

## State Development, Natural Resources and Agricultural Industry Development Committee

Report No. 38, 56<sup>th</sup> Parliament

Subordinate legislation tabled between 15 May 2019 and 11 June 2019

### 1 Aim of this report

This report summarises the committee's findings following its examination of the subordinate legislation within its portfolio areas tabled between 15 May 2019 and 11 June 2019. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).

### 2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
75	Aboriginal Land (Minjerribah) Amendment Regulation (No. 2) 2019	11 June 2019	16 October 2019
76	Fisheries Declaration 2019	11 June 2019	16 October 2019
77	Fisheries Quota Declaration 2019	11 June 2019	16 October 2019
80	Natural Resources, Mines and Energy Legislation (Fees) Amendment Regulation 2019	11 June 2019	16 October 2019
88	Proclamation made under the <i>Land, Explosives and Other Legislation Amendment Act 2019</i>	11 June 2019	16 October 2019
89	Petroleum and Gas (Safety) and Other Legislation Amendment Regulation 2019	11 June 2019	16 October 2019
90	Water Plan (Cape York) 2019	11 June 2019	16 October 2019
91	Water (Cape York) Amendment Regulation 2019	11 June 2019	16 October 2019
92	Electricity (CleanCo) Amendment Regulation 2019	11 June 2019	16 October 2019

### 3 Committee consideration of the subordinate legislation

No significant issues regarding policy, consistency with FLPs or the lawfulness of the subordinate legislation were identified. In general, the explanatory notes tabled with the regulations comply with the requirements of s 24 of the LSA except when noted otherwise.

### **3.1 Aboriginal Land (Minjerribah) Amendment Regulation (No. 2) 2019 (SL 75)**

The objective of the amendment regulation is to amend the Aboriginal Land Regulation 2011 to:

- declare areas of available state land as transferable land, and
- change the boundaries of Redland City for the purpose of the *Aboriginal Land Act 1991*.

The change to the boundaries of Redland City will enable parcels of land within that city to be available state land for the purposes of the *Aboriginal Land Act 1991*, in turn allowing them to be declared by regulation as available state land that is transferable land for the purposes of the *Aboriginal Land Act 1991*.<sup>1</sup>

#### **Committee comment**

The committee is satisfied that the Aboriginal Land (Minjerribah) Amendment Regulation (No. 2) 2019 does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.2 Fisheries Declaration 2019 (SL 76)**

The objective is to create a new Fisheries Declaration which consolidates all existing Fisheries Declarations (other than Quota Declarations) from the Fisheries Regulation 2008 and the Fisheries (East Coast Trawl) Management Plan 2010 into a single legislative instrument. According to the explanatory notes, the new Fisheries Declaration makes no substantive policy change to existing fishery management arrangements, and its creation represents nothing more than a structural legislative change. The new Fisheries Declaration incorporates existing fisheries declarations of the following types:

- regulated waters declarations
- regulated fish declarations
- regulated fishing apparatus declarations
- regulated fishing method declarations.<sup>2</sup>

The committee sought additional information on the nature of the Fisheries Declarations 2019 and the process of legislative change and took a briefing from officers of the Department of Agriculture and Fisheries (DAF) on 16 September 2019. Ms Anderson from DAF informed the committee:

*The [Fisheries (Sustainable Fisheries Strategy) Amendment Act 2019] was passed this year. The regulation was restructured at the same time. The amendments that you have before you at the moment commenced in May this year. That was the second stage we went through. The changes to the regulation were primarily structural changes. Previously we had the fisheries regulation and management plans. The management plans were no longer provided for in the act. The trawl management plan that used to contain all of the information on the east coast trawl fisheries was subsumed into the fisheries regulation... All of those changes that were previously in the trawl management plan are now sitting in the regulation.*

*The other thing that it did was set up declarations under the act. Rather than having to make regulation changes to give effect to fisheries management rules in a more responsive way, the act now provides for declarations to be made by the chief executive. That includes things like size and possession limits, quotas for fisheries and area quotas—things like that all sit in the declaration now. Effectively what that did was take a lot of things that were in the regulation and put them into the declarations. In the 20 May 2019 regulation changes there were no*

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<sup>1</sup> Explanatory notes, p 1.

<sup>2</sup> Explanatory notes, p 2.

*changes to the fishing rules—things that would affect commercial, recreational or charter fishers. It was effectively a restructure and modernisation of the regulation.*<sup>3</sup>

### **Potential fundamental legislative principle issue**

The explanatory notes raise an issue of FLP, relating to whether the subordinate legislation has sufficient regard to the institution of Parliament by allowing the chief executive to make a fisheries declaration. Section 4(5) of the LSA provides that legislation has sufficient regard to Parliament if, among other things, it is within the power under an Act that allows the subordinate legislation to be made.

Section 33 of the *Fisheries Act 1994* gives the chief executive power to make fisheries declarations. A fisheries declaration once made is subordinate legislation.

The explanatory notes provide the following justification:

*Due to the nature of Fisheries Declarations, which require specific, technical knowledge on regulated waters, regulated fish, regulated fishing apparatus and regulated fishing methods, and the need for the new Fisheries Declaration to be easily adapted to reflect current practices, it would be impractical and overly burdensome on Parliament's time to consider the fisheries Declaration. It is, therefore, more practical and timely for the Chief Executive to make and amend the Fisheries Declaration based on the Chief Executive's expertise and knowledge.*<sup>4</sup>

### **Committee comment**

The committee is satisfied that sufficient regard has been provided for the institution of Parliament, noting that the power to make declarations has been specifically provided for in the *Fisheries Act 1994* and that such declarations are made by way of regulation, which does allow for an amount of scrutiny by the Parliament.

The committee is therefore satisfied that the Fisheries Declaration 2019 does not raise any significant issues relating to policy, FLPs or lawfulness.

In regard to the compliance of the explanatory notes with part 4 of the LSA, the committee notes that, under the heading *Consistency with fundamental legislative principles*, the explanatory notes state:

*The subordinate legislation has been drafted with regard to the fundamental legislative principles (FLPs), as defined in section 4 of the Legislative Standards Act 1992.*

Part 4 of the LSA requires explanatory notes to include:

*... a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.*

The committee considers that the statement provided in the explanatory notes does not address the issue of consistency and any reasons for any inconsistency. This non-compliance is of concern and, as such, the committee brings the matter to the attention of DAF to ensure that all future explanatory notes fully comply with part 4 of the LSA.

The committee notes that the explanatory notes otherwise comply with the requirements set out in part 4 of the LSA.

### **3.3 Fisheries Quota Declaration 2019 (SL 77)**

The objective is to transition the existing quota declarations into a single quota declaration as a consequence of the *Fisheries (Sustainable Fisheries Strategy) Amendment Act 2019*.

This declaration sets out the total allowable commercial catch for prescribed species of fish and crabs.

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<sup>3</sup> Public briefing transcript, Brisbane, 16 November 2019, p 2.

<sup>4</sup> Explanatory notes, p 3.

The explanatory notes state:

*Having one Quota Declaration will support the new fisheries management framework for responsive decision making through harvest strategies that is established by the Amendment Act and in line with commitments outlined in the Strategy.<sup>5</sup>*

The committee notes that the new Quota Declaration makes no substantive policy change to existing fishery management arrangements, and its creation represents only a structural legislative change.<sup>6</sup> The committee sought additional information on the Fisheries Quota Declarations and took a briefing from officers of DAF on 16 September 2019.<sup>7</sup> Ms Anderson from DAF informed the committee:

*We had the act, the fisheries regulation 2018 and then two declarations. One declaration had regulated fish, waters, species and gear, and the other was for the quotas for each of our fish stocks each year... Most of our fisheries are moving towards output based controls like quotas, where you are given a certain allocation for the number of kilograms that you can take per year.<sup>8</sup>*

#### **Committee comment**

The committee is satisfied that the Fisheries Quota Declaration 2019 does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.4 Natural Resources, Mines and Energy Legislation (Fees) Amendment Regulation 2019 (SL 80)**

The objective of the amendment regulation is to index regulatory fees for the Department of Natural Resources, Mines and Energy (DNRME).

#### **Potential fundamental legislative principle issue**

The majority of fees have increased by the government indexation rate for 2019-20 of 2.25 per cent. However, the committee notes that the following fee increases were above the 2.25 per cent rate:

- Land Title Regulation 2015 Schedule 2 item 1 – increase from \$70 to \$73 – 4.3% increase – creating an indefeasible title or, on request, a separate indefeasible title
- Petroleum and Gas (General Provisions) Regulation 2017 – Schedule 2 Part 4 item 5 – increase from \$291.90 to \$313.34 – 7.3% increase – annual fee for pipeline licence holder that is a proportion of the state's funding commitments to national energy market regulation (for each kilometre of pipeline the subject of the licence)
- Water Regulation 2016 – Schedule 12 item 3 – increase from \$70 to \$73 – 4.3% increase – creating, on request, a title or separate title for a water allocation, other than under s 146 or 147 of the Act – for each title created.

#### **Committee comment**

Given the increases in the three examples provided above result in small dollar amount values, the committee is satisfied with the fee increases and that the Natural Resources, Mines and Energy Legislation (Fees) Amendment Regulation 2019 does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.5 Proclamation made under the Land, Explosives and Other Legislation Amendment Act 2019 (SL 88)**

The objective of the Proclamation is to fix a commencement date of 17 June 2019 for certain provisions of the *Land, Explosives and Other Legislation Amendment Act 2019*.

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<sup>5</sup> Explanatory notes, p 1.

<sup>6</sup> Explanatory notes, p 2.

<sup>7</sup> See explanation of page 2 of this report.

<sup>8</sup> Public briefing transcript, Brisbane, 16 November 2019, p 2-6.

### **Committee comment**

The committee is satisfied that the proclamation made under the *Land, Explosives and Other Legislation Amendment Act 2019* does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.6 Petroleum and Gas (Safety) and Other Legislation Amendment Regulation 2019 (SL 89)**

The objective of the amendment regulation is to amend the Coal Mining Safety and Health Regulation 2017, the Petroleum and Gas (General Provisions) Regulation 2017 and the Petroleum and Gas (Safety) Regulation 2018 to:

- prescribe requirements for information notices
- prescribe (in the Petroleum and Gas (Safety) Regulation 2018) that a gas work licence is not required for the replacement of a pigtail connected to a gas cylinder where the replacement is carried out under the safety management system, and by a person assessed under the safety management system as competent
- clarify that petroleum leases granted under the *Petroleum Act 1923* and replaced under the *Petroleum and Gas (Production and Safety) Act 2004* are not subject to additional safety requirements in overlapping tenure areas
- remove redundant section references in the Petroleum and Gas (Safety) Regulation 2018 and the Petroleum and Gas (General Provisions) Regulation 2017
- update a reference to Australian standard AS2885 in the Petroleum and Petroleum and Gas (Safety) Regulation 2018.<sup>9</sup>

### **Committee comment**

The committee is satisfied that the Petroleum and Gas (Safety) and Other Legislation Amendment Regulation 2019 does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.7 Water Plan (Cape York) 2019 (SL 90)**

The objective of the plan is to provide a framework for the allocation and sustainable management of surface water, underground water and overland flow water in the Cape York area. The plan's strategies ensure future water requirements can be met whilst protecting natural ecosystems and maintaining supply to existing water users.

The plan provides for the allocation and sustainable management of water in the plan area by:

- defining the availability of water
- providing a framework for sustainably managing water
- identifying priorities and mechanisms for dealing with future water requirements
- regulating the taking of and interference with surface water, and the taking of underground water
- providing a framework for establishing and managing water allocations
- providing access to water resources to help Aboriginal people and Torres Strait Islanders achieve their economic, social and cultural needs and aspirations
- providing a framework for reversing, where practicable, the degradation of natural ecosystems caused by the taking of, or interference with, water.<sup>10</sup>

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<sup>9</sup> Explanatory notes, p 1.

<sup>10</sup> Explanatory notes, p 2.

### **Potential fundamental legislative principle issue**

The plan raises the issue of FLP as to whether the subordinate legislation has sufficient regard to the institution of Parliament, by allowing the Minister to make a water plan. Section 4(5) of the LSA states that legislation has sufficient regard to Parliament if, among other things, it is within the power under an Act that allows the subordinate legislation to be made.

Section 42 of the *Water Act 2000* allows the Minister to prepare a water plan for any part of Queensland. According to s 48 of the *Water Act 2000*, a water plan does not have effect until it has been approved by the Governor in Council. From the approval, it becomes the water plan for its plan area and subordinate legislation.

### **Committee comment**

The committee is satisfied that sufficient regard has been provided for the institution of Parliament, given that the *Water Act 2000* provides the power to create the water plan and also its placement in the regulation. This allows for an amount of scrutiny by the Parliament.

The committee is therefore satisfied that the Water Plan (Cape York) 2019 does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.8 Water (Cape York) Amendment Regulation 2019 (SL 91)**

The objective of the amendment regulation is to amend the Water Regulation 2016 as a result of the commencement of the Water Plan (Cape York) 2019 to:

- remove unnecessary duplication of provisions replicated in two pieces of subordinate legislation
- continue the effect of particular parts of the Moratorium Notice which has had effect on and from 4 June 2018 for the Cape York Area
- state that an eligible person as defined under s 32 of the water plan is a prescribed entity
- ensure consistency between the water regulation and the water plan, by amending references in the water regulation with updated references to the same water in the water plan.

The explanatory notes state that the amendment regulation will assist to remove doubt as to which subordinate legislation is in force for particular areas of the water plan area. The intention is for the water plan to be the subordinate legislation for those particular matters being dealt with in this amendment regulation.<sup>11</sup>

These amendments will ensure there is consistency between the water regulation and the water plan for the management of water resources for the Cape York Water Plan Area.<sup>12</sup>

### **Committee comment**

The committee is satisfied that the Water (Cape York) Amendment Regulation 2019 does not raise any significant issues relating to policy, FLPs or lawfulness. The explanatory notes comply with part 4 of the LSA.

### **3.9 Electricity (CleanCo) Amendment Regulation 2019 (SL 92)**

The objective of the amendment regulation is to declare CleanCo Queensland Limited to be a state electricity entity under the *Electricity Act 1994*.

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<sup>11</sup> Explanatory notes, p 1.

<sup>12</sup> Explanatory notes, p 2.

Declaring CleanCo to be a state electricity entity will ensure it is subject to the same regulatory framework as its government owned corporation competitors, CS Energy Limited and Stanwell Corporation Limited, namely being subject to (among other things):

- ministerial directions under s 257 of the *Electricity Act 1994*
- employment provisions under chapter 8 of the Electricity Regulation 2006, and s 256 of the *Electricity Act 1994*, which excludes the application of the *Judicial Review Act 1991*.<sup>13</sup>

### Potential fundamental legislative principle issue

Rights and liberties should be dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

The explanatory notes identify an issue of FLP:

*Under section 256 of the Act, the Judicial Review Act 1991 will not apply to decisions of CleanCo made in carrying out:*

- *its commercial activities; or*
- *any community service obligations prescribed under regulation.*<sup>14</sup>

Decisions by CleanCo in relation to the above matters could affect an individual, who would thereby be denied review rights under the *Judicial Review Act 1991*.

The explanatory notes offer the following by way of justification:

*This is an appropriate and proportionate provision in the context of the commercial and community service responsibilities placed upon State electricity entities.*<sup>15</sup>

### Committee comment

The committee seeks further information from DNRME regarding how the provision relating to decisions by CleanCo are ‘appropriate and proportionate’<sup>16</sup> in the context of the commercial and community service responsibilities placed upon state electricity entities.

#### Recommendation 1:

The committee recommends that the Department of Natural Resources, Mines and Energy provide further information to the committee regarding how s 256 of the *Electricity Act 1994* as it relates to decisions by CleanCo are ‘appropriate and proportionate’ in the context of the commercial and community service responsibilities placed upon state electricity entities.

The committee did not identify any further issues within the Electricity (CleanCo) Amendment Regulation 2019 relating to policy, FLPs or lawfulness.

The committee notes the following two matters relating to the explanatory notes.

Firstly, in regard to the compliance of the explanatory notes with part 4 of the LSA, the committee notes that, under the heading *Consistency with fundamental legislative principles*, the explanatory notes state:

*The Regulation is consistent with fundamental legislative principles under the Legislative Standards Act 1992.*

<sup>13</sup> Explanatory notes, p 2.

<sup>14</sup> Explanatory notes, p 3.

<sup>15</sup> Explanatory notes, p 3.

<sup>16</sup> Explanatory notes, p 3.

Part 4 of the LSA requires explanatory notes to include:

*... a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.*

The committee considers that the statement provided in the explanatory notes does not address the issue of consistency and any reasons for any inconsistency. This non-compliance is of concern and, as such, the committee brings the matter to the attention of DNRME to ensure that all future explanatory notes fully comply with part 4 of the LSA.

Secondly, it is a requirement under paragraph 24(1)(b) of the LSA that the explanatory notes set out the provision of the Act or subordinate legislation under which the legislation is made. The explanatory notes refer to the definition of 'state electricity entity' in Schedule 5 of the *Electricity Act 1994*. The committee considers that it would be more appropriate to reference s 259A of the *Electricity Act 1994*, which provides that a regulation may declare certain entities to be state electricity entities. The committee considers that this would provide the regulation making power for SL 92.

The committee brings this matter to the attention of DNRME for consideration and future compliance.

The explanatory notes tabled with the amendment regulation otherwise comply with part of the LSA.

#### **4 Recommendation**

The committee recommends that the Legislative Assembly notes this report, including its recommendation and advice to the Department of Natural Resources, Mines and Energy.



Chris Whiting MP

**Chair**

**October 2019**

#### **State Development, Natural Resources and Agricultural Industry Development Committee**

<b>Chair</b>	Mr Chris Whiting MP, Member for Bancroft (Chair)
<b>Deputy Chair</b>	Mr Pat Weir MP, Member for Condamine (Deputy Chair)
<b>Members</b>	Mr David Batt MP, Member for Bundaberg
	Mr James (Jim) Madden MP, Member for Ipswich West
	Mr Brent Mickelberg MP, Member for Buderim
	Ms Jessica (Jess) Pugh MP, Member for Mount Ommaney