

# EDUCATION, EMPLOYMENT AND SMALL BUSINESS COMMITTEE

## Report No. 30

### Associations Incorporation and Other Legislation Amendment Bill 2019

#### QUEENSLAND GOVERNMENT RESPONSE

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#### INTRODUCTION

On 26 November 2019, the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice, introduced the Associations Incorporation and Other Legislation Amendment Bill 2019 (the Bill) into the Legislative Assembly.

The Bill was subsequently referred to the Education, Employment and Small Business Committee (the Committee) for consideration and report to the Parliament by 21 February 2020.

On 21 February 2020, the Committee tabled Report No. 30 (the report) on the Bill.

The Queensland Government response to the Committee's recommendation as outlined in the report is provided below.

#### RESPONSE TO RECOMMENDATION:

##### Recommendation 1:

The committee recommends that the Bill be passed.

##### Queensland Government response:

The Queensland Government notes and appreciates the Committee's recommendation that the Bill be passed, and thanks the Committee for its timely consideration of the Bill.

#### POINT OF CLARIFICATION:

The following matter in the report has been identified as requiring clarification.

"The explanatory notes do not, upon analysis, provide in-depth consideration or justification for the extension of these powers, other than to generally state that the *Financial Institutions Code 1992* is 'not considered to be a responsive modern repository of regulatory best practice for the conduct of compliance investigations or for investigation powers', whereas the *Fair Trading Inspectors Act 2014* is 'the most contemporary piece of legislation dealing with inspectorate provisions'. This falls short of offering justification for the breaches of fundamental legislative principle involved in the provisions" (page 29)

##### Clarification:

1. The proposed application of the *Fair Trading Inspectors Act 2014* (FTI Act) to the *Associations Incorporation Act 1981* (AI Act) is justified on the basis that there are currently deficiencies in the chief executive's power to request information from, and investigate, incorporated associations under the AI Act.

2. The chief executive's powers to investigate an association are presently encapsulated in Part 10 of the now repealed *Financial Institutions Code 1992* (the Code). Under the Code, the chief executive may appoint an investigator to investigate the affairs of an association if, in the chief executive's view, it is desirable to do so in the public interest; or for the protection of the public, members of the association, or (arguably) the association's creditors. Once appointed, an investigator may request information from an incorporated association.
3. The Code has some shortcomings in that it cannot be considered fit-for-purpose in the context of incorporated associations as it was originally intended to be used for the regulation of certain financial institutions. Additionally, the Code does not reflect modern regulatory best practices in the conduct of compliance investigations. For example, under the Code, investigators must be appointed to a specific investigation in writing by an instrument that outlines the investigator's remit. This may be considered both archaic and overly burdensome as the Office of Fair Trading (OFT) has full-time inspectors on staff who are trained to follow structured investigation procedures that involve inquiring, analysing and addressing information concerning suspected breaches of consumer protection legislation. OFT's published compliance and enforcement policy additionally commits inspectors to certain standards when undertaking investigations and outlines an escalation model of compliance and enforcement which emphasises the need for regulatory action to be proportionate to the seriousness of a breach or misconduct and the level of consumer detriment.
4. Outside of an investigation, section 119A of the AI Act provides the chief executive with a power to request information in instances where a complaint has been received. However, it is conceivable that there might be circumstances where no complaint has been received (for example, OFT may receive information from an external agency, the media, or through intelligence analysis that indicate a potential misuse of funds) and further information from an association is required to assist the chief executive in determining if an investigation is warranted. In this regard, the AI Act does not provide the chief executive with the necessary powers to undertake proactive compliance.
5. By contrast, there are a range of information-obtaining powers under the FTI Act. For example, following entry into a place, an inspector may search, inspect and take for examination a thing at the place. An inspector may require the production of a document required to be kept by a person under a primary fair trading Act. If an inspector reasonably believes an offence has been committed against the FTI Act or a primary Act, the inspector may also require the production of information related to the offence. The use of these powers are importantly not underpinned by a prerequisite for a formal investigation to have been commenced against an incorporated association or by a complaint to have been received.
6. It is considered necessary to enhance the range of powers available to investigate and obtain information from incorporated associations given the benefits of incorporation for associations are balanced with an obligation to abide by the provisions of the AI Act. Therefore, the chief executive should have the ability to ascertain whether associations are meeting their obligations under the Act and enforce offence provisions when circumstances warrant. The proposal by the Bill to introduce new governance obligations on management committee members and officers, as well as the intention to exempt certain incorporated associations from the financial reporting requirements under the AI Act further underscore the need for appropriate powers to be made available to minimise the risk of malfeasance within incorporated associations and instil public confidence in OFT's ability to investigate alleged breaches of the Act.

7. Although the FTI Act contains wide ranging powers, there are also safeguards to ensure the use of the powers is balanced. For example, the Act provides:
  - that an inspector must produce or display their identification card before or when exercising a power;
  - procedures for inspectors to follow when entering a place with consent;
  - for the seizure of things only with justification and requires an inspector to give a receipt for a seized thing;
  - for the return of a seized thing unless there are reasonable grounds that it should be forfeited; and
  - the ability for an owner to claim compensation for damage caused to property by an inspector exercising a power.
8. OFT inspectors carry out their roles and responsibilities within existing legal and policy frameworks. These frameworks incorporate a range of natural justice requirements and are complemented by a range of internal procedures, structured training programs and management supervision to ensure OFT inspectors are diligent in and held accountable for the use of what are significant powers.
9. It should be further noted that, under the Bill, the FTI Act is proposed to be applied in a modified way so that powers to stop or move vehicles, or to obtain criminal history checks, will not apply to investigations under the AI Act. In keeping with the general provisions of the FTI Act, entry powers will not apply to a place where a person resides.