrogates the privilege against self incrimination. Abrogating this privilege may be viewed as inconsistent with the fundamental legislative principle of having sufficient regard to the rights and liberties of individuals.*
- This provision is justified, as the questions posed are particularly in the knowledge of the persons to whom they are directed and it would be difficult to establish by any alternative evidential means. Further the clause limits the use of the information, so that the answer is not admissible in criminal prosecutions.*

Sufficient regard to the institution of Parliament

Delegation of legislative power

80. 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.
81. **A number of clauses** may allow the delegation of legislative power in inappropriate cases.
82. The clauses (67, 71, 101 and 126) would delegate legislative power to prescribe specified matters for offences.
83. In relation to whether the legislation has sufficient regard to the institution of Parliament, generally, the explanatory notes state (at 15):
- The Bill replicates the relevant heads of regulatory power under the PAMD Act. The matters to be prescribed under regulation are those matters usually prescribed under regulations, i.e. fees, qualification requirements and minor offences. As these are mostly administrative matters that can be subject to changes over time, it is appropriate that they are provided for in a regulation, rather than primary legislation.*
84. However, the explanatory notes do not provide specific information regarding the appropriateness of the delegation of legislative power in these proposed provisions.
85. **Clause 265**, the general regulation-making power, would not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.
86. Clause 265(2)(a) would delegate power to make subordinate legislation regarding specified 'fees, including the refunding of fees payable under this Act'.
87. A similar regulation-making power in the Commercial Agents Bill regarding fees was examined in chapter 4. As in that chapter, the committee notes that, as drafted, the delegated power is not confined to recovery of costs related to the cost of administering the licensing system.

Amendment of Act other than by another Act

88. Section 4(4)(c) of the *Legislative Standards Act* states that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.
89. **Clause 291** may authorise amendment of the Act by regulation.
90. Clause 291(1) would delegate legislative power to make transitional regulations to provide for matters of a saving or transitional nature:
- to allow or facilitate the continuation of the enforcement provisions of the repealed Act under section 292; and
 - for which the bill did not make provision or sufficient provision.
91. Clause 291(2) would authorise the delegated power to be exercised to provide a transitional regulation with retrospective operation to a day not earlier than commencement. However, a transitional regulation must state that it is a transitional regulation (clause 291(3)) and would expire one year after commencement (clause 291(4)).
92. 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;
 - transitional arrangements; and
 - the application of national schemes of legislation.
93. 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.
94. Accordingly, clause 291 would fall within the third of the acceptable categories. Further, the explanatory notes provide (at 15) information indicating an appropriate delegation of legislative power:
- Clause 291 of the Bill provides a transitional regulatory making power. The transitional-regulation power can affect the provisions of the Bill. While this transitional-regulation making power may be regarded as a Henry VIII clause it is necessary to obviate difficulties in the operation of a crucial transitional arrangement. Further, the power is not framed more widely than is necessary and is a sunset clause.*
- The regulation will comply with the requirements of section 4(5) of the Legislative Standards Act 1992.*

OPERATION OF CERTAIN STATUTORY PROVISIONS**Explanatory notes**

95. 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)).
96. Explanatory notes were tabled at the first reading of the bill. They are clear and precise and contain the information required by section 23.

PART 2 – SUBORDINATE LEGISLATION EXAMINED**SUBORDINATE LEGISLATION TABLED: 26 OCTOBER TO 23 NOVEMBER 2010**

(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
276	Food Amendment Regulation (No.1) 2010	EI	8/10/2010	23/03/2011	26/10/2010	24/03/2011
277	Local Government Legislation Amendment Regulation (No.2) 2010		8/10/2010	23/03/2011	26/10/2010	24/03/2011
278	Urban Land Development Authority Amendment Regulation (No.4) 2010		8/10/2010	23/03/2011	26/10/2010	24/03/2011
279	Sustainable Planning Amendment Regulation (No.4) 2010		8/10/2010	23/03/2011	26/10/2010	24/03/2011
280	Gambling and Other Legislation Amendment (Postponement) Regulation 2010	EI	8/10/2010	23/03/2011	26/10/2010	24/03/2011
281	Land Sales Amendment Regulation (No.3) 2010	EI	8/10/2010	23/03/2011	26/10/2010	24/03/2011
282	Justice Legislation (Costs and Fees) Amendment Regulation (No.1) 2010		8/10/2010	23/03/2011	26/10/2010	24/03/2011
283	Industrial Relations (Mandatory Code of Practice for Outworkers) Notice 2010		8/10/2010	23/03/2011	26/10/2010	24/03/2011
284	Plant Protection (Myrtle Rust) Notice 2010		6/10/2010	23/03/2011	26/10/2010	24/03/2011
285	Land Amendment Regulation (No.1) 2010		8/10/2010	23/03/2011	26/10/2010	24/03/2011
286	Hospitals Foundations Amendment Regulation (No.1) 2010	EI	15/10/2010	23/03/2011	26/10/2010	24/03/2011
287	Weapons Amendment Regulation (No.1) 2010		15/10/2010	23/03/2011	26/10/2010	24/03/2011
288	Food Production (Safety) Amendment Regulation (No.1) 2010		15/10/2010	23/03/2011	26/10/2010	24/03/2011
289	Building Amendment Regulation (No.4) 2010	RIS, EN	15/10/2010	23/03/2011	26/10/2010	24/03/2011
290	Liquor Amendment Regulation (No.2) 2010	EN,EI	15/10/2010	23/03/2011	26/10/2010	24/03/2011
291	Commission for Children and Young People and Child Guardian Amendment Regulation (No.2) 2010		15/10/2010	23/03/2011	26/10/2010	24/03/2011
292	Nature Conservation (Protected Areas Management) Amendment Regulation (No.2) 2010		15/10/2010	23/03/2011	26/10/2010	24/03/2011
293	Proclamation commencing certain provisions		22/10/2010	23/03/2011	26/10/2010	24/03/2011
294	Urban Land Development Authority Amendment Regulation (No.5) 2010		22/10/2010	23/03/2011	26/10/2010	24/03/2011
295	Transport Legislation Amendment Regulation (No.3) 2010		22/10/2010	23/03/2011	26/10/2010	24/03/2011
296	Proclamation commencing certain provisions		29/10/2010	6/04/2011	23/11/2010	7/04/2011

297	Petroleum and Gas (Production and Safety) Amendment Regulation (No.4) 2010	EI	29/10/2010	6/04/2011	23/11/2010	7/04/2011
298	Greenhouse Gas Storage Amendment Regulation (No.1) 2010	EI	29/10/2010	6/04/2011	23/11/2010	7/04/2011
299	Proclamation commencing remaining provisions		29/10/2010	6/04/2011	23/11/2010	7/04/2011
300	State Development and Public Works Organisation (State Development Areas) Amendment Regulation (No.1) 2010		29/10/2010	6/04/2011	23/11/2010	7/04/2011
301	Proclamation commencing certain provisions		29/10/2010	6/04/2011	23/11/2010	7/04/2011
302	Drug Court Amendment Regulation (No.1) 2010		29/10/2010	6/04/2011	23/11/2010	7/04/2011
303	Proclamation commencing remaining provisions		29/10/2010	6/04/2011	23/11/2010	7/04/2011
304	Proclamation commencing remaining provisions		29/10/2010	6/04/2011	23/11/2010	7/04/2011
305	Proclamation commencing remaining provisions		29/10/2010	6/04/2011	23/11/2010	7/04/2011
306	Water Resource (Baffle Creek Basin) Plan 2010	EN	5/11/2010	6/04/2011	23/11/2010	7/04/2011
307	Proclamation commencing certain provisions		5/11/2010	6/04/2011	23/11/2010	7/04/2011
308	Proclamation commencing remaining provisions		5/11/2010	6/04/2011	23/11/2010	7/04/2011
309	Building Amendment Regulation (No.5) 2010	RIS, EN	5/11/2010	6/04/2011	23/11/2010	7/04/2011
310	Superannuation (State Public Sector) Amendment Notice (No.4) 2010	EI	12/11/2010	6/04/2011	23/11/2010	7/04/2011
311	Health Services Amendment Regulation (No.2) 2010		19/11/2010	6/04/2011	23/11/2010	7/04/2011
312	Superannuation (State Public Sector) Amendment Regulation (No.1) 2010	EI	19/11/2010	6/04/2011	23/11/2010	7/04/2011
313	Greenhouse Gas Storage Amendment Regulation (No.2) 2010	EI	19/11/2010	6/04/2011	23/11/2010	7/04/2011
314	Proclamation commencing certain provisions		19/11/2010	6/04/2011	23/11/2010	7/04/2011
315	Forestry and Nature Conservation Legislation Amendment Regulation (No.3) 2010		19/11/2010	6/04/2011	23/11/2010	7/04/2011
316	Superannuation (State Public Sector) Amendment Notice (No.5) 2010	EI	19/11/2010	6/04/2011	23/11/2010	7/04/2011

* 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

1. In *Legislation Alert* 14/10, the committee reported on its examination of the:
 - Urban Land Development Authority Amendment Regulation (No.4) 2010 SL 278; and
 - Urban Land Development Authority Amendment Regulation (No.5) 2010 SL 294.
2. A response received from the minister regarding the subordinate legislation is included in this *Legislation Alert* at chapters 16-7 (at 94).

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS**13. LIQUOR AND OTHER LEGISLATION AMENDMENT BILL 2010**

Date introduced:	28 October 2010
Responsible minister:	Hon PJ Lawlor MP
Portfolio responsibility:	Minister for Tourism and Fair Trading
Date passed:	23 November 2010
Committee report on bill:	14/10; at 1 - 4
Date response received:	6 January 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:
 - **clause 47** which may affect rights and liberties of individuals to freedom of movement, residence and association;
 - **clauses 21 and 27** which may affect work-related rights; and
 - **clause 26** which does not provide statutory rights of appeal.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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



Hon Peter Lawlor MP
Member for Southport

Ref: MN118933, OGR-03483

24 DEC 2010

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

Dear Ms Miller

Jo-Ann

Thank you for your letter of 22 November 2010 concerning the Liquor and Other Legislation Amendment Bill 2010.

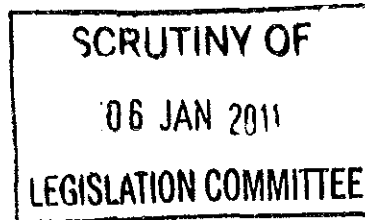
In response, I refer you to my comments contained in the enclosed document to this letter.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor MP
Minister for Tourism and Fair Trading

Encl.



B54.10



**Queensland
Government**

Minister for Tourism and Fair Trading

**RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 14 of 2010**

Liquor and Other Legislation Amendment Bill 2010

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

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

- **Clause 47** which may affect rights and liberties of individuals to freedom of movement, residence and association;
- **Clauses 21 and 27** which may affect work-related rights; and
- **Clause 26** which does not provide statutory rights of appeal.

Clause 47

The committee states that clause 47 (in so far that it inserts new part 6C into the Liquor Act, to provide for the making of civil banning orders to minimise harm associated with alcohol-related issues) of the Bill may affect rights and liberties of individuals to freedom of movement, residence and association.

Response:

I refer you to my comments in Parliament on 23 November 2010 during the summing up speech for the Bill, when I stated, in regard to civil banning orders, that any consideration of impacts on rights and liberties on individuals must be balanced against the public policy objective of regulation compatible with minimising harm and the potential for harm from alcohol abuse and misuse and associated violence, as well as minimising adverse effects on the health and safety of members of the public. In addition, the civil and criminal court-based banning schemes in the Bill contain the inherent safeguards associated with a judicial process, for example, consistency with natural justice principles, a right of hearing and an appropriate avenue of appeal.

It is intended the civil banning regime will be examined at the end of six months of implementation to ensure that the regime is achieving the desired effect while minimising the impact on the rights and liberties of persons.

Clauses 21 and 27

The committee comments that clauses 21 and 27, extending the moratorium on extended trading hours applications and further restricting trading hours for bottle shops, may affect work-related rights.

Response:

I refer you to my comments in Parliament on 23 November 2010 during the summing up speech for the Bill, when I stated that the extension of the extended trading hours application moratorium until December 2013 in the Bill means suburban clubs and hotels will not be able to sell liquor beyond their already approved post midnight extended liquor trading hours for at least another three years. This reminds licensees that approvals for extended liquor trading hours are a privilege and not a right.

The sale of liquor is highly regulated on the grounds of public interest and the proposed extension of the moratorium is intended to allow for the implementation and evaluation of the Government's place based management approach to alcohol-related violence through the piloting of drink safe precincts. The moratorium has been in place since September 2009, so the extension maintains the current regime already imposed by Parliament.

Whilst the amendments to restrict ordinary trading hours of bottle shops and other take-away liquor outlets may affect existing rights to carry on a business selling liquor, it again needs to be noted that the sale of liquor is highly regulated on the grounds of public interest and the proposed new restrictions are only minor changes to the regulatory environment.

It should also be noted that these changes will not impact on existing licensees' current approved bottleshop trading hours. The amendments will not impact on the current actual hours of existing bottle shops and other take-away liquor outlets, but rather will only affect new applications relating to take-away liquor and transfers of licences. Further, applications can be made for take-away liquor trading hours outside the new ordinary hours of 10am to 10pm for new applicants and transferees, provided community need can be demonstrated.

The amendments to restrict bottle shop and other take-away liquor outlets trading hours are in response to a recommendation by the Parliamentary Law, Justice and Safety Committee's final report into alcohol-related violence.

Clause 26

The committee comments that clause 26 would insert new section 58A in the Liquor Act, to provide for standard licence conditions to be prescribed in a regulation. It may make rights and liberties, or obligations, dependent on administrative power which is not subject to appropriate external review, since this amendment does not provide for statutory rights of appeal.

Response:

I refer you to my comments in Parliament on 23 November 2010 during the summing up speech for the Bill, when I stated that prescribed standard conditions are intended to apply to certain licence types, licences generally or on licences within drink safe precincts. For example, a standard condition could require licensees in a particular drink safe precinct to adopt a particular safety initiative.

In this regard, the amendment allows for a more efficient method of regulating licensees, with particular conditions that are relevant to multiple licences being able to be applied in a standard manner rather than individually applied to each licence. The power of the chief executive and the Queensland Liquor and Gaming Commission to impose conditions on individual licences remains and is appealable to Queensland Civil and Administrative Tribunal.

14. POLICE LEGISLATION AMENDMENT BILL 2010

Date introduced:	5 October 2010
Responsible minister:	Hon NS Roberts MP
Portfolio responsibility:	Minister for Police, Corrective Services and Emergency Services
Date passed:	26 October 2010
Committee report on bill:	13/10; at 21 - 27
Date response received:	25 November 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clause 6** enabling the electronic assessment of criminal history records for police service employment screening purposes;
 - **clause 25** allowing the minister to request the extended criminal history of an applicant for appointment as a member of the Prostitution Licensing Authority or executive director;
 - **clause 13** providing for the automatic suspension and cancellation of a brothel licence or approved manager's certificate following the non-payment of annual fees and which may affect work-related rights;
 - **clause 3** enabling the State-wide rollout of ticketing for public nuisance, public urination, and similar offences;
 - **clauses 16 and 20** providing that, for cancellation and disciplinary inquiries, the Prostitution Licensing Authority would not be bound by the rules of evidence;
 - **clauses 8, 16, 20, 25, 29, 31 and 35** amending existing offence provisions and creating new ones;
 - **clauses 16 and 20** which appear to provide appropriate protection against self-incrimination; and
 - **clause 25** which may not be drafted in a sufficiently clear and precise way.
2. The committee invites the minister to provide information regarding the procedures in place to ensure **clause 3** has sufficient regard to rights and liberties of individuals.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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



Honourable Neil Roberts MP
Member for Nudgee

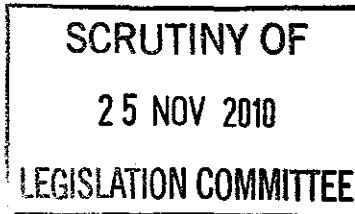


Queensland
Government

Minister for Police, Corrective Services
and Emergency Services

Ref: 11955 P2 TA

24 NOV 2010



B49.10

Mrs Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Level 6, Parliamentary Annexe
Alice Street
BRISBANE QLD 4000

Dear Mrs Miller

Thank you for your letter of 25 October 2010 inviting comment on the Scrutiny of Legislation Committee Alert No. 13 of 2010 in relation to the *Police Legislation Amendment Bill 2010* (the Bill).

I have considered the comments of the Committee in relation to clauses 3, 6, 8, 13, 16, 20, 25, 29, 31 and 35 of the Bill and submit the proposed amendments are necessary to achieve the objectives of the Bill. These issues have been explained in the explanatory notes accompanying the Bill.

However, for your assistance, I provide the following further comments.

In relation to the Committee's specific request for information regarding the procedures in place to ensure clause 3 has sufficient regard to the rights and liberties of individuals, I advise the ability for police statewide to issue infringement notices is in addition to actions currently available to police, including cautions, diversion, move-on-directions, the issue of notices to appear and arrest. Queensland Police Service policy provides that infringement notices for public nuisance and public urination and associated offences are only to be issued to persons who would otherwise be arrested or issued with a notice to appear for the offence. Public nuisance ticketing has the potential to divert persons from entering the criminal justice system and reduces the necessity for these persons to be arrested and taken into police custody for relatively minor offences. The Griffith University's evaluation of the public nuisance ticketing trial found that 46 percent of all persons ticketed during the 12 month trial had no previous criminal history.

Level 24 State Law Building
50 Ann Street Brisbane 4000
PO Box 15195 City East
Queensland 4002 Australia
Telephone +61 7 3239 0199
Facsimile +61 7 3221 9985
Email police@ministerial.qld.gov.au
ABN 65 959 415 158

Furthermore, in implementing the statewide rollout of public nuisance ticketing, the Police Service will focus on the use of existing policies to mitigate any unintended negative impact on vulnerable persons, including referral of persons to available support agencies and de-escalation of police action in appropriate circumstances. When issuing an infringement notice, police officers will be required to provide an information sheet. This information sheet, which will include details of relevant support agencies and services, will provide an opportunity for disadvantaged people to access support, such as information about obtaining legal advice. The Police Service is also engaged in a number of programs aimed at addressing underlying causes of offending behaviour. The potential impact on disadvantaged groups is recognised and significant effort is being applied to engage with support agencies.

Additionally, the statewide rollout of public nuisance ticketing will be evaluated by way of an Operational Performance Review (OPR) themed on Public Order Offending, to be undertaken by the Police Service 12 months after the statewide rollout of public nuisance ticketing. The OPR will seek involvement of relevant government and community agencies. The statewide rollout of public nuisance ticketing achieves an appropriate balance between the rights and liberties of individuals and public order enforcement.

The Committee has also raised whether clause 25, new section 10AB is drafted in a clear and precise way. Clause 25 inserts new sections 108AA to 108AE; it is noted the section in question is, in fact, new section 108AB.

New section 108AB, subsections (6) and (7) are drafted in line with current drafting practices. This is reflective of other similar legislation, including section 184(6) and (7) of the *Queensland Civil and Administrative Tribunal Act 2009*, section 155(2) of the *Public Service Act 2008*, section 357S of the *Commission for Children and Young People and Child Guardian Act 2000* and section 5AA.12(1) of the *Police Service Administration Act 1990*. I therefore consider that section 108AB is drafted in a sufficiently clear and concise way.

I acknowledge with thanks the Committee's comments that the explanatory notes were drafted in clear and precise language and conform with section 23 of the *Legislative Standards Act 1992* which, in part, requires consistency with fundamental legislative principles, or sufficient explanation of any inconsistency.

Thank you again for the opportunity to comment on the Committee's report. I trust my comments are of assistance.

Yours sincerely



Neil Roberts MP
**Minister for Police, Corrective Services
and Emergency Services**

15. WATER AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced:	26 October 2010
Responsible minister:	Hon S Robertson MP
Portfolio responsibility:	Minister for Natural Resources, Mines and Energy and Minister for Trade
Date passed:	25 November 2010
Committee report on bill:	14/10; at 7 - 22
Date response received:	24 November 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clauses 10 and 18** which would amend the *Energy Ombudsman Act* and may affect rights to have a dispute referred to the energy and water ombudsman;
 - **clauses 108, 112, 140, 146, 148, 155, 166, 169, 172, 193, 195, 210, 224, 228 and 236** which would amend existing offence penalties or create new offences;
 - **parts 3-4, 6 and 12-4** which may raise issues regarding the right to ecologically sustainable development for current and future generations;
 - **clause 47** which may make rights and liberties dependent on administrative power which is insufficiently defined;
 - **clauses 108 and 179** which may be inconsistent with principles of natural justice;
 - **clauses 195, 197-8 and 228-9** allowing entry other than with a warrant or consent;
 - **clauses 112, 146 and 148** raising issues regarding appropriate protection against self-incrimination;
 - **clause 2(2)** providing for part 5 to have retrospective operation; and
 - **clause 13** which may not be drafted in a sufficiently clear and precise way.
2. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
 - **various clauses** which would create new offences;
 - **clauses 47 and 126** and their effect upon rights of current members of the relevant statutory offices;
 - **clause 144** which may be intended to have retrospective operation;
 - **parts 3-4, 6 and 12-4** and, in particular, whether they have sufficient regard to Aboriginal tradition and Island custom and whether they provide sufficient legislative scrutiny of delegated legislative power;
 - **clauses 150-2** which may not sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly; and
 - **clauses 2, 8, 10 and 13** and whether they would represent an appropriate delegation of legislative power.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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



Hon Stephen Robertson MP
Member for Stretton

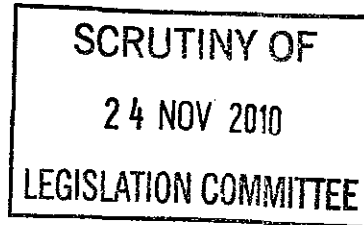


Queensland
Government

CTS 21284/10

24 NOV 2010

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



B52.10

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

Dear Mrs Miller

I refer to an email from the Scrutiny of Legislation Committee Office dated 22 November 2010, concerning the Water and Other Legislation Amendment Bill 2010.

My comments with respect to the relevant pages received of the Scrutiny of Legislation Committee's Legislation Alert No. 14 of 2010, which relates to the aforementioned Bill, are as follows:

Sufficient regard to rights and liberties of individuals

Rights and liberties

Right to fair and just legal process

The committee notes various clauses which would create new offences which have the potential to affect rights and liberties of individuals and that some offences could create liability where a person did not intend to commit the offence or where a mistake resulted from a lack of awareness of relevant facts.

◆ **Clauses 108, 112**

Clause 108 inserts a new section 170ZT of the *Queensland Competition Authority Act 1997* (QCA Act) that deals with failure by water suppliers to give the Queensland Competition Authority information, as required, relevant to the making of a water pricing determination. A penalty applies for a breach of this section.

Clause 112 inserts a new section 170ZZZL of the QCA Act that deals with the failure of a 'person' (a water supplier) to give the Queensland Competition Authority information, as required, about compliance with particular provisions. A penalty applies for a breach of this section.

Level 17
61 Mary Street Brisbane Qld 4000
PO Box 15216 City East
Queensland 4002 Australia
Telephone +61 7 3225 1861
Facsimile +61 7 3225 1828
Email nmet@ministerial.qld.gov.au

As noted in the explanatory notes, there is justification for the creation of these sections given the binding and important nature of water pricing determinations. There are also sufficient protections surrounding the new sections in that, for example, there is sufficient time given to comply with the Queensland Competition Authority's requests.

In the context of the penalties, in the majority of situations it is envisaged the penalty would be monetary in nature. However in appropriate instances where it could be proven there was extreme culpability on the part of an individual, imprisonment is an option in the determination of the sentence.

The Committee also comments on the potential situation where there was no intention on the part of a person in committing an offence or where a mistake inadvertently caused an offence. On the basis the penalties cited in the Bill are maximum penalties, it is anticipated that the 'intent' of a corporation or individual would be taken into account in determining the appropriateness of a penalty.

◆ **Clauses 155 and 193**

The Committee indicates these offences would depend upon provisions to be made in subordinate legislation, even though the respective proposed maximum penalties would be 100 and 500 penalty units.

The new s99AA places an obligation on a distributor-retailer to provide information (a report) regarding complaints made about matters mentioned in the Customer Water and Wastewater Code (the Code). The complaint reports will centre on the distributor-retailers' compliance (or otherwise) with the Code. As the contents of the Code are still subject to a public consultation process, it was not possible to prescribe what the complaints report should detail. However, it was desirable for the Queensland Water Commission to be able to access this information to ensure public complaints regarding water and wastewater services are being appropriately dealt with. When the content of the Code is finalised (post-public consultation), it will be possible to outline what the reports should detail.

The penalties stipulated are a maximum, and are not particularly onerous given the distributor-retailers are already required to have in place complaint and dispute resolution processes which would easily allow them to comply with the Commission's reporting requirement.

Clause 193 Amendment of s360ZCB outlines when a water efficiency management plan may be required. The new clause simply reinstates a penalty unit provision which had been included since the section's original introduction in 2006, but which was inadvertently omitted around May 2010 when other minor amendments were made to the section. The relevant subordinate legislation stipulates who is a relevant customer (i.e. to whom the requirement applies to). This is currently prescribed under s52AA of the Water Regulation 2002. Accordingly, there would be no ambiguity as to what circumstances the section applies to and the amendment simply brings the section back in line with Parliament's original intent that 500 penalty units apply for non-compliance.

◆ **Clause 195 (new section 370)**

Clause 195 – (new section 370) inserts an offence and penalty for failure by a responsible entity to provide an underground water impact report. This offence can be repeated because a new underground water report is required every three years or sooner if directed by the chief executive. There is potential for serious damage to aquifers, springs and the interests of bore owners if the impacts of groundwater extraction are not closely monitored. The penalty is justified even for repeatable offences because coal seam gas extraction and its impacts occur over time.

◆ **Clauses 210, 224, 228 and 236**

I note the committee's reference to various clauses which would create new offences which have the potential to affect rights and liberties of individuals and that some offences could create liability where a person did not intend to commit the offence or where a mistake resulted from a lack of awareness of relevant facts. However, this is not the case with these clauses and I take this opportunity to clarify the operation of these clauses.

Clause 210 – amends the *Water Supply (Safety and Reliability) Act 2008* and creates offences for failure to comply with a post supply obligation by a responsible entity (s 198) and for failure to comply with the conditions of an exclusion decision by a responsible entity (s 199).

Clause 210 creates new obligations and offences for a responsible entity, and this term is clearly defined in the *Water Supply (Safety and Reliability) Act 2008*. The relevant obligations will be detailed in a recycled water management plan (for a post supply obligation) and in an exclusion decision (for exclusion decision conditions). These offences do not create liability where a person does not intend to commit the offence or where a mistake resulted from a lack of awareness of relevant facts.

Clause 224 – amends the *Water Supply (Safety and Reliability) Act 2008* and creates a new offence for a failure by a relevant entity to prepare and make publicly available regular reports about the scheme (s 274).

Clause 224 creates a new obligation and offence for a relevant entity to prepare and make publicly available a report about certain recycled water schemes. A relevant entity is clearly defined in existing provisions in the *Water Supply (Safety and Reliability) Act 2008*. The relevant entity must comply unless they have a reasonable excuse and it is not an excuse that it may tend to incriminate the relevant entity, however there are limitations on the subsequent use of this information to protect individual rights. This offence does not create liability where a person does not intend to commit the offence and makes provision for an exception of reasonable excuse, in which case the offence does not apply. It also does not create liability where a mistake resulted from a lack of awareness of relevant facts.

Clause 228 – amends the *Water Supply (Safety and Reliability) Act 2008* and creates a new offence of failure by a recycled water provider or other responsible entity for the CSG scheme to comply with a notice requiring water quality monitoring and reporting (s 329C).

Clause 329C creates a new obligation and offence for a recycled water provider or any other responsible entity for a CSG (pt 9A, div 3) scheme to comply with a notice requiring water quality monitoring and reporting. A responsible entity is clearly defined. The obligations will be clearly defined in the notice. The offence does not create liability where a person does not intend to commit the offence and makes provision for an exception of a reasonable excuse. It also does not create liability where a mistake resulted from a lack of awareness of relevant facts.

Clause 236 – amends the *Water Supply (Safety and Reliability) Act 2008* and creates a new offence for failure by a CSG recycled water provider to comply with a notice requiring water quality monitoring and reporting during the transitional period for the scheme (s 643).

Clause 643 creates a new obligation and offence for a CSG recycled water provider to comply with a notice requiring water quality monitoring and reporting during transitional periods for the scheme. The obligations will be clearly defined in the notice. The offence does not create liability where a person does not intend to commit the offence and makes provision for an exception of a reasonable excuse. It also does not create liability where a mistake resulted from a lack of awareness of relevant facts.

Right to work and work-related rights

◆ **Clause 47**

The alert invites me to provide more information specifically on the effect of clause 47 on rights of current members of the relevant statutory offices and whether the clauses would have sufficient regard to the rights and liberties of individuals.

The Alert has already noted the purpose of the provision is to facilitate the re-appointment of a completely new water-inclusive Energy and Water Ombudsman Queensland (EWOQ) Advisory Council. The Alert has also already noted the termination has not been done due to any performance issues with the Council, but instead is being done to facilitate a re-organisation of the makeup of the Council.

With the exception of the termination of one of the two first tier energy retailers (to make way for a water distributor-retailer), the terminations are merely symbolic in as much as they simply provide a clean-slate opportunity to start a new water inclusive Advisory Council, with new water-inclusive functions. Members of the Advisory Council are aware of the symbolic nature of the terminations and re-appointments. All members (bar the first tier retailer as discussed above) have been invited to renominate.

While the proposed amendments may appear to have impact on these members' rights and liberties, a clean slate approach is not unusual where a council's function is significantly added to, as is the case here. It is recognised the rights of the first tier retailer member has been affected by his term being cut short. However, this must be balanced against the need for an Advisory Council which remains at a manageable size and the desire to ensure the Council is generally representative of the markets it covers. Any loss of a seat at the table

is mitigated by shorter rotations, which will allow the outgoing first tier retailer to be able to rotate with the other first tier retailer in approximately one year.

◆ **Clause 126**

Clause 137 amends the *Queensland Institute of Medical Research Act 1945* (QIMR Act) by inserting new section 24 to provide for the abolition of the Queensland Institute of Medical Research Trust (QIMR Trust). The Committee appears to have mistakenly referred to clause 126 as the relevant clause of the Bill in this regard.

Section 8C of the QIMR Act currently provides for QIMR Trust members to be appointed for three year terms. Section 8P of the QIMR Act also provides that a member will continue to hold office, notwithstanding that the member's term has expired, until such time as a successor has been appointed.

The QIMR Trust currently has only four members, one of whom will remain as a member of the QIMR Council after the proposed abolition of the QIMR Trust. The appointments of the other three members expired at the end of their three year terms on 13 December 2009 and they remain technically as members only because no successors have been appointed because the changes to the QIMR's governance arrangements were pending.

Accordingly, the abolition of the QIMR Trust is not considered to have an adverse impact upon the work-related rights of existing members of the QIMR Trust.

Right to ecologically sustainable development

◆ **Parts 3-4, 6 and 12-14**

Parts 3-4, 6 and 12 – 14 amend the Wild Rivers Act and related legislation including the Environmental Protection Act, Fisheries Act, Mineral Resources Act, Sustainable Planning Act, Vegetation Management Act and the Water Act to extend wild river protection to the Lake Eyre Basin rivers and make a number of operational amendments to the legislative wild rivers scheme.

The provisions and the purpose of the Wild Rivers Act are given effect through a Wild River declaration that applies to a certain area. The declaration is a framework setting out the development rules that apply within the wild river area. These rules allow for development to occur in a wild river area in such a way as to preserve the natural values of the wild river. A wild river declaration will ensure that future development in the area will be ecologically sustainable as a result of the development rules put in place.

Natural justice

◆ **Clause 108**

Clause 108 inserts a new section 170ZU of the QCA Act which may be inconsistent with the principles of natural justice, given that it may allow the Queensland Competition Authority to make decisions without first considering all relevant information. However, as the Committee has noted, the explanatory notes explain that the new section 170ZU is quite clear in that the Queensland

Competition Authority may only make a decision in this way if it is reasonable to do so in all of the circumstances. Specific factors are listed in new section 170ZU(4) which the Queensland Competition Authority must take into account when deciding the reasonableness of not taking into account information not provided to it by a specified date. Furthermore, as the explanatory notes describe, the new section 170ZU is modelled on section 168B of the QCA Act, which is a similar provision that applies to the making of certain decisions by the Queensland Competition Authority under part 5 of the QCA Act.

Power to enter premises

◆ Clauses 195, 197-8 and 228-9

I note the committee's reference to various clauses which would allow entry other than with a warrant or consent. However, in relation to the above clauses there are other protection mechanisms provided and I take this opportunity to clarify the operation of these clauses.

Clause 195 inserts new section 441. This power to enter land is transitioned from the *Petroleum Act 1923* and *Petroleum and Gas (Production and Safety) Act 2004* and is required to ensure petroleum tenure holders are able to carry out their responsibilities under final reports ensuring the impacts of their exercise of underground water rights are made good where required.

Clause 197 amends section 746 of the *Water Act* to provide an additional activity for which an authorised officer may enter land to monitor compliance. This new power of entry is justified in the explanatory notes.

Clause 198 amends section 747 of the *Water Act* to provide additional powers of entry for authorised officers in relation to collecting information. These entry powers are similar to the powers under the *Water Supply (Safety and Reliability) Act 2008* and are required because of the potential for serious damage to aquifers, springs and bore owners interests. Responsible entities produce underground water impact reports which cover a range of matters and require information to be gathered from various sources. It is appropriate that authorised officers have broad power to enter and investigate these matters on petroleum tenures which may be located on land owned by other parties.

Clause 228 amends the *Water Supply (Safety and Reliability) Act 2008* and confers new powers for entry for a CSG recycled water schemes subject to an application to and order being made by a Magistrate, in accordance with the existing framework for entry for environmental requirements under the *Environmental Protection Act 1994* (s 329J.) This makes the new entry provisions subject to an application and order by a Magistrate.

Clause 229 amends the *Water Supply (Safety and Reliability) Act 2008* and includes entry powers for authorised officers for the new CSG recycled water framework, consistent with the existing entry powers for authorised officers for other recycled water and drinking water provisions (s 410). Clause 229 merely extends existing authorised officer power provisions to cater for the new CSG recycled water framework.

Protection against self-incrimination

◆ **Clauses 112 and 195**

Clause 112 creates new section 170ZZZL of the QCA Act which will provide the Queensland Competition Authority with the power to require information from a water supplier for the purpose of monitoring the water supplier's compliance with a water pricing determination. The new section 170ZZZL will also create an offence for a water supplier to fail, without a reasonable excuse, to comply with a requirement to give information to the Queensland Competition Authority. As the Committee has noted, the new section 170ZZZL provides appropriate protection against self-incrimination.

Clause 195 inserts new section 447 of the Water Act which allows the Queensland Water Commission to request information from a tenure holder about the exercise of underground water rights. New section 447(4) provides appropriate protection for a tenure holder against self incrimination when providing this information.

Retrospective operation

◆ **Clause 2(2)**

Clause 2(2) provides for the amendments to the *Land Valuation Act 2010* to be retrospective. That is that the amendments are taken to have commenced on 20 September 2010. The retrospective amendments have sufficient regard to the rights and liberties of individuals as the amendments are being made to ensure that the previous valuation methodology, as provided for under the now repealed *Valuation of Land Act 1944*, for the valuation of mining, petroleum, GHG and geothermal leases is reinstated so as not to adversely impact the value of these particular leases. If the amendments are not made, then the value of these particular leases would be significantly impacted and would adversely impact leaseholders.

◆ **Clause 144**

The alert invites me to provide information clarifying the intended effect of clause 144 (charges on premises). Paragraph 72 of the Alert indicates the section does not appear to have been made retrospective in effect, despite the intention expressed in the explanatory notes for the section to have retrospective commencement from 1 July 2010.

There is no error in commencement. The Committee is directed to clause 172, which inserts a new transitional s112 into the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (DR Act)*. This section outlines the provisions regarding s53AS (i.e. clause 144 of the Bill) commence from 1 July 2010.

Aboriginal tradition and Island custom

◆ **Parts 3-4, 6 and 12-14**

Parts 3-4, 6 and 12 – 14 amend the Wild Rivers Act and related legislation including the Environmental Protection Act, Fisheries Act, Mineral Resources

Act, Sustainable Planning Act, Vegetation Management Act and the Water Act to extend wild river protection to the Lake Eyre Basin rivers and make a number of operational amendments to the legislative wild rivers scheme.

The Wild Rivers Act will have no impact on Indigenous traditional and customary activities, and Native Title is expressly protected under the Wild Rivers Act (S44). In drafting the amendments for parts 3-4, 6 and 12-4 the department took into consideration the consultation undertaken with the Desert Channels Queensland Aboriginal Advisory Panel as well as submissions from Wangkamadla Aboriginal Corporation, and the Purruka Aboriginal Corporation.

Sufficient regard to the institution of Parliament
Parliamentary scrutiny of delegated power

◆ **Clauses 150-2**

The Alert invites me to provide information about whether clauses 150 to 152 would sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly. In particular, the Committee has expressed concern the effect of clauses 150 to 152 would be that, although section 93(1) states the Code will provide for rights and obligations of individuals and amended section 94 would allow the Code to impose additional requirements to those prescribed in the Act, provisions of the Legislative Standards Act 1992 (Legislative Standards Act) and the Statutory Instruments Act 1992 (Statutory Instruments Act) would have no application to the Code, such as those requiring:

- explanatory notes;
- regulatory impact assessment and statements;
- parliamentary disallowance procedures; and
- staged automatic expiry.

I acknowledge, as the Code is no longer subordinate legislation, it would not be regulated by the Legislative Standards Act and no longer regulated by certain parts of the Statutory Instruments Act (i.e. those which only have application to subordinate legislation such as those listed above).

While this may be the case, there are certainly good policy reasons for this change and safeguards will apply to the Code. For example, while there will be no explanatory notes for the Code, not having the Code written as a regulation will enable it to be more readily understood by its target audience of residential and small business users. While the Code will not be subject to dedicated Regulatory Impact Statement (RIS) processes, future iterations of the Code will be subject to the new Regulatory Assessment Statement (RAS) processes being introduced to supplement (or even overtake) the RIS requirement into the future. It is also noted the existing legislation had previously provided a RIS exemption for the Code. While there is no staged automatic expiry for the Code, the policy proposal for the Code is for it to be upgraded in a staged fashion over a number of years, to improve and introduce consistency in customer service standards.

It is also noted while the Code will no longer be a regulation, certain safeguards under the Statutory Instruments Act will still apply. This is because the Code is still likely to be considered to be a 'statutory instrument', being a document prescribed by an Act which is a standard or a guideline which is public in nature. These safeguards include requirements the statutory instrument be interpreted

not to exceed powers conferred by authorising law and includes the application of provisions for interpretations of statutory instruments.

Given the water code is one of three codes (water, electricity and gas) about which the Energy Ombudsman hears disputes, it is appropriate to have the water Code made on the same footing as the other codes (i.e. not subordinate legislation). These codes are similarly not subject to disallowance but instead are tabled for information purposes only.

◆ **Parts 3-4, 6 and 12-14**

Parts 3-4, 6 and 12 – 14 amend the Wild Rivers Act and related legislation including the Environmental Protection Act, Fisheries Act, Mineral Resources Act, Sustainable Planning Act, Vegetation Management Act and the Water Act to extend wild river protection to the Lake Eyre Basin rivers and make a number of operational amendments to the legislative wild rivers scheme.

It was considered appropriate for wild river declarations to be given effect by a statutory instrument because:

- the Bill requires an extensive and transparent statutory consultation process to be followed for each proposal to declare a wild river area to ensure local issues can be addressed and catchment-specific assessment codes can be prepared to preserve the identified natural values of each wild river area;
- the Bill contains provisions protecting existing statutory rights in the event a declaration is made; and
- the approval of the Minister for Natural Resources, Mines and Energy and the Governor in Council are both required before a declaration comes into effect or is changed.
- all declarations are tabled before Parliament.

Amendment of Act other than by another Act

◆ **Clauses 2, 8, 10 13**

Clause 105 of the Alert invites me to provide information about whether clauses 2, 8, 10 and 13 would represent an appropriate delegation of legislative power. For clause 2 of the Bill, the Committee's concern is regarding the Code being the mechanism by which certain other clauses of the bill are commenced. For clauses 8 to 13, the substance of the Committee's concern is that the provisions would allow the Code itself to dictate who has access to the new EWOQ scheme.

Code as the commencement mechanism

Like its electricity and gas counterparts, the Code is a document to regulate the standards which providers must meet in providing services to certain customers regulated by the various codes. Like those other codes, any disputes in relation to compliance with the Code's requirements are dealt with as disputes by the EWOQ, where appropriately referred. The new EWOQ will be ready to take on this new 'water inclusive' dispute resolution function on 1 January 2011. However, to do so requires the Code to be in place. This Code is currently being made and it is anticipated it will be in effect for that time. In addition, the Code will supplant existing interim customer service standards under the DR Act that were designed to fall away once the Code was in place.

In reality, the making of the Code is simply the mechanism to ensure all of these things happen at the one time (i.e. the EWOQ gains jurisdiction only once the Code is in place and the old interim service standards fall away at that point too). In that way, the Code simply acts like a proclamation. On page 28 of its 1997 Report on Henry VIII clauses, *The use of "Henry VIII Clauses" in Queensland Legislation*, the Committee indicated that given there is no longer any danger a provision of an Act will fail to be commenced by failing to make the subordinate instrument, the Committee no longer has any concern about subordinate instruments being used to commence provisions of Acts.

Code determining access to the Energy and Water Ombudsman Queensland scheme

Clauses 8 to 13 of the Bill all relate to the jurisdiction of the new EWOQ. This jurisdiction is expressed in terms of being able to hear disputes between a water entity and a small water customer in relation to a water entity function under the Code. Essentially, that jurisdiction hinges off who is defined as a small customer under the Code.

The issue to be dealt with is whether the clause actually amends the relevant legislation, not whether it is capable of affecting it. As the Committee has itself pointed out, all subordinate instruments alter the effect of the principal Act. If there was no difference in the effect of an Act after the passage of a subordinate instrument then, by definition, the instrument would have had no effect.

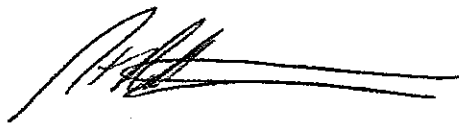
Here, the legislation in the form of the DR Act provides for the persons for whom the Code may apply to. The Code is capable of applying to any 'customer' (which is defined in the DR Act) in relation to any 'water service' or 'wastewater service' (also defined in the DR Act). The Code merely narrows the types of 'customers' and 'water/ wastewater services' who it applies to, it does not amend the DR Act.

There is nothing unusual in this and section 24(b) of the *Statutory Instruments Act 1992* expressly allows instruments such as the Code to apply more narrowly to particular classes of persons or matters. As the DR Act sets the parameters for the application of the Code by defining customers and water and wastewater services, the Code can legitimately apply on a more narrow scope than this. Should the Code purport to ever extend past the class of people who are 'customers' for the DR Act or past what are defined 'water/ wastewater services', there would indeed be issues with the Code amending the relevant pieces of legislation.

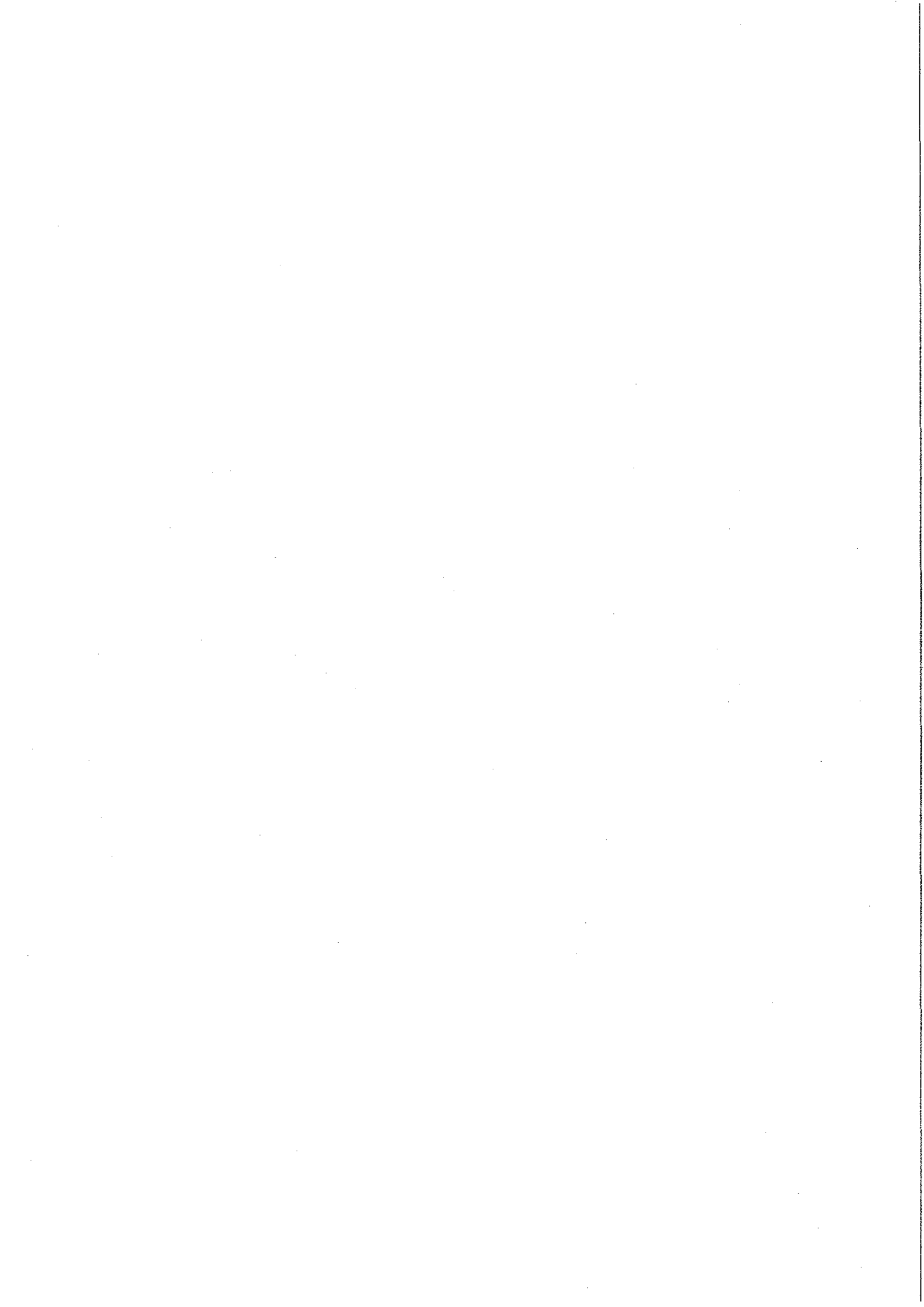
While the Code does appear to dictate who can access the EWOQ for water matters, this is within the confines set out under the DR Act. Both the electricity and gas small customers' access to the Energy Ombudsman Queensland's scheme are also currently dictated by legislation which is not primary legislation (i.e. the Electricity Regulation 2006 and the Gas Supply Regulation 2007 define who is a small customer).

I trust this information clarifies the situation. Should you have any further inquiries, please contact Judith Jensen, Director Water Legislation, Policy and Pricing, Strategic water Initiatives of my department on telephone 3330 6108.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Robertson', with a long horizontal flourish extending to the right.

STEPHEN ROBERTSON MP



PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION**16. URBAN LAND DEVELOPMENT AUTHORITY AMENDMENT REGULATION (NO.4) 2010
SL 278**

Date tabled: 26 October 2010
Disallowance date: 24 March 2011
Responsible minister: Hon Stirling Hinchcliffe MP
Committee report on sub-leg: 14/10; at 24
Date response received: 1 December 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF LEGISLATION

1. The committee invites the Minister to provide information regarding compliance with the *Legislative Standards Act* and the *Statutory Instruments Act*.

CORRESPONDENCE RECEIVED FROM MINISTER

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

**17. URBAN LAND DEVELOPMENT AUTHORITY AMENDMENT REGULATION (NO.5) 2010
SL 294**

Date tabled: 26 October 2010
Disallowance date: 24 March 2011
Responsible minister: Hon Stirling Hinchcliffe MP
Committee report on sub-leg: 14/10; at 25
Date response received: 1 December 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF LEGISLATION

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3. The committee makes no further comment regarding the subordinate legislation.



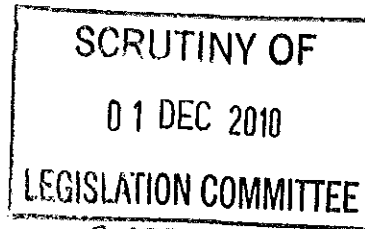
Hon Stirling Hinchliffe MP
Member for Stafford



Queensland
Government

Minister for Infrastructure and Planning

29 NOV 2010



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

SL278.10 &
SL294.10

Dear Jo-Ann

Thank you for your two letters dated 22 November 2010 about the *Urban Land Development Authority Amendment Regulations (Nos 4 and 5) 2010*.

Consistent with the Regulatory Assessment Statement Guidelines prepared by the Queensland Office of Regulatory Efficiency, a Regulatory Principles Checklist and a Preliminary Impact Assessment were undertaken for both Amendment Regulations. These were completed and attached to the respective Cabinet submissions that sought Cabinet approval for my recommending to the Governor in Council, under the *Urban Land Development Authority Act 2007*, the declaration of certain areas of land identified on regulatory maps as Urban Development Areas (UDA); and the introduction of Interim Land Use Plans over these areas.

Based on the outcomes of these assessments, it was considered that the Amendment Regulations would not impose significant regulatory impacts on the community, business or Government as they replaced an existing regulation of development through planning schemes with more streamlined and efficient planning and assessment processes. Matters such as policy options analysis and key stakeholder consultation were addressed in these assessments. Existing development applications continue to have effect under the former regulatory environment (i.e. the *Sustainable Planning Act 2009*), while any new development applications are able to be dealt with under a more efficient regulatory process.

In regards to public consultation, the *Urban Land Development Authority Act 2007* does not require consultation prior to declaring a UDA. Nevertheless, in the case of *Urban Land Development Authority Amendment Regulation (No. 4) 2010* (Ripley Valley, Greater Flagstone and Yarrabilba UDAs), extensive consultation was undertaken with landholders, Local Governments and State agencies prior to declaration of the UDAs. For *Urban Land Development Authority Amendment Regulation (No. 5) 2010* (Caloundra South UDA), the outcomes for the proposed UDA were consistent with extensive consultation that had previously been undertaken for this area.

Level 12 Executive Building
100 George Street Brisbane
PO Box 15009 City East
Queensland 4002 Australia
Telephone +61 7 3224 4600
Facsimile +61 7 3224 4781
Email infrastructure.planning@ministerial.qld.gov.au
ABN 65 959 415 158

Based on the overall assessments, it was considered that further consideration of regulatory impacts were not required at this stage. However, in both cases, the *Urban Land Development Authority Regulation 2007* will need to be amended again within 12 months to provide for the adoption of Development Schemes over the Urban Development Areas. At this time the regulatory impact of the amendment of the Regulation will be assessed to determine whether further assessments are required. The *Urban Land Development Authority Act 2007* requires extensive consultation during the preparation and consideration of the Development Schemes.

I trust this information is of assistance. If you require any further information, please contact Mark Saunders, Acting Director, Transit Oriented Development and Design, Growth Management Queensland, Department of Infrastructure and Planning, on 3238 3001 who will be pleased to assist.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stirling Hinchliffe', with a long horizontal flourish extending to the right.

Stirling Hinchliffe MP
Minister for Infrastructure and Planning