Parliamentary Committees

Subordinate legislation tabled between 1 August 2012 and 11 September 2012

Report No. 12

Agriculture, Resources and Environment Committee

November 2012

Agriculture, Resources and Environment Committee

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Acknowledgements

The committee thanks departmental officers who briefed the committee or otherwise contributed to the inquiry.

1 Introduction

Role of the committee

The Agriculture, Resources and Environment Committee (the committee) is a portfolio committee established by the *Parliament of Queensland Act 2001* and the Standing Orders of the Legislative Assembly on 18 May 2012.[1] The committee's primary areas of responsibility are: the Department of Agriculture, Fisheries and Forestry; the Department of Environment and Heritage Protection; and the Department of Natural Resources and Mines.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each Bill and item of subordinate legislation (SL) in its portfolio area to consider –

a) the policy to be given effect by the legislation;
b) the application of fundamental legislative principles to the legislation; and
c) for subordinate legislation – its lawfulness.

Aim of this report

This report notes the subordinate legislation tabled between 1 August 2012 and 11 September 2012 that are within the committee's portfolio areas. The report also discusses issues the committee identified in the course of its inquiries.

SL No	Subordinate Legislation	Tabled Date	Disallowance Date
120	Water and Other Legislation Amendment Regulation (No.1) 2012	21/08/2012	28/11/2012
121	Explosives Amendment Regulation (No.2) 2012	21/08/2012	28/11/2012
127	Brands Regulation 2012	21/08/2012	28/11/2012
128	Vegetation Management Regulation 2012	21/08/2012	28/11/2012
141	Animal Care and Protection Regulation 2012	11/09/2012	13/02/2013

2 Issues identified in particular subordinate legislation

2.1 SL 120 Water and Other Legislation Amendment Regulation (No.1) 2012

The objectives of SL 120 are to amend the Sustainable Planning Regulation 2009 to:

- prescribe one assessment manager for water-related development applications involving multiple jurisdictions. This involves aligning work related to dams with the chief executive administering the *Water Supply (Safety and Reliability) Act 2008*;
- allow the destruction of vegetation, excavation or placement of fill in a watercourse, lake or spring without a riverine protection permit if these activities are carried out under an environmental authority for a chapter 5A activity (greenhouse gas storage activities, geothermal activities and petroleum activities) issued under the *Environmental Protection Act 1994*;
- allow the destruction of vegetation, excavation or placement of fill in a watercourse, lake or spring without a riverine protection permit if the activity is undertaken in accordance with the chief executive approved guideline;
- omit provisions for the transfer of interim water allocations. These provisions relate to the Lower Mary River Water Supply Scheme;
- declare the downstream limit for the Boyne River;
- enable the Conondale Water Supply Co-op Ltd to hold a water licence not attached to land; and
- correct several minor errors and inconsistencies.

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

Committee considerations

The committee asked the department for the following information:

(1) an overview of what the objectives seek to achieve;

(2) clarification as to whether the holder of an Environmental Authority will still require a land owner's consent to undertake vegetation clearing (as is presently the case); and

(3) whether the removal of the requirement to have a Riverine Protection Permit with an Environmental Authority (to undertake destruction of vegetation etc.) still takes into account circumstances of environmental harm that can occur downstream in circumstances where a person/group undertaking clearing works to a riverine system does not follow best practice i.e. cause of sediment build-up downstream?

In response to the committee's query, the department provided the following response:

1. An overview of what the objectives seek to achieve.

(a) Prescribe one assessment manager for water-related development applications involving multiple jurisdictions. This involves aligning work related to dams with the chief executive administering the Water Supply (Safety and Reliability) Act 2008

In short, the objective of the amendment was to prescribe one assessment manager for water-related development applications involving multiple jurisdictions (i.e. more than one administering agency) in schedule 6 of the Sustainable Planning Regulation 2009 (Sustainable Planning Regulation).

Schedule 6 of the Sustainable Planning Regulation prescribes who the assessment manager is for deciding various water-related development applications (among other things).

The assessment manager for water-related development applications was prescribed as the chief executive administering the *Water Act 2000*, the *Water Supply (Safety and Reliability) Act 2008*, the *Vegetation Management Act 1999* and/or the *Wild Rivers Act 2005*, depending on the development application.

Prior to the release of Administrative Arrangements Order (No.4) 2012, these Acts were administered under the one portfolio (the Department of Environment and Resource Management) and therefore, in effect, only one assessment manager for water-related development applications. As the abovementioned Acts are now administered under different portfolios (as a consequence of Administrative Arrangements Order (No.4) 2012), there were inadvertently two or more assessment managers for a single development application involving multiple jurisdictions.

Having two or more assessment managers was never intended, nor is it practical. It could have resulted in a development application receiving two development notices from two different assessment managers, with different considerations and potentially conflicting conditions on the approval or, in a worst case scenario, one development approval and one refusal with no mechanism for resolving which takes priority. It would also have created additional administrative burden and increased the risk of not meeting statutory timeframes under the Integrated Development Assessment System.

As most water-related development applications in schedule 6 involve multiple jurisdictions, the amendments to schedule 6 to prescribe one assessment manager were prepared in consultation with the relevant administering agencies. For example, for an application related to operational work for the construction of a dam and/or operational work for the taking or interfering with water and/or operational work for the clearing of native vegetation and/or development for removing quarry material, it was agreed, in conjunction with the Department of Energy and Water Supply, that the chief executive administering the *Water Act 2000* and the *Vegetation Management Act 1999* (i.e. the chief executive of the Department of Natural Resources and Mines) was better placed to assess the application. The chief executive administering the *Water Supply (Safety and Reliability) Act 2008* would still have jurisdiction as a concurrence agency for development applications relevant to its portfolio.

(b) Allow the destruction of vegetation, excavation or placement of fill in a watercourse, lake or spring without a riverine protection permit if these activities are carried out under an environmental authority for a chapter 5A activity (greenhouse gas storage activities, geothermal activities and petroleum activities) issued under the Environmental Protection Act 1994

The destruction of vegetation, excavation and the placing of fill in a watercourse, lake or spring is permitted under the Water Regulation 2002 (Water Regulation) if it is carried out under a mining or petroleum authority/lease or licence, or under an environmental authority for a mining activity under the *Environmental Protection Act 1994*.

The objective of the amendment to the Water Regulation was to expand the exemption to other resource industries such as greenhouse gas and geothermal. The legislation regulating these resource industries had not been incorporated into the *Water Act 2000*, and expanding the exemption to include these industries ensured equity and consistency in providing an exemption for all mining and petroleum resource industries.

The amendment prevents the need for significant and lengthy departmental assessment of riverine protection permits for these resource industries and simplifies and reduces red tape for these industries.

(c) Allow the destruction of vegetation, excavation or placement of fill in a watercourse, lake or spring without a riverine protection permit if the activity is undertaken in accordance with the chief executive approved guideline

The objective of the amendment to the Water Regulation was to expand the guideline which was prescribed under the Water Regulation called *Guideline—Activities in a watercourse, lake or spring associated with mining operations* to apply to other resource industries such as greenhouse gas and geothermal. This guideline allowed holders of a mineral development licence or mining lease under the *Mineral Resources Act 1989* to undertake certain activities without a riverine protection permit where undertaken in accordance with the guideline.

The legislation regulating these resource industries had not been incorporated into the *Water Act 2000*, and expanding the guideline to include these industries ensured equity and consistency in providing an exemption for all mining and petroleum resource industries.

Note:

For amendments (b) and (c), it is noted that both of these amendments, in effect, provide an exemption for resource industries to destroy vegetation, excavate and place fill in a watercourse, lake or spring. It is necessary to retain both exemptions on the basis that the guideline is often used as a reference document for determining conditions for environmental authorities for resource activities. In circumstances where it is not used, the exemption in the Water Regulation will permit the destruction of vegetation, the excavation and placement of fill in a watercourse, lake or spring when it is carried out under an environmental authority issued under the Environmental Protection Act 1994 for the particular resource activity.

2. Clarification as to whether the holder of an Environmental Authority will still require a land owners' consent to undertake vegetation clearing (as is presently the case).

Under section 309I of the *Environmental Protection Act 1994*, a person may apply for an environmental authority (for a chapter 5A activity) only if the person is the holder of a relevant resource authority for the application. A relevant resource authority for a chapter 5A activity is the resource authority to which the activity relates, for example: a geothermal tenure under the *Geothermal Energy Act 2010*, a petroleum tenure under the *Petroleum and Gas (Production and Safety) Act 2004*, or a greenhouse gas exploration permit under the *Greenhouse Gas Storage Act 2009* etc.

It is under the relevant resource authority that a landowner's consent would be obtained to undertake vegetation clearing.

Queensland's new land access laws set out requirements of resource authority holders and landholders related to access to private land and compensation. A resource authority holder is allowed to undertake activities related to the resource authority on private land in the area of the resource authority, however affected landholders are entitled to know what activities are being undertaken, and provide input and receive compensation for any impacts associated with those activities. More specifically:

Under the *Petroleum and Gas (Production and Safety) Act 2004*, an authority to prospect holder (section 74), and a petroleum lease holder (section 153), must consult with each owner and occupier of private or public land on which authorised activities for the authority/lease are proposed to be carried out or are being carried out.

Under section 495, a person must not enter private land in a petroleum authority's area to carry out a preliminary activity or advanced activity for the authority unless the petroleum authority's holder has given each owner and occupier of the land a written notice of the entry (an entry notice). In accordance with section 496, the notice must state the activities proposed to be carried out on the land. An advanced activity means an authority activity for the authority, for example, vegetation clear-felling.

Under section 500, a person must not enter private land in a petroleum authority's area to carry out an advanced activity for the authority unless each eligible claimant for the land is a party to an appropriate conduct and compensation agreement. An eligible claimant and a petroleum authority holder may enter into an agreement about how authorised activities under the petroleum authority to the extent they relate to the eligible claimant must be carried out.

The abovementioned requirements are also reflected in other resource legislation: *Geothermal Energy Act 2010*, *Greenhouse Gas Storage Act 2009*, *Mineral Resources Act 1989* and *Petroleum Act 1923*.

3. Does the removal of the requirement to have a Riverine Protection Permit with an Environmental Authority (to undertake destruction of vegetation etc.) still take into account circumstances of environmental harm that can occur downstream in circumstances where a person/group undertaking clearing works to a riverine system does not follow best practice i.e. cause of sediment build up downstream.

It is an offence under section 814 of the *Water Act 2000* for a person to destroy vegetation, excavate or place fill in a watercourse, lake or spring without a riverine protection permit, unless the activity is undertaken in accordance with a prescribed guideline under the Water Regulation, such as *Guideline – Activities in a watercourse, lake or spring associated with a resource activity or mining operations*. Where the activity has not been undertaken in accordance with the guideline, a person would be in breach of section 814 of the *Water Act 2000*.

Alternatively, where the destruction of vegetation, excavation or placement of fill is undertaken under the authority of an environmental authority, any harm or damage caused to the environment would be penalised under the *Environmental Protection Act 1994*.

Generally an application for an environmental authority under the *Environmental Protection Act 1994* must include relevant information about the likely risks to the environment from the activity, or in some cases, an environmental impact statement must be prepared before an environmental authority is issued. This is likely to include the impacts on any water resources in the area of the environmental authority.

The administering authority may condition an environmental authority to take action to prevent environmental harm (section 309Z). Alternatively, the administering authority may condition an environmental authority to require the holder to clear vegetation in accordance with the guideline

Guideline – Activities in a watercourse, lake or spring associated with a resource activity or mining operations prescribed under the *Water Act 2000*. Under section 430 of the *Environmental Protection Act 1994*, a person who contravenes a condition of an environmental authority is guilty of an offence.

Potential FLP issue and comment

***Legislative Standards Act 1992*, section 4(2)(a), 4(3)(k) – regard to rights and liberties of individuals, and whether unambiguous and drafted in a sufficiently clear and precise way**

Section 4(2)(b), 4(5)(c) – regard to the institution of Parliament, and whether contains only matter appropriate to subordinate legislation

The *Water Act 2000*, section 814 creates the offence of destroying vegetation, excavating or placing fill without a permit. However, it does not apply to certain activities, including destruction of vegetation, excavation or placing of fill permitted under a regulation (s 814(2)(ix)). The Water Regulation 2002 (Water Regulation), sections 49-51 prescribe the circumstances in which destroying vegetation, excavating or placing fill is permitted.

Sections 8(2), 9(2) and 10(2) of the amendment regulation achieve the second objective outlined above and amend the Water Regulation 2002 to provide that destroying vegetation, excavating or placing fill in a watercourse, lake or spring is permitted if carried out under the document called *Guideline – Activities in a watercourse, lake or spring associated with resource activity or mining operations*.

The amendment introduces the term 'resource activity' into the Water Regulation for the first time. The definition of the term 'resource activity' appears in the guideline as follows:

'Resource activity is an activity that involves—

a) a geothermal activity that, under the Geothermal Energy Act 2010, is an authorised activity for a geothermal tenure
b) a GHG Storage activity that, under the Greenhouse Gas Storage Act 2009, is an authorised activity for a greenhouse gas storage authority under that Act
c) a mining activity that, under the Mineral Resources Act 1989, is an authorised activity for a mining tenure
d) a petroleum activity that is
    i. an activity that, under the Petroleum Act 1923, is an authorised activity for a petroleum tenure under that Act or
    ii. an activity that, under the Petroleum and Gas (Production and Safety) Act 2004, is an authorised activity for a petroleum authority under that Act.'

In order to find out precisely what activities are permitted, a reader then must refer to the relevant Act. For example, for a geothermal activity, the term 'authorised activity for a geothermal tenure' is not specifically defined in the *Geothermal Energy Act 2010*. Nor is it immediately clear from the *Geothermal Energy Act 2010* what activities are authorised.

Committee's request for advice

The committee sought advice from the department in relation to:

- what activities are authorised;
- why the term 'resource activity' was not defined in the regulation; and
- why the provisions omit the transfer of interim water allocations from the Mary River Water Supply Scheme.

The department's advice

Issue 1 – What activities are authorised

The intention of the amendments to sections 49-51 of the Water Regulation was to permit the destruction of vegetation, excavation or the placement of fill in a watercourse, lake or spring without a riverine protection permit by the holder of an:

- environmental authority for a geothermal activity under the *Environmental Protection Act 1994;*
- environmental authority for a greenhouse gas storage activity under the *Environmental Protection Act 1994; or*
- environmental authority for a petroleum activity under the *Environmental Protection Act 1994;*

if carried out in accordance with the guideline which is *Guideline – Activities in a watercourse, lake or spring associated with a resource activity or mining operations*.

These activities (geothermal activity, greenhouse gas storage activity and petroleum activity) are collectively referred to as chapter 5A activities under the *Environmental Protection Act 1994* (Environmental Protection Act). Section 309A defines this term:

(1) This chapter provides for environmental authorities for environmentally relevant activities for which an environmental authority is required under section 426A, namely—
(a) greenhouse gas storage activities; and
(b) geothermal activities, unless under the Geothermal Act the activities are—
(i) geothermal exploration for exempt heat pump production or to evaluate the feasibility of exempt heat pump production; or
(ii) exempt heat pump production; or
(iii) other geothermal production that, under the Geothermal Act, is not of a large-scale; and
(c) petroleum activities.
(2) An activity mentioned in subsection (1) is a chapter 5A activity.

Each of the abovementioned activities are individually defined in schedule 4 (Dictionary) of the Environmental Protection Act.

However, amendments to the Environmental Protection Act have been passed by Parliament (but not yet commenced) under the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012* (Greentape Reduction Act) which is to commence in March 2013. The Greentape Reduction Act instead uses the term 'resource activity' to collectively refer to a geothermal activity, a GHG storage activity, a petroleum activity and a mining activity. This term is defined under section 107 as:

*A **resource activity** is an activity that involves—*

(a) a geothermal activity; or
(b) a GHG storage activity; or
(c) a mining activity; or
(d) a petroleum activity.

Each of the abovementioned activities is individually defined in schedule 2 (Dictionary) of the Greentape Reduction Act.

The definition of each individual activity is the same in both the Environmental Protection Act and the Greentape Reduction Act despite the fact that the term used to collectively refer to the activities (geothermal, greenhouse gas storage, petroleum and mining) is not the same.

The reference to the term 'resource activity' in the Water Regulation is used in the title of the guideline prescribed in sections 49-51 of *Guideline – Activities in a watercourse, lake or spring associated with a resource activity or mining operations* to collectively refer to each individual activity (geothermal activity, a GHG storage activity, a petroleum activity and a mining activity) for which an environmental authority is required under the Environmental Protection Act and the

Greentape Reduction Act. The use of the term 'resource activity' is consistent with the terminology used in the Greentape Reduction Act.

Because the amendments to the Water Regulation are, in effect, authorising the holder of an environmental authority for a geothermal activity, a GHG storage activity, a petroleum activity or mining activity to destroy vegetation, excavate or place fill in a watercourse, lake or spring, it was necessary to use the definition of each individual activity as prescribed under the Environmental Protection Act and the Greentape Reduction Act.

Issue 2 –

Why the term 'resource activity' was not defined in the regulation

The reference to the term 'resource activity' in the Water Regulation is only used in the title of the guideline prescribed in sections 49-51 of the Water Regulation *Guideline – Activities in a watercourse, lake or spring associated with a resource activity or mining operations* and as such it was considered appropriate to define the term in the guideline itself, rather than in the Water Regulation.

Issue 3 – Why the provisions omit the transfer of interim water allocations from the Mary River Water Supply Scheme

The committee also sought advice from the department in relation to SL 120 which omits the provisions for the transfer of interim water allocations from the Lower Mary River Water Supply Scheme.

The department advised the committee that there are no interim water allocations remaining in the Lower Mary River Water Supply Scheme since their conversion to water allocations by the Mary River Resource Operations Plan (commenced on 5 September 2011).

Under the water planning process pursuant to the Water Act, resource operations plans provide for the conversion of interim water allocations and interim resource operations licences to water allocations and resource operations licences respectively. A resource operations plan has now been approved for the Mary River Basin which provides for the conversion of these interim water allocations in the Lower Mary River Water Supply Scheme.

As there are no more interim water allocations in the Lower Mary River Water Supply Scheme that may be transferred to other land, it is necessary to remove the Lower Mary River Water Supply Scheme entry in schedule 3 of the Water Regulation 2002, as it is no longer relevant.

Committee comment

The committee thanks the department for this response.

2.2 SL 121 Explosives Amendment Regulation (No.2) 2012

The objective of SL 121 is to change the competency assessment timeframe for a shotfirer licence in the Explosives Regulation 2003 from three years to five years, to be consistent with the term of a shotfirer licence, and to make administrative amendments.

Potential FLP issue and comment

There are no potential FLP issues of concern. This SL is lawful and within power.

2.3 SL 127 Brands Regulation 2012

The objective of SL 127 is to remake the Brands Regulation 1998 prior to its automatic expiry under the *Statutory Instruments Act 1992*, part 7. The Brands Regulation 1998 prescribes a system of permanently and uniquely marking and identifying various livestock for the purposes of the *Brands Act 1915*; and details the fees that apply to the registration and transfer of brands and earmarks.

Potential FLP issue and comment

***Legislative Standards Act 1992*, section 4(2)(a) – Sufficient regard to rights and liberties of individuals**

Cancellation of brand or earmark after conviction for disqualifying offence

Section 8 of the Brands Regulation 2012 provides that the registrar of brands may cancel a registered brand or earmark if its registered owner has within the last five years been convicted of a disqualifying offence. The Explanatory Notes raise this issue and point out that cancellation of a brand or earmark only occurs after conviction of an offence in relation to a brand or earmark, that is, one of the following:

- Using registered brands with criminal intention – section 444B *Criminal Code*
- Unlawfully using stock – section 445 *Criminal Code*
- Illegal branding – section 447 *Criminal Code*
- Defacing brands – section 448 *Criminal Code.*

Further, the Minister administering the *Brands Act 1915* must approve cancellation of a brand or earmark. Therefore cancellation of a brand or earmark in these circumstances appears to be justified.

Committee comment

There are no potential FLP issues of concern. This SL is lawful and within power.

2.4 SL 128 Vegetation Management Regulation 2012

The objectives of SL 128 are to:

- Replace the Vegetation Management Regulation 2000 to ensure continued operation of the vegetation management framework. The Vegetation Management Regulation 2012 supports the implementation of the *Vegetation Management Act 1999* by declaring classification of regional ecosystems and giving effect to the statutory codes, policies and maps that underpin the vegetation management framework.
- Remove outdated provisions and update the commercial timber species list.

Potential FLP issue and comment

Legislative Standards Act 1992, section 4(2)(a), (3)(k) – Sufficient regard for the rights and liberties of individuals, whether unambiguous and drafted in a sufficiently clear and precise way

Legislative Standards Act 1992, section 4(2)(b), (5)(c) – Sufficient regard to the institution of parliament, whether contains only matter appropriate to subordinate legislation

Section 8(4) and schedule 4 of the regulation prescribe grassland regional ecosystems for the purposes of the definition of 'vegetation' in section 8(b) of the Act. The content of these provisions is the same as that contained in the Vegetation Management Regulation 2000. The term 'vegetation' is, understandably, an important concept in the *Vegetation Management Act 1999.* It is used in provisions creating offences with a maximum penalty of 1665 penalty units ($183,150) (see, for example, section 54A Stop work notice, section 54B Restoration notice).

The former Scrutiny of Legislation Committee considered it preferable for important terms to be defined in the Act itself and regarded a situation where a term was primarily defined by regulation to be an inappropriate delegation of legislative power (Alert Digest No. 2 of 1999). In the committee's

opinion, if sanctions could apply for breaching a section of an Act, then terms used in that section should be defined in the Act.

Committee's request for advice

The committee requested advice from the department as to the reasoning behind having the definition of the term 'vegetation' as part of the regulation as opposed to including it in the Act.

The department's advice

Within the definition of 'vegetation', it includes amongst other things a native tree or plant other than a plant within a grassland regional ecosystem prescribed under a regulation. Although the entire definition is included in the *Vegetation Management Act 1999*, it does reference regional ecosystems prescribed within the Vegetation Management Regulation 2012. The advantage of the definition in the Act referring to ecosystems prescribed within the regulation is to cater for regular amendments to the list of regional ecosystems including grasslands. These ecosystems are still being defined and mapped through the state vegetation mapping program and changes can occur from time to time. Having the definition refer to the regulation provides for a flexible method to amend the list of grassland regional ecosystems from time to time.

Committee comment

The committee thanks the department for this response.

2.5 SL 141 Animal Care and Protection Regulation 2012

The objective of SL 141 is to remake the Animal Care and Protection Regulation 2002, prior to its automatic expiry under the *Statutory Instruments Act 1992*, part 7, to give effect to various compulsory and voluntary codes of practice to provide for the welfare of animals. The amendment regulation also gives effect to new provisions concerning minimum accommodation requirements for pigs.

Potential FLP issue and comment

There are no potential FLP issues of concern. This SL is lawful and within power.

Committee's request for advice

The committee asked the department to provide further information on the amendment to SL 141.

The department's advice

The Animal Care and Protection Regulation 2012 is a remake of the previous Animal Care and Protection Regulation 2002 which was repealed by the 2012 Regulation. Pursuant to the provisions of the *Statutory Instruments Act 1992*, the 2002 Regulation was scheduled to expire on 1 September 2012 and, therefore, it was decided to remake the regulation.

The 2012 Regulation maintains all provisions, including compulsory standards and voluntary codes of practice or guidelines for the welfare of animals that were in the previous regulation.

The regulation ensures that animals in Queensland are afforded standards of animal welfare that meet community expectations and market requirements, incorporate sound scientific principles, and provide for animal welfare outcomes that are consistent with other Australian jurisdictions.

The only addition, compared with the 2002 Regulation, is to incorporate new provisions concerning minimum space requirements for pigs. This was in line with the national *Model Code of Practice for the Welfare of Animals – Pigs* which was endorsed by the former Primary Industries Ministerial Council. All states and territories agreed to phase in the minimum space requirements to their legislation.

3 Recommendation

Recommendation 1

The committee recommends that the Legislative Assembly notes this report and the committee's conclusion that the five regulations considered in this report raise no issues of fundamental legislative principles.

Mr Ian Rickuss MP

Chair

November 2012