Parliamentary Committees

Subordinate legislation tabled between 30 October 2013 and 11 February 2014

Report No. 39
Agriculture, Resources and Environment Committee
April 2014

Agriculture, Resources and Environment Committee

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1 Introduction

1.1 Role of the Committee

The Agriculture, Resources and Environment 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: agriculture, fisheries and forestry; environment and heritage protection; and natural resources and mines.[2]

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 portfolio subordinate legislation tabled between 30 October 2013 and 11 February 2014 that the committee has examined and presents any concerns the committee has identified. All the items of subordinate legislation covered by this report were tabled on 11 February 2014 and have a disallowance date of 8 May 2014. Unless expressly noted below, no issues were identified.

SL No	Subordinate Legislation
231	Proclamation made under the *Agriculture and Forestry Legislation Amendment Act 2013*
232	Agriculture Chemicals Distribution Control Amendment Regulation (No.1) 2013
233	Nature Conservation Legislation Amendment Regulation (No.4) 2013
234	Proclamation made under the *Land, Water and Other Legislation Amendment Act 2013*
235	Petroleum Legislation Amendment Regulation (No.1) 2013
247	Chemical Usage (Agricultural and Veterinary) Control Amendment Regulation (No.1) 2013
248	Nature Conservation (Protected Areas) Amendment Regulation (No. 3) 2013
249	Nature Conservation (Protected Areas) Amendment Regulation (No. 4) 2013
250	Nature Conservation and Other Legislation Amendment Regulation (No. 1) 2013
251	Water Amendment Regulation (No.3) 2013
252	Land Title and Other Legislation Amendment Regulation (No. 1) 2013
253	Proclamation made under the Land, Water and Other Legislation Amendment Act 2013
254	Aboriginal Land Amendment Regulation (No. 6) 2013
255	Proclamation made under the Vegetation Management Framework Amendment Act 2013
256	Vegetation Management Amendment Regulation (No.2) 2013
270	**Fisheries Legislation Amendment Regulation (No.1) 2013**
271	Environmental Protection Amendment Regulation (No.2) 2013
272	Environmental Protection (Water) Amendment Policy (No.2) 2013
282	Water Resource (Wet Tropics) Plan 2013
285	Nature Conservation (Macropod Harvest Period 2014) Notice 2013
298	Animal Care and Protection Amendment Regulation (No.3) 2013
299	Aboriginal Land Amendment Regulation (No.7) 2013
300	**Water Amendment Regulation (No.4) 2013**
301	Water Resource (Boyne River Basin) Plan 2013
302	Coal Mining Safety and Health and Other Legislation Amendment Regulation (No.1) 2013

1 Section88 *Parliament of Queensland Act 2001* and Standing Order 194.
2 Schedule 6 of the Standing Rules and Orders of the Legislative Assembly of Queensland.

2 Issues identified in particular subordinate legislation

2.1 SL 270 Fisheries Legislation Amendment Regulation (No.1) 2013

The objectives of the *Fisheries Legislation Amendment Regulation (No.1) 2013* are to implement a number of minor amendments emanating from Fisheries Queensland's annual review of its subordinate legislation. The regulation amends the:

- *Fisheries Regulation 2008*
- *Fisheries (Coral Reef Fin Fish) Management Plan 2003* (the Coral Reef Management Plan,; and
- *Fisheries (East Coast Trawl) Management Plan 2010* (the East Coast Management Plan).

The Explanatory Notes state the "amendments aim to ensure consistency in the legislation, to better reflect the original policy intent and to make minor corrections".[3] The regulation:

- updates the list of prescribed persons who may possess and use a net to take a fish in the Trinity Bay regulated waters
- allows an assistant fisher to possess fishing apparatus outside a boat – to avoid the unforseen problem of situations where the assistant fisher buys the apparatus and carries the apparatus outside a boat
- ensures persons holding a carrier boat licence or another relevant authority carry mud crabs over certain distances
- amends the term 'in possession limit'
- adds Manta Rays as a protected species, and
- amends the provision relating to general fisheries permits to enable the chief executive to issue permits based on the merits of each application, not based on strict criteria as is currently the case.

Further, the Explanatory Notes state:

> *The Management Plans are to be amended to the extent necessary to correct the reference relating to the Great Barrier Reef Marine Park. An additional amendment is being made to the East Coast Management Plan to remove the use of radio as an acceptable mode of communication for certain trawl vessels.*[4]

Potential FLP issues and comments

Notwithstanding that the regulation amends the *Fisheries Regulation 2008*, and not an Act, clause 5 (amendment of section 204 (types of permits) amends section 204 of the *Fisheries Regulation 2008*, to enable the chief executive to issue a permit based on the merits of each application, rather than on strict criteria.

The Office of the Queensland Parliamentary Counsel FLP Notebook states:

> *Depending on the seriousness of a decision to be made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision. The criteria should be express and relevant in the ordinary sense of the word.*[5]

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3 Fisheries Legislation Amendment Regulation (No.1) 2013, Explanatory Notes, page 1.

4 Explanatory Notes, page 2.

5 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: The OQPC Notebook, page 15.

Committee's request for advice

The committee sought advice from the Department of Agriculture, Fisheries and Forestry regarding:

1. **why it is appropriate for this administrative decision making to be included in clause 5 of the regulation without providing criteria for making the decision**
2. **the processes the chief executive would follow when making a determination 'on merit' that a permit should be issued, and**
3. **the review process available to applicants who are refused a permit by the chief executive 'on merit'.**

Advice from the Department of Agriculture, Fisheries and Forestry[6]

1. Why it is appropriate for this administrative decision making to be included in clause 5 of the regulation without providing criteria for making the decision

Chief Executive's power to issue general fisheries permits under the Act

A general fisheries permit is a type of permit that allows the applicant to carry out an activity that would otherwise not be allowed under the legislation. Every application for a general fisheries permit is considered on its merits and applicants must be able to demonstrate how their application relates to fisheries legislation, and how their proposed activity is consistent with the objectives of the Fisheries Act 1994 (the Act).

Under the Act, the chief executive has the power to issue general fisheries permits in a manner that is necessary or convenient in the performance of the chief executive's functions. Section 20 of the Act provides the chief executive's functions under the Act. Of most relevance are the functions under section 20(1)(a) and section 20(2)(a), which provide—

- *Section 20(1)(a) - the chief executive is responsible for the management, use, development and protection of aquaculture, marine plants, fish habitats and, coral limestone and fisheries resources generally.*
- *Section 20(2)(a) - the chief executive is to ensure the fair division of access to fisheries resources for commercial, recreational and indigenous use.*

Under section 20A (Powers) the chief executive is granted power to do a number of things, of particular relevance is section 20A(1)(h) and section 20A(1)(k). Respectively, these sections provide that the chief executive has the power to formulate and operate arrangements for adjusting the use of fisheries resources, including, for example, by adjusting the number of authorities for a fishery and that the chief executive may do anything else necessary or convenient to be done for, or in connection with, the performance of the chief executive's functions.

<u>Amendment under clause 5</u>

Clause 5 of the amendment regulation omits and replaces the subsections of section 204 (Types of Permits) under the Fisheries Regulation 2008 (the Regulation) relevant to general fisheries permits. Section 204(1), as amended by clause 5, provides the types of permits that the chief executive may issue, namely—

a. *developmental fishing permits;*
b. *indigenous fishing permits;*
c. *stocked impoundment permits; and*
d. *general fisheries permits.*

[6] Department of Agriculture, Fisheries and Forestry, 2014, *Correspondence*, 10 April.

The amended section 204(2) also provides that the chief executive may issue a general fisheries permit for an activity that –

a. *is not able to be carried out under another type of authority; and*

b. *is carried out for any purpose, regardless of whether it is for a commercial purpose or a non-commercial purpose.*

Lastly, section 204(3), as amended by clause 5, provides that where the main or sole purpose of the activity is a commercial purpose, the chief executive must issue the permit for a term not longer than 2 years.

In 2012, the chief executive sought an amendment to the Regulation to limit the reasons for which general fisheries permits could be issued. This course of action was taken in response to some participants in the commercial fishing industry seeking general fisheries permits as a means of circumventing the established management framework in some of Queensland's commercial fisheries. As a consequence, section 204(2) of the Regulation was amended by the Fisheries Legislation Amendment Regulation (No. 1) 2012, (SL No. 252) to state that the chief executive may only issue a general fisheries permit for activities for which any of the following was the sole or main purpose—

a. *fisheries research;*

b. *conducting a fisheries management trial;*

c. *activities relating to disease and biosecurity;*

d. *collection of fish and fisheries resources for aquaculture.*

It became apparent however that limiting the ability to issue general fisheries permits to the aforementioned purposes inadvertently prevented the issuance of general fisheries permits for legitimate reasons (e.g. providing the ability for fishers affected by natural disaster to operate in other areas and allowing for the possession of regulated fish for display and education purposes). As a consequence it was determined that a further amendment was required to allow the chief executive to issue permits for legitimate reasons but still provide a means of restricting the issue of general fisheries permits for commercial activities.

The amendments brought on by clause 5 remove the specificity of the types of the activities, thereby providing the chief executive with the ability to again issue permits for legitimate reasons and provided the ability to differentiate between permits issued for commercial and non-commercial purposes. Clause 5 also imposed a 2 year limit on the period for which a general fisheries permit can be issued under a commercial activity. The changes brought to section 204 by clause 5 are considered to be minor when compared to the previous version of the Regulation and are needed to allow the chief executive the flexibility to consider applications for general fisheries permits on their merits.

Section 204 was not intended to be prescriptive about the criteria, that is, the types of activities or any other matters that the chief executive must consider when making a decision about a general fisheries permit. Given this intention, since the Regulation was made, section 204 has not involved prescribing criteria regarding the decision-making process and this remains unchanged by the amendments in clause 5. The decision-making process is guided by policy developed by Fisheries Queensland (see below).

<u>Justification for amendment</u>

It is considered appropriate for the administrative decision making of general fisheries permits to be included under clause 5 without providing criteria for making the decision. The previous version of section 204 was too limiting on the chief executive's powers under the Act and this had adverse unintended consequences. The previous section 204 was too prescriptive as to the types of activities for which a general fisheries permit may be issued. This adversely affected the chief

executive's ability to exercise their powers under the Act as the chief executive was not able to issue general fisheries permits for other activities that had genuine merit. For example, the chief executive could not issue a general fisheries permit to provide relief to a commercial fisher as a result of the impacts of a natural disaster by allowing the commercial fisher to fish in other ways or in other areas.

The original intention under section 204 was to allow the chief executive to exercise their powers in a way that was necessary and convenient to achieve the functions of the Act and this intention is facilitated by clause 5, which allows the chief executive to consider each application on its merit. Whilst the amendments under the clause 5 are relatively minor, when compared to the previous version of the Regulation, the amendments are necessary to allow for the original intention underlying section 204.

2. The processes the chief executive would follow when making a determination 'on merit' that a permit should be issued

The processes the chief executive would follow when making a determination 'on merit' that a general fisheries permit be, or not be, issued have become more restrictive following the amendment by clause 5. The processes involve the following—

1. *The chief executive delegates the function to issue general fisheries permits, along with other permits, to senior employees of Fisheries Queensland within the Department of Agriculture, Fisheries and Forestry.*
2. *The delegates are guided by the Standard Operating Procedures: Issuance of General Fisheries Permits for commercial activities (the SOPs) and the Guidelines for Decision-makers (the Guidelines) documents (copy of both documents attached).*

Under section 21 of the Act (Chief executive may delegate), the chief executive may delegate the chief executive's functions under the Act within a prescribed list of potential delegates. Under section 21(1)(b), the chief executive may delegate their functions to an officer or employee of the public service. The function of issuing general fisheries permit is delegated to Fisheries Queensland employees who are senior officers.

Following the adoption of clause 5, changes were made to the fisheries delegation instrument (Fisheries Delegation (No. 1) 2014) to restrict the ability to issue general fisheries permits for commercial purposes to members of the Fisheries Queensland Executive. Previously, the delegation to issue general fisheries permits for any purpose, extended to officer level. As a consequence, the ability to issue general fisheries permits is now far more limited than what it was prior to the adoption of clause 5. As such the potential for fishers to apply for a general fisheries permit to circumvent established fisheries management arrangements has been greatly reduced.

Whilst the amendment aims to provide greater flexibility for the chief executive to exercise their powers under the Act and as intended, in recent years the chief executive has sought to impose greater restrictions on the issue of general fisheries permits. The restrictions are through the administrative processes that the chief executive's delegates should follow. The delegates are guided by the SOPs and the Guidelines.

The SOPs are part of the new process and aim to ensure that every commercial application for a general fisheries permit is considered on its own merits and it provides a number of aspects that must be considered to ensure greater consistency in the decision making process associated with general fisheries permits. Prior to the amendments under clause 5, applications for activities that would have fallen under a commercial category were assessed by delegates at lower classification levels and could be issued for indefinite periods of time. However, clause 5 now provides that the term for which a general fisheries permit can be issued is a maximum of 2 years for a commercial activity. Along with the period restriction under clause 5, the administrative

process has also changed so that all activities that fall under the commercial category can only be assessed by delegates at a senior or executive level.

Another key aspect of the decision making process under SOPs is that an application for a general fisheries permit must adequately demonstrate to the satisfaction of the delegate a solid, sound, evidence-based reason as to why a general fisheries permit should be issued for that activity. Commercial activities can impose greater sustainability risks than non-commercial activities this is why it is important for each application to adequately demonstrate merit.

The Guidelines have had long standing in the process and aim to provide underlying principles and a process to facilitate fair, informed decision-making, and to foster the accountability of decision-makers and are underpinned by the requirements under the Judicial Review Act 1991. The principles provided in the Guidelines have been derived from the document An easy guide to good administrative decision-making, published by the Queensland Ombudsman. A key relevant principle from the Guidelines is the non-fettering principle. This principle provides that a decision-maker must not apply policy without also having regard to the circumstances and merits of a particular case. This is also required under section 23(f) of the Judicial Review Act 1991.

Both the SOPs and Guidelines require delegates to provide reasons for the decision made, including for refusal of applications, to the applicants. Under SOPs, the response must outline the delegation held, the decision related to the application, the evidence relied upon for the decision (including but not limited to relevant policies and legislation), the reasoning for the decision and, if it is a refusal, the appeal rights of the applicant. The Guidelines require that applicants be notified about the reasons for the decision to issue or not issue a general fisheries permit. This requirement is imposed on delegates so as to enhance transparency, amongst other reasons.

It is not desirable to include in the legislation the decision-making criteria provided under SOPs and the Guidelines for a number of reasons. The SOPs and Guidelines are comprehensive policy documents developed with a practical view of their application and this might be difficult to capture in the legislation. Additionally, given the range of matters covered under both documents, it is not considered practical to place the content into legislation. For example, the Guidelines include case studies as examples of the decision-making process which could not be practically conveyed in the legislation. Lastly, by having the criteria for decision-making in policy instruments, Fisheries Queensland is afforded greater flexibility in managing changes that might impact the criteria without going through the process of a legislative amendment.

3. The review process available to applicants who are refused a permit by the chief executive 'on merit'

The review process for decisions under section 204 remains unchanged by clause 5. As such, a decision by the chief executive, or its delegates, regarding a general fisheries permit under section 204 of the Regulation is a decision reviewable under the following—

- *the Queensland Civil and Administrative Tribunal (QCAT);*
- *judicial review at common law under the Judicial Review Act 1991; and*
- *the Queensland Ombudsman.*

The chief executive's decision about an application for a general fisheries permit includes a decision to refuse to issue a general fisheries permit, and it is a decision reviewable by the Queensland Civil and Administrative Tribunal (QCAT). Section 185(1) of the Act (Who may apply for review) provides that:

"A person who is dissatisfied by an order, direction, requirement or other decision of the chief executive may apply, as provided under the QCAT Act, to QCAT for a review of the decision on 1 or more of the following grounds—

a. the decision of the chief executive was contrary to this Act;

b. the decision of the chief executive was manifestly unfair;

c. the decision of the chief executive will cause severe personal hardship to the person."

Also, the decision to issue a general fisheries permit is reviewable under the Judicial Review Act 1991 as it is a type of decision that would fall under section 4 (Meaning of decision to which this Act applies) of the Judicial Review Act 1991.

Lastly, given that a decision regarding a general fisheries permit is a decision of the Queensland Government, the Queensland Ombudsman can also be called upon to review the decision.

Committee comment

The committee notes and is satisfied by the department's advice.

2.2 SL 300 Water Amendment Regulation (No.4) 2013

The objective of the *Water Amendment Regulation (No.4) 2013* is to remove the upstream limits for Bullhead Creek and One Mile Creek from the *Water Regulation 2002* (the Water Regulation). The Explanatory Notes provide that currently water upstream is managed as overland flow water and a water entitlement is not required to take or interfere with water. The amendment addresses community concerns about the effect of the overland flow management regime on the security of downstream water entitlements.[7]

Potential FLP issues and comments

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

Landholders who want to interfere with water above the two upstream limits are now required to apply for a water licence and possibly a development permit. The current application fee for a water licence is $109.80, with additional costs for public notice and any additional information as requested by the assessing officer.

The Explanatory Notes state:

> *Implementation of this amendment may reduce incentives for some businesses to compete and may limit the potential for further development to occur upstream of Honey Dam. However, implementation will increase water security for Honey Dam, address some community members' concerns, and will maintain at least the current level of employment or economic development for the area.*[8]

The Explanatory Notes also state:

> *The upstream limits removed by the amendment regulation are located within the Lakeland area and were introduced in September 2013 as part of a package of 19 upstream limits. The introduction of these limits was generally supported but some landholders were concerned about the security of water entitlements downstream of the upper limits, in particular, entitlements to take water from Honey Dam. Further concerns about the introduction of the upstream limits for Bullhead and One Mile Creeks were raised following the commencement of the Water and Another Regulation Amendment Regulation (No.1) 2013. In order to address these concerns it was decided to amend the Water Regulation to remove the upstream limits for Bullhead and One Mile Creeks.*[9]

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals. The Scrutiny of Legislation Committee considered that the reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has

7 Water Amendment Regulation (No.4) 2013, Explanatory Notes, page 2.

8 Explanatory Notes, page 2.

9 Explanatory Notes, page 3.

sufficient regard to the rights and liberties of individuals. The Office of the Queensland Parliamentary Counsel (OQPC) FLP Notebook states:

> *Provisions imposing liability should be fair and reasonable both in relation to the circumstances in which the liability is imposed, but also in relation to exemptions and defences.*[10]

Committee's request for advice

The committee considered whether imposing in this regulation restrictions on particular individuals (individuals who live upstream of Honey Dam, who currently do not hold a water licence) is fair and reasonable given that their neighbours who may hold a current water licence will only be required to continue to pay the annual water licence fee (currently $69.10).

The committee also considered the benefit and imposition that this amendment confers on some individuals (surety of supply to downstream licence holders) and whether this is consistent with the benefit and imposition conferred on upstream licence holders or potential upstream licence applicants.

The committee sought advice from the Department of Natural Resources and Mines regarding:

1. **how many individuals living upstream of Honey Dam and not currently in possession of a water licence will be adversely affected by the regulation, and the additional costs or disbenefits they will incur, and**
2. **how many water licence holders downstream from Honey Dam will be affected and, what benefits they will enjoy as a result of this regulation.**

Advice from the Department of Natural Resources and Mines[11]

1. How many individuals living upstream of Honey Dam and not currently in possession of a water licence will be adversely affected by the regulation, and the additional costs or disbenefits they will incur

There are approximately 10 rural landowners (not including town blocks) upstream of Honey Dam. Three of these landowners have direct frontage onto One Mile and Bullhead creeks. Two property owners with frontage onto Bullhead and One Mile creeks do not have a licence to take water. The additional costs include the annual water licence fee for existing licences. For new licences, costs include application fees and related costs (eg. public notice consultant costs). For any additional water that might be accessed from these watercourses, an application for a licence under section 206 of the Act (fee of $109.80) is required. Applications are subject to public notification and submissions (cost approximately $400 to $600). Additional information supporting an application may also be requested at the cost of the applicant.

2. How many water licence holders downstream from Honey Dam will be affected and, what benefits they will enjoy as a result of this regulation.

There are no water licences directly downstream of Honey Dam; however, there are three licences accessing water from the dam. Reintroducing water licencing arrangements upstream of Honey Dam may protect the reliability of these water entitlements. The licensees will have the opportunity to make a submission about applications for water. Submitters may apply for internal review and may appeal a decision.

Additional Information:

The two upstream limits were introduced by the Water and Another Regulation Amendment Regulation (No. 1) 2013 on 27 September 2013. As a result, they were only in force for a short time (approximately three months). The removal of these upstream limits restores the status quo that existed prior to 27 September 2013. As the licences that existed above the two upstream

[10] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p. 133.

[11] Department of Natural Resources and Mines, 2014, *Correspondence*, 14 April.

limits were not cancelled in the intervening months, the regime that existed before the introduction of the Water Amendment Regulation (No. 4) 2013 will continue. Prior to the introduction of the upstream limits on 27 September 2013, the licensing process under section 206 of the Act was in place for these watercourses.

Committee comment

The committee notes and is satisfied by the department's comprehensive advice.

3 Recommendation

The committee recommends that the Legislative Assembly note this report and the committee's conclusion that the subordinate legislation covered (nos. 231, 232, 233, 234, 235, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 270, 271, 272, 282, 285, 298, 299, 300, 301 and 302) raise no issues regarding the application of fundamental legislative principles.

Ian Rickuss MP
Chair
April 2014