

**Portfolio subordinate legislation
tabled between 11 September 2012
and 15 November 2012**

Report No. 24

Finance and Administration Committee

February 2013

FINANCE AND ADMINISTRATION COMMITTEE

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Chair's Foreword

This report presents the Committee's findings from its consideration of items of subordinate legislation tabled between 11 September 2012 and 15 November 2012 that fall within its portfolio responsibilities. The Committee did not identify any significant issues regarding consistency with fundamental legislative principles or the lawfulness of the subordinate legislation.

Michael Crandon MP
Chair
February 2013

1. Introduction

The Finance and Administration 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: Premier and Cabinet; and Treasury and Trade.

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 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.

2. Findings and recommendations

The Committee recommends that the Legislative Assembly note the subordinate legislation tabled between 11 September 2012 and 15 November 2012 and considered by the Committee. The Committee did not identify any significant issues regarding consistency with fundamental legislative principles or the lawfulness of the subordinate legislation.

3. Subordinate legislation considered

The following table lists the subordinate legislation considered by the Committee and the deadline in each case for Members to give notice in the House of a disallowance motion in accordance with Standing Order 59.²

SL No 2012	Subordinate Legislation	Tabled Date	Disallowance Date ³
156	<i>Public Service Amendment Regulation (No.1) 2012</i>	30 October 2012	7 March 2013
169	<i>Resources Legislation and Another Regulation Amendment Regulation (No.1) 2012</i>	30 October 2012	7 March 2013
184	<i>Superannuation (State Public Sector) Amendment Regulation (No.1) 2012</i>	30 October 2012	7 March 2013
192	<i>Proclamation commencing certain provisions – Fiscal Repair Amendment Act 2012</i>	13 November 2012	21 March 2013

4. Issues for consideration

The Committee identified potential fundamental legislative principle (FLP) and/or other issues with the following subordinate legislation highlighted in the table:

- *Resources Legislation and Another Regulation Amendment Regulation (No.1) 2012*
- *Superannuation (State Public Sector) Amendment Regulation (No.1) 2012*

¹ *Parliament of Queensland Act 2001*, s.88 and Standing Order 194

² Section 50 of the *Statutory Instruments Act 1992* provides that the Legislative Assembly may pass a resolution disallowing subordinate legislation if notice of a disallowance motion is given by a Member within 14 sitting days after the legislation is tabled in the Legislative Assembly.

³ Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

4.1 SL No 169 of 2012 – Resources Legislation and Another Regulation Amendment Regulation (No.1) 2012

The regulation has five policy objectives as follows:

- replacement of the existing two tier coal royalty system with a three tier coal royalty system as announced in the 2012-2013 State Budget;
- introduction of a civil penalty to manage possible revenue risks where a person understates their expected royalty liability to reduce monthly payments under the *Mineral Resources Act 1989* and the *Petroleum and Gas (Production and Safety) Act 2004*;
- amendment to specify how unpaid royalty interest is worked out;
- amendment to allow for Ministerial discretion with regard to whether a late lodgement fee on royalty returns is required to be paid; and
- amendment of *State Penalties Enforcement Regulation 2000* to prescribe the payment of attendance expenses.

4.1.1 Fundamental legislative principles issues

The Committee identified the following issues with regard to the regulation:

- **New civil penalty provisions – Minister may remit**

Sections 8 and 18 of the Amendment Regulation provide for imposition of civil penalties by inserting new section 46A into the *Mineral Resources Regulation 2003* and new section 149E into the *Petroleum and Gas (Production and Safety) Regulation 2004*.

Sections 46A(8) and 149E(8) provide that the Minister may remit the whole or part of the civil penalty. These provisions confer a discretionary power on the executive. The exercise of this power has the potential to be arbitrary, so that one person may be liable to pay the penalty, while another person will be excused from payment. Therefore, it is possible that the new penalty provisions will not apply equally to all. On this basis, it is questionable whether these provisions have sufficient regard to the rights and liberties of individuals.

Neither the Amendment Regulation nor the explanatory notes set out guidelines within which the Minister will remit all or part of a civil penalty. The explanatory notes do not explain the rationale for this discretionary power. It appears confusing to impose a penalty and then not apply it equally to all.

As a general principle, law should apply ‘generally and without discrimination’. (European Commission for Democracy through Law (‘The Venice Commission’), Report on the Rule of Law, April 2011).

The new civil penalty provisions are made under section 321A of the *Mineral Resources Act 1989* and 604A of the *Petroleum and Gas (Production and Safety) Act 2004*. These sections were inserted into the relevant Acts by the *Fiscal Repair Amendment Act 2012*. The *Fiscal Repair Amendment Act 2012* was not referred to the Committee for consideration.

▪ **Prescribed fee for royalty return – Minister may remit**

Clause 4 amends the section 28 of the *Mineral Resources Regulation 2003*. New section 28(5) provides that the Minister may remit the whole or part of the prescribed fee for a royalty return. This provision raises similar issues of regard for the rights and liberties of individuals as sections 8 and 18 above. The concerns about this provision are slightly less serious, because it is a prescribed regulatory fee rather than a penalty that can be potentially remitted.

Neither the Amendment Regulation nor the explanatory notes set out guidelines within which the Minister will remit all or part of a civil penalty. The explanatory notes do not explain the rationale for this discretionary power.

The Committee identified that the civil penalty as noted above also includes a provision to allow the Minister to remit the whole or part of the penalty which confers a discretionary power on the executive. This also applies to the inclusion or the remit provisions for the royalty return. The Committee also considered the issue of whether the exercise of this power has the potential to be arbitrary and not apply equally to all. On this basis it is questionable whether these provisions have sufficient regard to the rights and liberties of individuals as the law should apply 'generally and without discrimination'.

The Committee wrote to the Minister seeking a response to these issues. The Minister advised the following:

Monthly payment arrangements for royalties were introduced on 1 January 2012 under the Mineral Resources Regulation 2003 and the Petroleum and Gas (Production and Safety) Regulation 2004. Under these arrangements, the monthly instalments are generally worked out under the default method of one-third of the previous quarter's royalty liability. However, a person may elect to use the estimates method and pay a lower instalment if the actual royalty liability in the current quarter is reasonably expected to be less than the previous quarter. The estimated instalment must be at least one-third of the estimated royalty liability for the current quarter.

To manage possible revenue risks where a person incorrectly uses the estimates method and understates their expected royalty liability to reduce monthly royalty payments, section 321A of the Mineral Resources Act 1989 and the 604A of the Petroleum and Gas (Production and Safety) Act 2004 authorise the making of a regulation dealing with civil penalties.

Consistently with the approach taken for the imposition of penalties under the Taxation Administration Act 2001, which applies for the State's other major own source revenues, the civil penalty applies by operation of the legislation in state circumstances. That is, imposition of the penalty is automatic where stated circumstances exist, and not discretionary. The penalty applies as an alternative to prosecution for an offence.

Where a person elects to use the estimates method for working out one or both of the monthly royalty instalments for a quarter, a civil penalty will apply if either:

- *the actual royalty liability for the quarter is more than 115 per cent of the royalty payable by the person for the previous return period; or*
- *the actual royalty liability for the quarter is less than the royalty payable by the person for the previous period but the total of the royalty paid for instalments 1 and 2 is less than 50 per cent of the actual royalty liability for the quarter.*

This approach provides royalty payers with certainty about the sanction that will apply if the estimates basis is incorrectly used for making monthly royalty payments, and encourages compliance with payment obligations. In deciding whether or not to elect to use the estimates method rather than the default method for calculating monthly royalty payments, application of the penalty is a matter that should properly be taken into account.

There are cases where requiring payment of the full penalty may not be appropriate. Inclusion of a discretion to remit the civil penalty in full or part is consistent with sound revenue administration principles, allowing all relevant circumstances to be taken into account in determining the level of sanction that will apply.

This approach is consistent with the Taxation Administration Act 2001, where the factors to be taken into account in deciding whether or not to remit a penalty are specified under administrative guidelines. It is also consistent with the fact that, if prosecution proceedings were instead instituted, the court would determine the appropriate penalty based on all relevant matters.

However, given the policy basis for imposition of a penalty, remission will be limited and subject to administrative guidelines.

Under the Mineral Resources Regulation 2003, a late lodgement fee applies when a royalty return is lodged late. Consistent with the approach taken for the civil penalty, the fee applies automatically. However, unlike the approach for the civil penalty, there was no ability to remit the fee where it was appropriate for it to apply in the circumstances. For instance, a royalty payer affected by a natural disaster may be unable to lodge a royalty return on time, despite best efforts.

The Regulation amends the Mineral Resources Regulation 2003 to provide for remission of the fee, which also will be subject to administrative guidelines.

4.1.2 Lawfulness

The regulation is lawful and within regulatory power.

4.1.3 Committee comments

The Committee is satisfied that the FLP issues raised in this regulation are reasonable. The Committee is also satisfied with the additional explanations provided by the Treasurer and Minister for Trade.

4.2 SL No 184 of 2012 – Superannuation (State Public Sector) Amendment Regulation (No.1) 2012

The *Superannuation (State Public Sector) Act 1990* provides that a public sector unit may be an employer-sponsor of QSuper. Public sector units may be declared under the regulation. Other definitions of what is a unit of the state public sector are also contained in the Act.

The objective of the regulation is to:

- Declare the Australian Skills Quality Authority to be a public sector unit to enable it to be an employer-sponsor of QSuper for employees who transferred from the Department of Education, Training and Employment;
- Remove a number of entities from the schedule that are no longer employer-sponsors.
- Remove two GOCs and a subsidiary of one, from the schedule as they fit the other definitions of a state public sector unit contained in the Act.

4.2.1 Fundamental legislative principles issues

Section 13AA of the Act provides for continuation of membership of QSuper after an employer ceases to be a public sector unit. Within these provisions there are prescribed circumstances (sections 13AA (c) and (d)) where this continuation would not apply.

The Committee identified that if these sections are not to apply then the rights and liberties of individuals could be affected as they would no longer be eligible to continue to contribute to QSuper.

The Committee sought details of the reasons why the entities are no longer public sector units and assurance that those employees who are members of QSuper remain eligible to contribute should they wish to do so.

The Minister advised that:

Certain employers are nominated in the Regulation to remove any doubt that their employees have QSuper eligibility as they are not what are traditionally considered to be part of core Government. Employer-sponsorship for these employers is often of short duration and results from activities such as asset sales, transferring of State functions to the Commonwealth Government and the Government restructuring certain functions. As long as these employers have employees who are members of QSuper, then the employer remains an employer-sponsor. However, once either the employer ceases to exist, for example because it was carrying out a transitional function only, or there are no more employees who are members of QSuper, the employer ceases to be an employer-sponsor.

4.2.2 Lawfulness

The regulation is lawful and within regulatory power.

4.2.3 Committee comments

The Committee is satisfied with the additional explanations provided by the Treasurer and Minister for Trade.

