Parliamentary Committees

Subordinate legislation tabled between 27 August – 14 October 2014

Report No. 1

Agriculture and Environment Committee

April 2015

Agriculture and Environment Committee

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1 Introduction

1.1 Role of the Committee

The Agriculture and Environment Committee is a portfolio committee established by the Legislative Assembly on 27 March 2015 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, sport and racing; environment and heritage protection; and national parks and the Great Barrier Reef.[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 27 August and 14 October 2014 that the committee has examined and presents any concerns the committee has identified. Unless expressly noted below, no issues were identified.

SL No	Subordinate Legislation	Tabled On	New Disallowance Date
197	Food Production (Safety) Regulation 2014	09/09/14	26/03/15
198	Environmental Legislation Amendment and Repeal Regulation (No.1) 2014	09/09/14	26/03/15
221	Food Production (Safety) Amendment Regulation (No.1) 2014	14/10/14	07/05/15
222	Proclamation – *Environmental Offsets Act 2014*	14/10/14	07/05/15
223	Nature Conservation and Other Legislation Amendment Regulation (No.2) 2014	14/10/14	07/05/15
230	Rural and Regional Adjustment Regulation (No.7) 2014	14/10/14	07/05/15

2 Issues identified in particular subordinate legislation

2.1 SL 198 - Environmental Legislation Amendment and Repeal Regulation (No.1) 2014

The objective of the Regulation is to provide for administration and enforcement of the *Environmental Protection Act 1994* and the *Waste Reduction and Recycling Act 2011* to protect the environment and human health and ensure an appropriate level of management for wastes in Queensland. The Regulation also has the objective of allowing Queensland to meet national obligations in relation to waste tracking requirements.

Potential FLP issues and comments

Section 16

Section 16 of this Regulation amends section 42A of the Waste Reduction and Recycling Regulation 2011 to include new section 41ZH(1)[3] in the list of prescribed provisions for section 245, definition *prescribed provision*, paragraph (b), of the *Waste Reduction and Recycling Act 2011*.

[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.
[3] Section 41ZH(1) provides that a person must not dilute, disaggregate or otherwise treat PCB material at a place other than a licensed treatment facility.

Breach of a prescribed provision under the *Waste Reduction and Recycling Act 2011* (and failure to redress the breach following issue of a compliance notice) can ultimately incur a maximum penalty of 300 penalty units pursuant to section 251(c) of that Act (in this instance for managing waste other than at an appropriately licensed facility).

Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the rights and liberties of individuals. The then Scrutiny of Legislation Committee (SLC) adopted a formal policy (Policy No. 2 of 1996) on the question of delegation of legislative power to create offences and prescribe penalties, being:

> *The Committee accepts that legislative power to create offences and prescribe penalties may be delegated in limited circumstances provided the following safeguards are observed:*
>
> - *rights and liberties of individuals should not be affected, and the obligations imposed on persons by such delegated legislation should be limited;*
> - *the maximum penalties should be limited, generally to 20 penalty units.*[4]

In respect of this, the Explanatory Notes state:

> *Under regulatory conventions the maximum allowable penalty in regulation is 20 penalty units. Due to the potential seriousness of the impact on the environment and human health as a result of inappropriate management of these wastes, these provisions will become prescribed provisions for the purposes of the Waste Reduction and Recycling Act 2011. This provides a maximum penalty of 300 penalty units for offences where these wastes are not managed at an appropriately licensed facility. This approach ensures high environmental standards are maintained and is not inconsistent with the intent of the provisions in providing the ability to apply a significant deterrent to inappropriate activities where significant environmental harm and cost to the community may occur.*
>
> *Strong penalties are required to ensure that hazardous wastes are managed in such a way that maintains protection of the environment and human health. This emphasises both the seriousness of offences involving these wastes and serves to act as a deterrent for operators from causing significant damage to the State's economic, social and environmental prosperity.*[5]

Whilst the maximum penalty of 300 penalty units is actually imposed under section 251(c) of the *Waste Reduction and Recycling Act 2011* for a failure to comply with a compliance notice issued in respect of particular offending behaviour, the offending behaviour which constitutes the offence and can ultimately lead to that substantial penalty for non-rectification, is found in the list in section 42A of the Waste Reduction and Recycling Regulation 2011, which list, pursuant to section 16 of this Regulation (Environmental Legislation Amendment and Repeal Regulation (No.1) 2014), now includes a failure to comply with section 41ZH(1) by diluting, disaggregating or otherwise treating polychlorinated biphenyls (PCB) material at a place other than a licensed treatment facility.

It must be noted that this Regulation is not itself imposing a 300 penalty unit fine (which would be obviously contrary to the 20 penalty unit cap recommended by the SLC), but rather that the conduct which (if uncorrected) can lead to the 300 penalty unit fine is provided for in this Regulation (at section 41ZH(1)). In respect of section 41ZH(1), the Explanatory Notes state:

> *This section is a prescribed provision for the purposes of section 245 of the Waste Reduction and Recycling Act 2011 and allows for the retention of a penalty proportionate to the potential hazard associated with the inappropriate handling of this waste.*[6]

[4] Alert Digest No. 4 of 1996

[5] Environment Legislation Amendment and Repeal Regulation (No.1) 2014, Explanatory Notes, pp. 3-4.

[6] Environment Legislation Amendment and Repeal Regulation (No.1) 2014, Explanatory Notes, p. 32.

Section 3

In a more moderate example, section 3 inserts, *inter alia*, new section 81ZM into the Environmental Protection Regulation 2008 which introduces a requirement to treat industrial waste for disposal, with a maximum penalty for breach of 40 penalty units, double the recommended 20 penalty unit cap for regulatory offences.

Committee's request for advice

The former Agriculture, Resources and Environment Committee sought advice from the Department of Environment and Heritage Protection as to the justification for:

1. a maximum of 40 penalty units, rather than 20 penalty units, for breach of new section 81ZM
2. the inclusion of 'diluting, disaggregating or otherwise treating PCB material at a place other than a licensed treatment facility' as a prescribed provision with a maximum 300 penalty unit fine, and
3. if the offending conduct is of such gravity, not including it as an offence provision under the Act.

Department's advice

1. *The expiring Environmental Protection (Waste Management) Regulation 2000 contained a number of provisions where offences carried penalties of 40 and 165 penalty units. These were identified during the transfer of these provisions to the Environmental Protection Regulation 2008 and subsequently changed to 20 penalty units to reflect the 20 penalty unit maximum penalty limit for regulation. This penalty unit [for new section 81ZM] was retained in error during the transfer of these provisions to the Environmental Protection Regulation 2008 and will be rectified at the next available opportunity.*

2. *Polychlorinated biphenyl (PCB) wastes are particularly hazardous wastes that require specialised handling, storage and management. The hazardous nature of this waste means that any treatment should be undertaken at an appropriately licensed facility in order to reduce the potential for environmental harm due to inadequate risk mitigation at premises that are not licensed to handle the waste.*

   Several prescribed provisions, in relation to used packaging, are already contained in the Waste Reduction and Recycling Regulation 2011 and the Waste Reduction and Recycling Act 2011 provides the ability to prescribe provisions through regulation where considered appropriate.

3. *While the regulation is generally consistent with the fundamental legislative principles, the regulation prescribes section 41ZH as a 'prescribed provision' for the purposes of section 245 of the Waste Reduction and Recycling Act 2011 (the Act).*

   The Waste Reduction and Recycling Act 2011 makes provision for provisions contained in regulation to be prescribed for the purposes of an offence under the Act, where it is considered appropriate to do so. There is no penalty under the Waste Reduction and Recycling Regulation 2011 for a breach of a prescribed provision as the offence is contained in the Act.

   Specifying certain provisions as a prescribed provision allows more enforcement flexibility, creating the ability for the chief executive to issue a show cause notice prior to compliance action being undertaken. This allows for a better natural justice process as it gives a person the opportunity to demonstrate they are not contravening the prescribed provision before further compliance action is taken.

   The previous penalty of 165 penalty units for this offence contained in the (now repealed) Environmental Protection (Waste Management) Regulation 2000 was designed to reflect the level of potential risk posed by inappropriate handling of the waste. lt was considered that 20 penalty units, as required for regulation, is not proportionate to the risk of environmental harm from inadequate controls around the handling of this waste.

Prescribed provisions are already in place in the Waste Reduction and Recycling Regulation 2011 for offences involving used packaging to ensure that effective deterrents are in place to ensure packaging brand owners appropriately manage the impacts from their packaging waste. Retaining this provision in regulation and using the prescribed provision mechanism is consistent with the approach that has been taken previously.[7]

Committee comment

The committee notes the context of the Amending Regulation, to transfer provisions from expiring regulation that need to be retained for the management of waste. In the course of the work to determine to retain and transfer the provisions, the committee would expect to see an approach to harmonise these provisions within the legislative framework for regulating waste management. The committee notes that a number of offences now attract a lower maximum penalty of 20 penalty units to fit with the recommended penalty unit cap for regulation. However, the committee is struck by the effect whereby the primary legislation sets out offences and higher penalty units for apparently less hazardous materials such as general littering and advertising material; this is compared to the regulation setting out offences and lower penalty units relating to the inappropriate management of clinical and related waste and PCB. The committee acknowledges that safe management of the latter materials are the subject of voluntary industry standards and/or management plans, which aid in enforcement of safe management practices and should act to reduce the likelihood of an incident and the severity of the consequences. That said, from a relative risk management approach, it is still difficult to assess the potential harm from bio hazardous waste and PCB, and therefore penalties for non-compliance, as lower compared with general littering.

By exception, the Amending Regulation sets out a single offence in relation to PCB that attracts the maximum penalty of 300 penalty units under the Act (as a prescribed provision), associated with diluting, disaggregating or otherwise treating PCB other than at a licensed facility, possibly with the intent for it to become non-scheduled PCB waste in terms of its concentration quantity (section 41ZH(1)). This is almost double the penalty units from the expiring regulation. In contrast, the offence of actually disposing of scheduled PCB waste or liquid PCB waste to landfill attracts a reduced maximum penalty of 20 penalty units. Both diluting / disaggregating PCB and disposing to landfill are prohibited for concentrated PCB; the difference in potential risk of harm that would give rise to varying penalties is unclear, and instead, there is concern that it may create a perverse incentive towards disposal owing to the size of the discrepancy.

That said, the committee has no concern with respect to section 41ZH(1) being a prescribed provision for the purpose of having the enforcement option of a show causes notice prior to compliance action being undertaken. It was obviously Parliament's intention in passing the *Waste Reduction and Recycling Act 2011* that some provisions could be deemed by regulation to be prescribed provisions for the purpose of section 245 of the Act as this is provided for in section 245(b) of the Act - *a provision of a regulation prescribed for the purpose of this paragraph*. However, if a person does not comply with a notice, then the effect of sections 245(b) and 251 is that contravention of a prescribed provision in subordinate legislation will make a person liable for a substantial monetary penalty (maximum 300 penalty units). This issue of fundamental legislative principle was initially identified in the context of section 41ZH(1) in this Amending Regulation, but the origin of the issue is in the primary legislation. While the Act provides for prescribed provisions in regulation, the Act fails to consequently set the maximum penalty for not complying with notice for these prescribed provisions in line with the recommended penalty unit cap for regulation (and as occurs in other legislation, e.g. *Animal Care and Protection Act 2001* and *Biosecurity Act 2014*). As a result, other current prescribed provisions relating to planning and information requirements for used packaging also attract a maximum 300 penalty units for non-compliance, by default.

[7] DEHP, 2014, *Correspondence*, 5 December, pp. 1-2.

3 Recommendation

The committee recommends that the Legislative Assembly note this report and its conclusions and recommendations that:

1. section 251 of the *Waste Reduction and Recycling Act 2011* be amended to insert a maximum penalty of 20 penalty units if a compliance notice relates to a contravention of a prescribed provision in regulation under section 245(b). This will ensure that the maximum penalty for provisions prescribed in regulation is in line with the recommended penalty unit cap for regulation, and prevent this breach of fundamental legislative principle reoccurring
2. a review of Chapter 5 of the *Waste Reduction and Recycling Act 2011* and Parts 5B and 5C of its Regulation be included in the scope of a future review of that Act to consider whether greater consistency in risk management approaches and treatment between waste types is desirable, and
3. subordinate legislation no.198 contained a drafting error in respect of the penalty unit for section 81ZM, which the department will correct by an additional amendment.

Jennifer Howard MP
Chair
April 2015