Parliamentary Committees

Subordinate legislation tabled between 12 September 2012 and 27 November 2012

Report No. 16

Agriculture, Resources and Environment Committee

February 2013

Agriculture, Resources and Environment Committee

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Acknowledgements

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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: Agriculture, Fisheries and Forestry; Environment and Heritage Protection; and 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 12 September 2012 and 27 November 2012 that are within the committee's portfolio areas. The committee identified potential issues regarding the application of fundamental legislative principles (FLPs) with two instances of subordinate legislation. These are listed in the table below.

SL No	Subordinate Legislation	Tabled Date	Disallowance Date
157	Nature Conservation (Protected Areas) Amendment Regulation (No.2) 2012	30/10/12	7/3/13
161	Brands Amendment Regulation (No.1) 2012	30/10/12	7/3/13
162	Chemical Usage (Agricultural and Veterinary) Control Amendment Regulation (No.1) 2012	30/10/12	7/3/13
163	Fisheries Amendment Regulation (No.1) 2012	30/10/12	7/3/13
164	Plant Protection (Approved Sugarcane Varieties) Amendment Declaration (No.1) 2012	30/10/12	7/3/13
171	Food Production (Safety) Amendment Regulation (No.2) 2012	30/10/12	7/3/13
172	Nature Conservation (Protected Plants) Amendment Conservation Plan (No.1) 2012	30/10/12	7/3/13
173	Aboriginal Land Amendment Regulation (No.3) 2012	30/10/12	7/3/13
176	Rural and Regional Adjustment Amendment Regulation (No.7) 2012	30/10/12	7/3/13
177	Nature Conservation (Protected Areas) Amendment Regulation (No.3) 2012	30/10/12	7/3/13
180	Waste Reduction and Recycling Amendment Regulation (No.2) 2012	30/10/12	7/3/13
181	Proclamation made under the Mines Legislation (Streamlining) Amendment Act 2012	30/10/12	7/3/13
182	Mineral Resources Amendment Regulation (No.3) 2012	30/10/12	7/3/13
183	Waste Reduction and Recycling (Postponement) Regulation 2012	30/10/12	7/3/13
188	Land Title and Other Legislation Amendment Regulation (No.1) 2012	30/10/12	7/3/13
195	Rural and Regional Adjustment Amendment Regulation (No.8) 2012	13/11/12	21/3/13
196	Environmental Protection and Other Legislation Amendment Regulation (No.1) 2012	13/11/12	21/3/13
209	Nature Conservation (Protected Areas) Amendment Regulation (No.4) 2012	27/11/12	18/4/13

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

2 Issues identified in particular subordinate legislation

2.1 SL 180 Waste Reduction and Recycling Amendment Regulation (No.2) 2012

The objective of SL180 is to give effect to the provisions of the National Environment Protection (Used Packaging Materials) Measure (the UPM measure) by introducing part 5A into the Waste Reduction and Recycling Regulation 2011. The UPM measure works with the Australian Packaging Covenant to provide a co-regulatory framework to reduce the environmental impacts of packaging waste. The covenant is an agreement between industry and governments to reduce the environmental impacts of consumer packaging. Participation in the covenant is voluntary. However, "brand owners who choose not to become signatories or who fail to comply with the covenant requirements will be regulated under the UPM measure in each of the states and territories within which the company sells its products".[2] As advised in the Explanatory Notes to the amendment regulation, one of the commitments of signatories to the covenant is to give effect to the provisions of the measure through legislation in that jurisdiction.

The measure, dated 16 September 2011, was made by the National Environment Protection Council under the *National Environment Protection Council Act 1994* (Cwlth), the *National Environment Protection Council (Queensland) Act 1994*, and particular Acts of other states.

Potential FLP Issue and Comment

Legislative Standards Act 1992, section 4 – Sufficient regard to the rights and liberties of individuals, sufficient regard for the institution of Parliament, contains only matter appropriate to subordinate legislation

Section 4 of the amendment regulation inserts new section 42A into the Waste Reduction and Recycling Regulation 2011. New section 42A makes the following provisions as prescribed provisions for section 245 of the *Waste Reduction and Recycling Act 2011*:

- section 41L(1) – failure to create an action plan for a financial year and give to the chief executive;
- section 41M(9) – failure to comply with a requirement (to state what steps have been taken or will be taken to achieve the recovery rate stated in section 41I) or failure to make submissions (about why the chief executive should not take action under chapter 11 of the Act) within certain timeframes;
- section 41N(1) and (2) – failure to prepare and keep for at least 5 years certain information or failure to give information to the chief executive by 30 September after the end of the financial year, unless the person has a reasonable excuse; and
- section 41R(3) – failure to provide information stated in the notice to the chief executive within 3 months after the end of the financial year to which the information relates.

A breach of one of these sections could trigger the show cause notice and compliance notice provisions in the Act. A person must comply with a contravention notice unless he or she has a reasonable excuse (section 251 of the Act). Non-compliance with a compliance notice is punishable by a maximum penalty of 300 penalty units.

As advised in the Explanatory Notes (at page 5), the former Scrutiny of Legislation Committee adopted a formal policy,[3] stating that the principal means of creating offences should always be through Acts of Parliament rather than regulations (at page 7). The former committee accepted that legislative power to create offences and prescribe penalties may be delegated in limited circumstances, provided that safeguards including the following are observed:

[2] Australian Packaging Covenant, page 4.
[3] Policy No. 2 1996 in Alert Digest No. 4 of 1996.

- rights and liberties of individuals should not be affected, and the obligations imposed on persons by regulations should be limited; and
- maximum penalties provided for in regulations should be limited, generally to 20 penalty units.

Where these safeguards were not observed, the former committee stated that it would consider moving for the disallowance of the relevant provisions.

The amendment regulation creates a situation where a breach of section 41L(1), 41M(9), 41N(1) or (2) or 41R(3) could be punishable by a maximum penalty of 300 penalty units, which is far greater than the 20 penalty units suggested by the former Scrutiny of Legislation Committee.

The *Waste Reduction and Recycling Act 2011* provides for show cause notices and compliance notices to be issued. The amendment regulation introduces provision for a new sort of notice to be issued, whereby it is possible for a notice to be issued under the regulation, then a show cause notice under the Act, followed by a compliance notice under the Act.

The Explanatory Notes advise that the scheme of show cause notices and compliance notices creates a better natural justice process by giving a person more opportunity to demonstrate they are not contravening a prescribed provision before further compliance action is taken.

Legislative Standards Act 1992, section 4(2)(b) Sufficient regard to the institution of Parliament; national scheme legislation

The amendment regulation implements the UPM measure as part of national scheme legislation. National scheme legislation, either in principal or delegated legislation, can create a tension between the efficient collaboration between Australia's different jurisdictions and the independence of action of each of their sovereign Parliaments.[4] It has been suggested that when Queensland legislation implements national scheme legislation, it is preferable for the scheme legislation itself to be tabled in the Queensland Legislative Assembly. This practice is based on a *Position Paper on Scrutiny of National Schemes of Legislation* prepared by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia in October 1996 (page 38).[5] The former Industry, Education, Training and Industrial Relations Committee took this approach in its Report on the Education and Care Services National Law (Queensland) Bill 2011 (page 3). At this stage it would appear that the UPM measure has not been tabled in the Queensland Legislative Assembly.

References to Australia

New sections 41B (definition of 'brand owner'), 41D (definition of 'consumer packaging material'), 41E (meaning of 'recovery rate'), 41L (action plans) and 41N (keeping and giving information) make reference to 'Australia'. For example, section 41N(1)(b)(ii) requires a brand owner to keep information about recovery of consumer packaging material reused or recycled in Australia. The committee notes the reference to 'Australia' throughout the regulation rather than 'Queensland', given the national nature of this legislative scheme.

An Impact Statement for the UPM measure was released for public consultation nationally in February 2011.[6] This was regarded as an extensive impact assessment process, so this amendment regulation is excluded from the Regulatory Assessment Statement process.[7]

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4 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p.176.

5 Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees.

6 See http://www.scew.gov.au/archive/product-stewardship/pubs/upm-nepm/impact-statement-upm-nepm-2011.pdf.

7 See http://www.treasury.qld.gov.au/office/knowledge/docs/ras-system-guidelines/ras-system-guidelines.pdf.

Committee considerations

In consideration of the regulation, the committee had three queries for the Department of Environment and Heritage Protection:

(1) The committee noted the department's explanation of the fee increase contained in the (amendment) regulation's Explanatory Notes. However, given the view of the former Scrutiny of Legislation Committee and the size of the increase, the committee asked the department to elaborate further on the reasoning for the fee increase being incorporated into the regulation and not the Act.

The department provided the following response:

> *The success of the Australian Packaging Covenant lies in the fact that it is a co-regulatory arrangement. The Covenant is a voluntary industry arrangement supported by a National Environment Protection Measure. This Measure is given effect through legislation in each jurisdiction. The legislative provisions apply to free-rider brand owners – that is, those brand owners to whom the Covenant applies but are either not signatories or are not fulfilling their obligations as a signatory.*
>
> *As part of their signatory obligations, companies are also required to contribute funding towards Covenant projects and to support the Covenant Secretariat service. The funding contribution is linked to the annual turnover of the company. Free-rider companies will not have the additional costs that signatory companies have and may gain a market advantage and monetary benefit by being able to charge a lower shelf price or keep production costs down. Brand owner signatories expect that strong enforcement action is available to be taken against free-riders to ensure that the voluntary component of the framework works effectively and that compliant companies are not disadvantaged in the market place through free-riders potentially gaining an advantage in that they have reduced costs.*
>
> *If the legislative provisions underpinning the Covenant do not provide sufficient incentive for brand owners to sign the Covenant this framework would collapse. One of the incentives for brand owners to sign the Covenant is that obligations under the NEPM are significantly more onerous. However, simply having more onerous requirements is meaningless unless the attendant penalties associated with non-compliance are proportionate to the potential benefit that a brand owner may gain from non-compliance.*
>
> *This was not the case with the previous regulatory provisions. The maximum penalty for non-compliance under the previous provisions was 20 penalty units.*
>
> *No new offences or penalties have been created under the regulation. The offence for the listed prescribed provisions is for a breach of a compliance notice as issued under the Waste Reduction and Recycling Act 2011, after a show cause process has first been applied. The Act provides a framework for prescribed provisions that allows more flexibility in the application of penalties than a direct offence provision contained in regulation.*
>
> *The penalties created as a result of making these provisions prescribed provisions under the Waste Reduction and Recycling Act 2011 better reflect the costs that may be associated with complying with signatory obligations. They also align more closely with the penalties imposed in other jurisdictions. This has the effect of reducing the potential for a brand owner to establish head office operations in Queensland to avoid higher compliance penalties in other states and works towards achieving regulatory harmonisation between jurisdictions.*

For example:

- *the NSW Protection of the Environment Operations (Waste) Regulation 2005 provides maximum penalties:*
  - *in the case of a corporation—200 penalty units and, in the case of a continuing offence, a further penalty of 100 penalty units for each day the offence continues, or*
  - *in the case of an individual—100 penalty units and, in the case of a continuing offence, a further penalty of 50 penalty units for each day the offence continues.*

It should be noted that the higher penalties only come into effect if a brand owner is not complying with their signatory obligations and only after the show cause process under the Act has been completed.

It should also be noted that companies with an annual turnover of less than $5 million are not brand owners for the purposes of the Covenant and therefore do not meet the eligibility criteria for the NEPM and regulatory obligations. This means that any penalties that may be applied as a result of non-compliance may only be applied to those companies with an annual turnover of $5 million or more.

(2) The committee asked the department whether it intended tabling the UPM measure in accordance with the approach taken by the former Industry, Education, Training and Industrial Relations Committee.

The department provided the following response:

The Minister will consider the request and may table the National Environment Protection (Used Packaging Materials) Measure.

(3) The committee noted that the regulation is facilitating the implementation of a national scheme; however, it asked the department whether the amendment regulation had taken into account any Queensland-specific issues which may arise.

The department provided the following response:

Queensland-specific issues were considered in the drafting of the Amendment Regulation. One of the issues considered was the brand owner spectrum in Queensland. Queensland currently has 66 Covenant signatories. These signatories range in size from large multinational and international corporations including Parmalat, Virgin Australia, Century Yuasa Batteries and Incitec Pivot to smaller state-based companies such as Buderim Ginger.

Compliance in Queensland has previously been undertaken through a complaints-based and notification approach. The Australian Packaging Covenant Council Secretariat notifies the Department of Environment and Heritage Protection of Queensland-based brand owners that have been identified as non-signatories or that are not complying with their signatory obligations. The Department sends a letter to the company asking them to demonstrate that they are an eligible brand owner in the first instance and outlining their option if they are an eligible brand owner—sign the Covenant, achieve equivalent outcomes to Covenant signatories or have the NEPM provisions apply. To date, no Queensland brand owner signatory has been identified as being non-compliant and, once identified as an eligible brand owner, none have elected to comply with the requirements of the NEPM.

Due to the range of brand owners established in Queensland, this framework provides a more appropriate approach to managing brand owner compliance issues.

2.2 SL 188 Land Title and Other Legislation Amendment Regulation (No.1) 2012

The objective of SL 188 is to amend the Building Units and Group Titles Regulation 2008, Land Regulation 2009, Land Title Regulation 2005 and Water Regulation 2002 to increase regulatory fees for lodging land and water allocation documents in the titles registry, and specific searches including current title search, historical title search, copy of title or survey plan, and copy of document. It is proposed to use the projected additional revenue raised from the adjusted fees to fund:

- a rolling program for the replacement and enhancement of Department of Natural Resources and Mines land and cadastral information technology systems; and
- uninterrupted 24/7 access by business and the public to cadastre, property address, imagery, elevation, drainage, roads, geodesy and positioning, administrative boundaries and place names.

Potential FLP Issue and Comment

Fee increases

The amendment regulation increases the fees chargeable under the regulations mentioned above by a factor ranging between 5.1 per cent and 13 per cent.

The 'Indexation of fees and charges policy' set out in Attachment A to the Queensland Government circular 'Principles for Fees and Charges', April 2011, states that fees and charges are to be indexed annually by the full movement in the actual Australian Bureau of Statistics Brisbane All-Groups CPI (Consumer Price Index). Approval by the Cabinet Budget Review Committee (CBRC) is required for changes to fees and charges that are not in line with the annual movement in the CPI.

According to advice from Queensland Treasury, the CBRC had determined that fee increases from 1 July 2012 would be 3.5 per cent.

Committee considerations

The committee asked the Department of Natural Resources and Mines how the fee increase has been indexed and whether the relevant CBRC approval has been obtained.

The department provided the following response:

> *Fees under the relevant regulations were increased by the Natural Resources and Mines Legislation Amendment Regulation (No. 1) 2012 based on the CBRC approved indexation of 3.5%, with effect from 1 August 2012.*
>
> *The further increases under the Land Title and Other Legislation Amendment Regulation (No. 1) 2012 were not indexed as such but were set as specific dollar-value increases based on annual volumes of certain transactions in order to meet the government's commitment to fund a rolling program to replace and enhance DNRM land and cadastral information technology systems and to provide business and the community with 24/7 access to key spatial information datasets.*
>
> *These further increases were approved by CBRC through the 2012-13 Budget Process.*
>
> *The $15 technology levy on lodgement fees (effective 1 Nov 2012) was announced in the 2012 State Budget with revenue to be reinvested to help fund a rolling program of system enhancements and replacements to ensure the ongoing reliability and integrity of land and cadastral information systems. The $1.50 increase to specific search fees was approved to support 24/7 provision of spatial datasets to business and the community (taking effect from 1 Dec 2012 following a separate round of notifications to key stakeholders).*

3 Recommendation

Recommendation 1

The committee recommends that the Legislative Assembly notes this report and the committee's conclusion that the 18 regulations considered in this report raise no issues regarding the application of fundamental legislative principles.

Ian Rickuss MP

Chair

February 2013