

**Subordinate legislation tabled between
20 August and 10 September 2013**

Report No. 33

Agriculture, Resources and Environment

Committee

December 2013

Agriculture, Resources and Environment Committee

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1 Introduction

1.1 Role of the Committee

The Agriculture, Resources and Environment Committee (the committee) is a portfolio committee established by the Legislative Assembly on 18 May 2012 under the *Parliament of Queensland Act 2001*.¹ It consists of government and non-government members. 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 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.

1.2 Aim of this report

This report advises of subordinate legislation examined and, where applicable, presents any concerns the committee has identified in respect of subordinate legislation tabled between 20 March and 30 April 2013 that are within its portfolio responsibilities. Unless expressly noted below, no issues were identified.

SL No	Subordinate Legislation	Tabled Date	Disallowance Date
164	Nature Conservation Legislation Amendment Regulation (No.1) 2013	10 September 2013	13 February 2014
165	Proclamation made under the Land, Water and Other Legislation Amendment Act 2013	10 September 2013	13 February 2014
166	River Improvement Trust Regulation 2013	10 September 2013	13 February 2014
167	Valuers Registration Regulation 2013	10 September 2013	13 February 2014
170	Mineral Resources Regulation 2013	10 September 2013	13 February 2014
173	Plant Protection (Approved Sugarcane Varieties) Amendment Declaration (No.1) 2013	10 September 2013	13 February 2014

2 Issues identified in particular subordinate legislation

2.1 SL 170 Mineral Resources Regulation 2013

The objective of SL170 is to replace the *Mineral Resources Regulation 2003* with the *Mineral Resources Regulation 2013*. The *Mineral Resources Regulation 2013* ('the Regulation') commenced on 1 September 2013 and is substantially similar to the previous regulation.

As described by the explanatory notes, the Regulation prescribes:

- conditions, restrictions, exemptions and prohibitions for tenure, areas for particular land, reporting requirements, a small scale mining code; additional information and lodgement requirements, prescribed hours of business and rent payable for mining tenements; and
- the rates and methods of calculating royalty, the way in which royalty is assessed and payable, and the basis for collection and enforcement of royalty liabilities.

The royalty provisions largely reflect current arrangements. However, to ensure continued, effective royalty administration, the Regulation:

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

- specifies that returns are to be lodged for calendar quarters where a mining operation is under one or more mining claims, unless the Treasurer and Minister for Trade (the Minister) decides that a financial year return is appropriate in the circumstances;
- requires that, where returns are being lodged for calendar quarters and the mining operation ends during a quarter, the return for the relevant quarter must be lodged on or before the last business day of the month after the quarter ended;
- allows the Minister to specify an earlier date for lodging returns than otherwise required where it is considered necessary for the protection of the public revenue;
- recognises the particular contractual arrangements under which certain minerals are sold, allowing royalty to be paid on an adjustment basis where the mineral's value cannot be finally determined when the royalty liability arises;
- allows a refund of overpaid royalty to be credited against an amount the Minister is reasonably satisfied is, or will become payable, by the person for royalty related amounts; and
- clarifies the operation of the gross value royalty provisions by specifying when a person will be required to obtain a gross value royalty decision for a mineral or to advise the Minister when a gross value royalty decision is incorrect, the Minister's powers for making and amending gross value royalty decisions, the dates of effect for gross value royalty decisions, and a person's rights of review.

Annual tenure rentals are effective as of 1 September each year and have been incorporated into this remake. The regulatory fees for rental payable have been reviewed for indexation and validated. A CPI increase of 3.5 per cent has been applied.

Potential FLP Issues and Comments

Regard for the institution of Parliament – appropriate subject matter for subordinate legislation - Legislative Standards Act 1992, section 4(5)(c)

Section 47(5) particular royalties payable on adjustment basis – Ministerial discretion

Section 47(5) provides that if a Minister decides that this section does not apply for a particular holder or a particular sale of a mineral, the Minister must give the holder a notice stating that this section does not apply. Section 47 did not appear in the 2003 Regulation. In relation to this section, the explanatory notes state:

'The Regulation... recognises the particular contractual arrangements under which certain minerals are sold, allowing royalty to be paid on an adjustment basis where the mineral's value cannot be finally determined when the royalty liability arises...'

The effect of section 47(5) is that the Minister has the discretion to decide whether or not section 47 applies to a particular holder or sale of a mineral.

Section 104 – Period to which royalty return must relate – Ministerial discretion

Section 104(3) provides that the Minister may at any time decide that this section no longer applies to a person who was, immediately before commencement (1 September 2013), required under former section 27 to lodge royalty returns relating to designated time periods. That is, in effect, the Minister can decide whether or not this section applies to a person. Section 104 is a transitional provision and the discretion it confers on the Minister is broader than the discretion conferred by the previous section 27, which gave the Minister discretion about the period to which a royalty return must relate.

Section 47 gives the Minister a broad discretion as to whether royalties are payable, while section 104 also gives the Minister broad discretion as to the period in which a royalty return must relate. There does not appear to be any criteria to guide the Minister in exercising this discretion in either the Regulation or Explanatory Notes.

Section 321 of the Act sets out a head of power for regulations to prescribe royalties. Section 321(3)(d) gives the Governor in Council discretion to prescribe in the Regulation royalties differing between different persons. However the intention of the Act appears to be that these differential rates would be set out in the Regulation rather than delegated to the Minister for him to decide in his discretion.

Given this Ministerial discretion, it is arguable that sections 47 and 104 are inconsistent with the principle of equality under the law. This principle *'requires that, for a particular matter, in the absence of justification to treat persons differently, all persons should be treated in the same way'*². The explanatory notes do not appear to identify or address this potential issue of fundamental legislative principle.

Equality under the law is regarded as being part of the rule of law. The Commission for Democracy through Law, in its checklist³ for evaluating the rule of law in single states, includes the following under the heading 'Non-discrimination and equality before the law':

- *'Are the laws applied generally and without discrimination?'*
- *'Are there individuals or groups with special legal privileges?'*

It may therefore be the case that sections 47(5) and 104(3) bring into question whether the principle of equality under the law is being used appropriately in this instance and has sufficient regard to the institution of Parliament.

Rights and liberties of individuals dependent on administrative power - Legislative Standards Act 1992, section 4(3)(a)

Section 73 refund on reassessment and section 75 refund on assessment

Sections 73(2)(b)(i) and 75(2)(b)(i) of SL170 create a ministerial discretion for a refund of overpayment and are new sections without equivalent in the *Mineral Resources Regulation 2003*.

Section 73 deals with refunds on reassessment of royalty. Section 73(2)(b)(i) provides that the Minister must refund excess amounts by crediting the excess against *an amount the Minister is reasonably satisfied is, or will be, payable by the person for royalty, unpaid royalty interest or a civil penalty*.

Section 75 deals with refunds on assessment of royalty. Section 75(2)(b)(i) provides that the Minister must refund excess amounts by crediting the excess against *an amount the Minister is reasonably satisfied is, or will be, payable by the person for royalty, unpaid royalty interest or a civil penalty*.

In relation to these sections, the explanatory notes state:

'the Regulation... allows a refund of overpaid royalty to be credited against an amount the Minister is reasonably satisfied is, or will become payable, by the person for royalty related amounts...'

Sections 73(2)(b)(i) and 75(2)(b)(i) have the effect that the refund of an overpayment can be subject to Ministerial discretion which then becomes a question as to whether this power is sufficiently defined and subject to appropriate review.

If royalties have been overpaid, it would appear appropriate for the excess to be automatically be refunded in full instead of requiring Ministerial discretion to refund an overpayment. There is nothing in the Regulation or explanatory notes which comment on why these provisions have been inserted or the criteria governing the exercise of the Minister's discretion under section 73(2)(b)(i) or 75(2)(b)(i).

The Regulation does not set out any review mechanisms for a decision made by a Minister under section 73(2)(b)(i) or 75(2)(b)(i). If a ground could be made out in a particular situation, judicial review of a decision made under section 73(2)(b)(i) or 75(2)(b)(i) would be available under the *Judicial Review Act 1991*.

The option also exists at sections 73(2)(b)(i) and 75(2)(b)(i) for the Minister to allow crediting a refund amount against a civil penalty. It is usually preferable for civil penalties to be dealt with separately as they

² Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, 2008, p.130

³ European Commission for Democracy through Law (the Venice Commission), *Report on the Rule of Law*, April 2011, Annex.

are of a punitive nature whereas royalties are of an administrative nature. An amount that is or will be payable for a civil penalty would usually not be a relevant consideration when calculating refund of royalty.

Rights and liberties of individuals Legislative Standards Act 1992, section 4(3)(k) – unambiguous, clear and precise

Schedule 2, parts 2, 3 and 4; schedule 6, definition ‘restricted area’

At schedule 2, parts 2, 3 and 4, and schedule 6 the regulation defines ‘restricted area’ referring to plans. However, it is unclear from the Regulation as to whether these plans are publicly available, for example, on the Department website. It would be preferable for a reader of the Regulation to know precisely where it can find information in order to know what land is restricted land and what the prescribed area for mining claim land is for the Georgetown, Quilpie or Winton mining districts.

Explanatory Notes Comments

The requirements for explanatory notes for subordinate legislation are set out in part 4 of the *Legislative Standards Act 1992*.

Change to variable in formula for calculating processed oil shale royalty

Schedule 3, part 2, item 11 amends the CPI base, which is a variable in the formula for calculating the royalty rate for oil processed from oil shale, from 110 to 61.2. The change is material – for example, all other amounts being equal in calculating the royalty rate for oil processed from oil shale, this change to the CPI base could result in the WTI% changing from 13.12 per cent to 4.40 per cent. The WTI% is used to calculate the royalty rate for processed oil shale.

Consultation

The Department of the Premier and Cabinet has, in its ‘Guidelines for the Preparation of explanatory notes’⁴ outlined its expectations of the ‘consultation’ part of explanatory notes. While these expectations are phrased in terms of Bills, they also apply for subordinate legislation. The Guidelines state:

‘When preparing this statement:

- *consider that, in principle, consultation should occur with affected key stakeholders at all stages of the regulatory cycle – the explanatory notes should explain how consultation has occurred and, if not, why not;*⁵
- *the groups or persons consulted should be suitably identified (preferably by means of a list);*⁶ and
- *additional information about the consultation process may be required depending on the nature and importance of the bill – this might include:*
 - *the form of consultation;*
 - *a summary of the views expressed;*
 - *the resultant impact of the consultative process on the content of the bill; and*
 - *if no consultation occurred, the reasons for that.*⁷

The explanatory notes tabled with the Regulation state:

‘a review of the Mineral Resources Regulation 2003 was undertaken in consultation with industry in relation to regulatory matters’.

⁴ Department of the Premier and Cabinet, Guidelines for the preparation of explanatory notes

⁵ Citing Principle 7, COAG *Principles of Best Practice Regulation*.

⁶ Citing Appendix 5.6, Auditor-General’s Report No 6 of 2009.

⁷ Citing Appendix 5.6, Auditor-General’s Report No 6 of 2009.

However, the notes do not identify the persons consulted or explain how consultation occurred. A significant amount of fees and royalties are prescribed by the Regulation and the occasion of its expiry and remaking after 10 years of operation is significant. Further, the government regards resources as one of the 4 pillars of the Queensland economy. Therefore, there are grounds for arguing that this is an important regulation and information on consultation would be in the public interest.

Committee's request for advice

The committee sought advice from the Office of State Revenue, Queensland Treasury and Trade and the Department of Natural Resources and Mines in relation to the following issues:

1. The rationale in allowing the Minister a broad discretion in relation to sections 47(5) and section 104(3);
2. Whether there is a criteria the Minister will use in using the discretionary powers provided for under sections 73(2)(b)(i) and 75(2)(b)(i) to refund an overpayment and the rationale for the introduction of these sections generally;
 - a. Further, the rationale in allowing for the crediting of a refund amount against a civil penalty;
3. Whether the plans referred to in the definition of 'restricted area' at schedule 2, parts 2, 3, and 4 are publically available;
4. Provide further information as to the rationale in changing the CPI base from 110 to 61.2 in calculating the royalty rate for oil processed from oil shale; and
5. Provide further information as to the consultation process undertaken when drafting the regulation.

The department's advice

(1) *The rationale in allowing the Minister a broad discretion in relation to sections 47(5) and section 104(3).*

Response:

Section 47(5)

Under section 46 of the *Mineral Resources Regulation 2013*, royalty is payable for all mineral sold, disposed of or used in a royalty return period. For those minerals where royalty is payable based on the mineral's value, the gross value of the mineral must ordinarily be worked out when the sale is made. However, there are cases where the terms of the contract of sale for the mineral do not allow the mineral's gross value to be finally worked out when the royalty return is due. For instance, contracts for the sale of mineral concentrate to a smelter or refiner typically allow for an adjustment to be made once the actual metal content of the concentrate has been determined. In the absence of section 47, royalty would be payable without regard to the fact that contractual adjustments may ultimately decrease the mineral's value, and therefore the royalty payable.

Section 47 is a new, beneficial provision that allows a royalty payer to account for royalty on an adjustment basis in these cases. That is, a provisional royalty is payable in the return period when the sale is made, based on the assumed gross value for the mineral. Once the actual gross value can be determined, any additional royalty is then payable or a refund made.

The provision merely allows royalty to be paid in increments. It does not alter the total royalty payable for the mineral and therefore is not inconsistent with section 321(3)(d) of the *Mineral Resources Act 1989* as there is no discretion for the Minister to change the royalty liability. The discretion available to the Minister under section 47(5) simply recognises that there may be individual cases where an administratively concessional provision such as this should not apply, and royalty should be paid within ordinary timeframes.

These provisions give legislative support to a longstanding administrative arrangement.

Section 104(3)

Under section 27 of the *Mineral Resources Regulation 2003*, royalty returns were required to be lodged annually unless the Minister decided that, based on the size of the operation, they should be lodged quarterly. Accordingly, larger operations, which ordinarily include mining leases, were generally lodging royalty returns quarterly and smaller operations, which ordinarily involve mining claims, were generally lodging annual returns. However, there were exceptions to these general principles.

On the making of the *Mineral Resources Regulation 2013*, the administrative practice of generally requiring operations with mining leases to lodge quarterly returns was legislated in section 35(1)(a). Similarly, section 35(1)(b) required operations not involving mining leases to lodge annual returns. However, to ensure there was continued flexibility to require royalty returns to be lodged for the most appropriate period having regard to all matters, section 35(2) of the *Mineral Resources Regulation 2013* allows the Minister to decide that mining operations involving a mining lease may lodge annually, and vice versa.

Given the different, more prescriptive approach taken in section 35, all operations involving mining leases would have had to lodge quarterly returns on commencement of the Regulation and all other operations would have had to lodge annual returns unless the Minister made a decision under section 35(2). To ensure that existing return lodgement arrangements could continue without any need for Ministerial action to 'overturn' section 35(1), a transitional provision was included in section 104 which effectively switched-off section 35(1), allowing existing return lodgement arrangements to continue indefinitely while they remained appropriate.

However, section 104(3) recognises that there may be cases where the substantive provision should apply according to its terms, rather than the grandfathered return lodgement arrangements continuing. The making of the decision by the Minister under section 104(3) activates section 35(1) for return lodgement obligations. It places a person in the position they would have been in on commencement of the Regulation, but for the beneficial transitional provision.

The Minister's decision does not affect the total royalty payable by a person, but merely the time by which they must pay it.

(2) Whether there is a criteria the Minister will use in using the discretionary powers provided for under sections 73(2)(b)(i) and 75(2)(b)(i) to refund an overpayment and the rationale for the introduction of these sections generally.

a. Further, the rationale in allowing for the crediting of a refund amount against a civil penalty.

Response:

Rationale for provisions

Where royalty was overpaid following the making of an assessment, section 45 of the *Mineral Resources Regulation 2003* required the Minister to either refund the amount or apply it as a credit against the royalty payable for the next return period. Although this provision allowed the crediting of overpaid royalty against a future liability, it was limited compared to the refund provision in the *Petroleum and Gas (Production and Safety) Act 2004* which allows overpaid petroleum royalty to be credited against any amount the Minister is satisfied is, or will become, payable for petroleum royalty, unpaid royalty interest or a civil penalty. As there is no basis for having different refund arrangements applying for mineral and petroleum royalties, a provision consistent with section 600 of the *Petroleum and Gas (Production and Safety) Act 2004* was included in the *Mineral Resources Regulation 2013*.

The provision serves an important revenue protection purpose by ensuring that, where an overpayment is identified for a particular period as part of an investigation conducted by the Office of State Revenue for

instance, and an underpayment identified for another period, the overpaid amount can be offset against the underpayment to ensure the proper amount of royalty is paid without the possible need for protracted debt recovery processes. The provision protects the State's right to receive the royalty payable for resources extracted.

Civil penalty

Quarterly royalty return lodgers are required to pay royalty by monthly instalments which are generally worked out under the default method as 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's. 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 understates their expected royalty liability to reduce the monthly payments, a civil penalty is imposed 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.

These tolerance levels have been set to ensure that, in the ordinary course, a person who legitimately uses the estimates method will not be liable for a penalty.

The penalty is 25 per cent of the difference between the amount worked out under the default method and the actual payment made for the month. It may be partly or fully remitted and applies as an alternative to prosecution for an offence relating to the understatement.

Allowing a royalty refund to be credited against unpaid royalty interest or a civil penalty, in addition to royalty, recognises that these liabilities are all incurred directly in connection with a person's overall royalty liability and should be extinguished in the same way.

(3) Whether the plans referred to in the definition of 'restricted area' at schedule 2, parts 2, 3, and 4 are publically available.

Response:

The Department maintains a freely available restricted area register which can be found on the department's website, or through use of the Local Area Mining Report to extract information pertaining to restricted areas.

(4) Provide further information as to the rationale in changing the CPI base from 110 to 61.2 in calculating the royalty rate for oil processed from oil shale.

Response:

In working out the royalty payable for processed oil shale for a quarter, the royalty rate is determined by reference to the average crude oil price for that quarter.

Royalty on oil shale was first legislatively provided for in 1997. When then setting the basis for working out the royalty rate, the 4th quarter 1993 average crude oil price was decided as the benchmark. To maintain relativities at 1993 levels, the processed oil shale royalty formula de-escalates the average crude oil price for the current quarter to 4th quarter 1993 prices by adjusting it by the factor:

CPI BASE
CPI NOW

The Consumer Price Index (CPI) for 4th quarter 1993 was 110 and this was the figure stated for CPI_{BASE} in the *Mineral Resources Regulation 2003*.

The Australian Bureau of Statistics (ABS) re-referenced CPI from the September 2012 quarter. This required an adjustment to the CPI_{BASE} reference to maintain relativities between the CPI_{NOW} figure and the base CPI figure. The change to CPI_{BASE} therefore ensures continuation of the status quo, with the formula for determining royalty for processed oil shale continuing to apply in the same way as it did before the ABS re-referencing.

(5) Provide further information as to the consultation process undertaken when drafting the regulation.

Response:

Regarding the tenure-related provisions, the following entities were consulted during the regulatory review for the regulation remake in 2012:

- Queensland Resources Council
- Association of Mining and Exploration Companies
- Mining Registrars
- Queensland Treasury.

Industry representatives were happy with the current regulation and identified only minor changes. They were supportive of / wanted consistency, with minor reordering to achieve streamlining where possible, and supported the removal of sections related to registers and for them to be re-published as a document on the department's website.

(Please note that the review was only of the tenure related provisions and OSR were required to undertake their own consultation.)

In relation to the royalty provisions, the objective was to remake them consistently with current arrangements as far as possible and appropriate. To this extent, consultation was not considered necessary. Where changes were made to improve royalty administration to support the Office of State Revenue in ensuring royalty obligations are complied with and the right amount of royalty paid, consultation was not undertaken prior to the making of the Regulation. This is consistent with the approach taken by the Office of State Revenue generally for tax and other revenue related reforms and recognises that consultation on revenue management initiatives is generally inappropriate. However, the Office of State Revenue has worked with industry since introduction of the Regulation to ensure certainty about rights and obligations.

Committee Comment

The committee thanks the Office of State Revenue, Queensland Treasury and Trade and the Department of Natural Resources and Mines for their responses in relation to SL 170. The committee is satisfied with the information provided by the departments regarding the application of fundamental legislative principles.

3 Recommendation

Recommendation

The committee recommends that the Legislative Assembly note this report and the committee's conclusion that subordinate legislation nos. 164, 165, 166, 167, 170 and 173 raise no issues regarding the application of fundamental legislative principles.



Ian Rickuss MP
Chair
December 2013