

**Subordinate legislation tabled between
11 February and 18 March 2014**

Report No. 41
Agriculture, Resources and Environment
Committee
June 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 18 March 2014 and have a disallowance date of 5 June 2014. Unless expressly noted below, no issues were identified.

SL No	Subordinate Legislation
21	Coastal Protection and Management Amendment Regulation (No. 1) 2014
25	Aboriginal Land Amendment Regulation (No. 1) 2014

¹ Section 88 *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 Possible fundamental principles issues with the legislation

2.1 SL 21 Coastal Protection and Management Amendment Regulation (No. 1) 2014

The Coastal Protection and Management Amendment Regulation (No. 1) 2014 amends the Coastal Protection and Management Regulation 2003 to address key issues identified by the Queensland Floods Commission of Inquiry in its 2012 final report.³ The amendment regulation amends the Integrated Development Assessment System (IDAS) code for development applications for prescribed tidal work to:

- clarify an existing requirement that new pontoons be restrained in the vicinity of the property to prevent the structure washing away as a result of flooding impacts (up to a defined flood event)
- include a new requirement for new pontoons to be identifiable in the event they are dislodged from their moorings or restraint system (when the defined flood event is surpassed), and
- include a new subsection to limit the specific outcomes required to be certified by a Registered Professional Engineer of Queensland to ensure design and construction standards are met.

The amendment regulation also provides for a new IDAS code for self-assessable development for tidal works, or works completely or partly within a coastal management district.

Potential FLP issues and comments

Institution of Parliament – Delegation of legislative power – Scrutiny of the Legislative Assembly - Section 4(5)(e) *Legislative Standards Act 1992*

Provisions

The amendment regulation introduces a new IDAS code for self-assessable development for tidal works, or works completely or partly within a coastal management district.

Section 6 of the amendment regulation amends section 16 of the regulation to provide that the IDAS for self-assessable operational work is the document called 'Code for self-assessable development—For tidal work, or works completely or partly within a coastal management district' dated February 2014 and published on the department's website.

Potential FLP issues

Section 4(5)(e) of the *Legislative Standards Act 1992* provides that whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the subdelegation of a power delegated by an Act only:

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.

The significance of dealing with such matters other than by subordinate legislation is that since the relevant document is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*.

Authorised by an Act

Section 167 of the *Coastal Protection and Management Act 1995* provides that the Governor-in-Council may make regulations to declare a statutory instrument or another document to be a code for IDAS under the *Sustainable Planning Act 2009*.

³ Queensland Floods Commission of Inquiry, 2012, *Final Report*, March.

http://www.floodcommission.qld.gov.au/_data/assets/pdf_file/0007/11698/QFCI-Final-Report-March-2012.pdf

Section 23 of the *Statutory Instruments Act 1992* provides that if an Act authorises the making of a statutory instrument with respect to a matter, the statutory instrument may make provision for the matter by applying, adopting or incorporating another document.

It would therefore appear that the subdelegation in this instance is authorised.

Appropriate cases and to appropriate persons

In considering whether it was appropriate for matters to be dealt with by an instrument that was not subordinate legislation, and therefore not subject to parliamentary scrutiny, the committee followed the practices adopted by the former Scrutiny of Legislation Committee which considered the importance of the subject dealt with and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation.⁴

The self-assessable code is a 16 page document which includes detailed criteria for the self-assessment. It is, therefore, arguable that it is appropriate for practical reasons for such detailed matters to be set out in a document other than subordinate legislation.

Availability of document and parliamentary scrutiny

The former SLC's concerns about subdelegation were reduced where the document in question could only be incorporated under subordinate legislation (which could be disallowed) and attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection.

It is noted that the self-assessable code is incorporated by the amendment regulation. The document will be available from the website of the Department of Environment and Heritage Protection (DEHP), however, it is not clear that the document will be tabled in parliament.

It is also noted that the self-assessable code cannot be changed or replaced unless the regulation is amended to prescribe a new or amended version of the self-assessable code by reference to a new date of issue.

Currently, the self-assessable code (dated February 2014) is not contained in the subordinate legislation in its entirety and, as such, its contents do not come to the attention of the House. Similarly, while a [future] amendment regulation will alert the House that there has been an amendment to the document (e.g. if the future amendment regulation states that it is replacing self-assessable code dated February 2014 with the self-assessable Code dated *DDMMYYYY*), it will not contain information about the changes that have been made.

Where there is, incorporated into the legislative framework of the State, an extrinsic document (such as the self-assessable code) that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the House, it may be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of parliament.

Committee's request for advice

The committee sought advice from DEHP on whether the self-assessable code and the process by which it is incorporated into the legislative framework may have insufficient regard to the institution of parliament given that changes to the code can be made without the content of those changes coming to the attention of the House.

The committee also suggested to the department that detailed information about changes to the self-assessable code (including the reasons for, and nature of, the changes) is included in the explanatory notes that accompany future amendment regulations to help ensure that the House is duly informed.

⁴ Scrutiny of Legislation Committee, 1999, *Alert Digest No.4 of 1999*, p. 10.

Advice from the Department of Environment and Heritage Protection

The department's Deputy Director-General in response to the committee⁵ advised:

I note the points raised in your email, but for the reasons set out below I consider that the making of a statutory code, that is not subordinate legislation, for self-assessable development is consistent with the statutory development assessment framework established under the Sustainable Planning Act 2009 (SPA).

Under this framework, assessable development may be: self-assessable; development requiring compliance assessment; code assessable, impact assessable or prohibited. Development is generally made assessable via the Sustainable Planning Regulation 2009 (SPR) – for State triggered assessable development - or via local government planning schemes. The SPR describes the type of development that is self-assessable (refer to Schedule 3, part 2) and the applicable self-assessable code.

Self-assessable development is considered low risk, provided it is undertaken in accordance with specified technical standards that are set out in a self-assessable code. As a consequence, unlike other types of development, self-assessable development can be undertaken without a requirement for the proponent to obtain a development permit, provided the activities are undertaken in conformity with the relevant code.

In accordance with the development assessment framework under SPA (refer to Chapter 6), a code can be prepared under another Act. The Coastal Protection and Management Act 1995 provides that a regulation may declare a statutory instrument or another document to be a code for development assessment under SPA (see section 167(6)). Given their highly technical nature and the difficulty of drafting them in legislative form, self-assessable codes are considered to be more appropriately dealt with through a statutory instrument other than subordinate legislation.

By way of comparison, the development assessment framework for activities associated with the Fisheries Act 1994 and the Water Act 2000 currently contain a large number of self-assessable codes which are not included in subordinate legislation. These include (but not limited to):

Code for self-assessable development—Maintenance works on existing lawful structures (other than powerlines and on-farm drains) in a declared Fish Habitat Area or involving the removal, destruction or damage of marine plants

http://www.daff.qld.gov.au/_data/assets/pdf_file/0015/51603/MP02-Existing-lawful-structures-2011.pdf

Code for self-assessable development—Low impact aquaculture

http://www.daff.qld.gov.au/_data/assets/pdf_file/0007/71935/Aqua-SelfAssessDevCode-Feb2013.pdf

Code for self-assessable development for taking overland flow water to satisfy the requirements of an environmental authority or a development permit for carrying out an environmentally relevant activity

http://www.dnrm.qld.gov.au/?a=109113:policy_registry/code-self-assesable-development-environmental-authority.pdf

Code for self-assessable development of replacement bores

http://www.dnrm.qld.gov.au/?a=109113:policy_registry/code-self-assesable-development-replacement-bores.pdf

⁵ Department of Environment and Heritage Protection, 2014, *Correspondence*, 3 June.

The Coastal Protection and Management Amendment Regulation (No. 1) 2014 brings the coastal development assessment framework into line with the current approach of other frameworks in respect to self-assessable codes.

Overall, the self-assessable code and the process by which it is incorporated into the legislative framework does have sufficient regard to the institution of parliament because it is appropriate that delegated matters be dealt with through an alternative process to the subordinate legislation, taking into account:

- *the importance of the subject dealt with*
- *the practicality or otherwise of including those matters entirely in subordinate legislation*
- *the commercial or technical nature of the subject matter.*

The Department of Environment and Heritage Protection notes the committee's suggestion that detailed information about changes to the self-assessable code (including the reasons for, and nature of, the changes) be included in the explanatory notes that accompany future amendment regulations to help ensure that the House is duly informed.

Committee comment

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

3 Recommendation

Recommendation 1

The committee recommends that the Legislative Assembly note this report and the committee's conclusion that the subordinate legislation covered (nos. 21 & 25) raise no issues regarding the application of fundamental legislative principles.



Ian Rickuss MP
Chair
June 2014