Principles of Good Legislation: OQPC guide to FLPs

The institution of Parliament—subordinate legislation

Office of the Queensland Parliamentary Counsel

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The institution of Parliament—subordinate legislation

Summary

Consider whether legislation has sufficient regard to the institution of Parliament having regard to the content of subordinate legislation. Legislation has regard to the institution of Parliament under section 4(5) of the Legislative Standards Act 1992 if, for example, the subordinate legislation is within power, is consistent with the policy of the authorising law, contains matter appropriate to subordinate legislation, amends only other statutory instruments, and allows subdelegation of legislative power only where appropriate and when authorised by an Act.

Subordinate legislation's role in modern legislation

Subordinate legislation is legislation that is authorised by an Act to be made by an entity other than Parliament. The nature and complexity of modern legislation means that subordinate legislation has become a regular feature of modern legislative schemes (paragraph [2]).

Subordinate legislation and regard to the institution of Parliament

This chapter examines the following issues relevant to whether subordinate legislation shows sufficient regard to the institution of Parliament:

- whether the subordinate legislation is within the power of the empowering Act (paragraphs [6]-[15]);
- whether the subordinate legislation imposes fees and, if so, the proper characterisation of the fees (paragraphs [16]-[21]);
- whether the subordinate legislation complies with Act procedures for making subordinate legislation (see [22]-[25]);
- whether the subordinate legislation is consistent with the policy objectives of the authorising law (paragraphs [26]-[29]);
- whether the subordinate legislation contains only matters appropriate to that level of legislation (paragraphs [30]-[56];
- whether the subordinate legislation amends only statutory instruments (paragraphs [57]-[62]);
- miscellaneous issues including tabling procedures and postponing the commencing of principal legislation (paragraphs [63]-[66]).

The information contained in this chapter is current as at 27 June 2014.

Introduction

[1] This chapter discusses legislation that is authorised by an Act to be made by an entity other than Parliament, usually known as delegated legislation or subordinate legislation.

[2] The nature and complexity of modern legislation means that this kind of legislation has become a regular feature of legislative schemes. To manage complexity, it has become common practice for parliaments to delegate the making of some aspects of legislation to another entity, most commonly the executive government. As Pearce and Argument have identified, it may even be preferable to delegate the making of legislation that is highly technical or that deals with frequently changing or uncertain situations because the delegation frees parliamentary time for consideration of other important issues.[1]

[3] Subordinate legislation can affect the rights of individuals and the former Scrutiny of Legislation Committee (the ***Scrutiny Committee***) and the present parliamentary portfolio committees have commented and continue to comment on FLPs issues of this kind raised by subordinate legislation.[2] However, the focus of this chapter is whether subordinate legislation has sufficient regard to the institution of Parliament and, in particular, whether subordinate legislation is consistent with the principles set out in the *Legislative Standards Act 1992*, section 4(5)(a), (b), (c) and (e) and other principles identified by parliamentary committees.

[4] However, this chapter does not discuss the FLP stated in the *Legislative Standards Act 1992*, section 4(5)(d), that subordinate legislation should amend only statutory instruments. The literature and commentary on the provisions of subordinate legislation that amend Acts, often referred to as 'Henry VIII provisions' or 'Henry VIII clauses', is so extensive that a separate chapter of the *Principles of Good Legislation* has been dedicated exclusively to it.

A note on parliamentary committees' consideration of subordinate legislation

[5] Before 2009 the Scrutiny Committee would report on subordinate legislation if the subordinate legislation was the subject of a disallowance motion, or if correspondence with the Minister did not resolve an issue of concern to the committee.[3] The Scrutiny Committee would also report on subordinate legislation in its annual report. Between 2009 and 2011, the Scrutiny Committee reported on subordinate legislation in its Legislative Alerts. The present arrangement is that each parliamentary portfolio committee reports on subordinate legislation relevant to its portfolio.[4]

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1 Pearce & Argument, *Delegated Legislation in Australia* (4th ed, 2012) '(Pearce & Argument (2012))', p 6

2 See, for example, the Transport, Housing and Local Government Committee's LGC Report No 18 (2013) p 3.

3 The Scrutiny Committee would approach the Minister directly with its concerns about FLP issues associated with the legislation: see the Scrutiny Committee Report No 22 (2002) p 2 para 3.4 Records of the Scrutiny Committee's consideration of subordinate legislation and correspondence between the Scrutiny Committee and the responsible Minister were included in Alert Digests from 2002 until 2009.

4 The *Parliament of Queensland Act 2001*, s 93(1)(c), also provides the parliamentary portfolio committees with jurisdiction to consider the lawfulness of subordinate legislation.

Whether subordinate legislation is within power

Statutory and common law principles

[6] The validity of subordinate legislation depends largely on whether the subordinate legislation is *ultra vires*, or beyond the power given by Parliament to make subordinate legislation for the principal Act.[5]

[7] The case law shows that questions of *ultra vires* are decided largely on the features of the particular legislation. In each case the court has to consider whether the subordinate legislation is within the power given under the particular authorising law.

[8] Subordinate legislation may be beyond power because particular procedural requirements have not been followed in making it.[6] In Queensland, the *Statutory Instruments Act 1992*, section 20 provides that all conditions and preliminary steps required for the making of a statutory instrument are presumed to have been satisfied and performed in the absence of evidence to the contrary.

[9] Other examples of subordinate legislation that is *ultra vires* include:

- subordinate legislation that deals with a subject not within the scope of the power in the authorising law;[7]
- subordinate legislation that deals with a subject within the scope of the power in the authorising law but exceeds the prescribed limits of the authorising law;[8]
- subordinate legislation that is inconsistent with, or repugnant to, the authorising law, another Act or the general law;[9]
- subordinate legislation that has been made for a purpose other than the purpose set out in the authorising law;[10]
- subordinate legislation the effect of which is so unreasonable that it cannot be regarded as having been within the contemplation of the legislature in passing the authorising law;[11]
- subordinate legislation that is not reasonably proportionate to the empowering provisions of the authorising law;[12]

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5 Pearce & Argument (2012) p 172
6 See Pearce & Argument (2012) pp 172-173
7 *Young v Tockassie* [1905] HCA 17; (1905) 2 CLR 470 at 477
8 *Young v Tockassie* [1905] HCA 17; (1905) 2 CLR 470 at 477
9 *Plaintiff M47-2012 v Director-General of Security* (2012) 292 ALR 243; [2012] HCA 46; *Gentel v Rapps* [1902] 1 KB 160 at 166
10 *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170
11 *Brunswick Corporation v Stewart* [1941] HCA 7; (1941) 65 CLR 88
12 *Brunswick Corporation v Stewart* [1941] HCA 7; (1941) 65 CLR 88 *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1

- subordinate legislation that does not contain sufficiently clear or certain information about the obligations of the people who are required to obey it;[13]
- subordinate legislation that subdelegates the power to legislate on its subject matter to another entity.[14]

[10] Other issues may also affect the validity of subordinate legislation. If the empowering Act is invalid for being unconstitutional, any subordinate legislation made under that Act also fails. In *James Paterson & Co Pty Ltd v Melbourne Harbor Trust Commissioners*, the Supreme Court of Victoria found that a regulation made under a Victorian Act was invalid under the *Commonwealth Constitution*, section 92 because it interfered with interstate trade and commerce.[15] In contrast, in *Attorney-General for the State of South Australia v Corporation for the City of Adelaide* the majority of the High Court upheld the validity of a local government by-law that proscribed preaching, canvassing, haranguing or distributing printed material within the City of Adelaide without a permit, finding that the by-law did not disproportionately burden the freedom of political communication guaranteed under the *Commonwealth Constitution*.[16]

[11] The *Statutory Instruments Act 1992*, part 4, division 3, contains provisions about the power to make statutory instruments and the interpretation of such power. Section 21 provides that statutory instruments are to be interpreted as operating only within the scope of principal legislation under the authority of which they are made. Section 22 provides that if principal legislation authorises the making of subordinate legislation, the legislation authorises the making of subordinate legislation in relation to any matter that is:

- required or permitted to be prescribed by the authorising law or other law; or
- necessary or convenient to be prescribed for carrying out or giving effect to the authorising law or other law.

[12] The courts have held the words 'necessary or convenient' in the *Statutory Instruments Act 1992*, section 22(1)(b) are words of broad meaning. A regulation can be made under a 'necessary and convenient' power when it complements[17], or is incidental to, the specific provisions in the authorising law. However, the 'necessary or convenient power' cannot be used to extend the scope of the provisions of the authorising law.[18] In *Shanahan v Scott*, the High Court held that where there is power to make regulations necessary or convenient for giving effect to an Act:

> ... such power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of a subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts

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13 *King Gee Clothing Co Pty Ltd v Commonwealth* [1945] HCA 23; (1945) 71 CLR 184
14 See however the *Statutory Instruments Act 1992*, s 22.
15 [1961] VR 60; [1961] VR 343
16 [2013] HCA 3 at [68] per French CJ; at [141] per Hayne J; [217]-[220] Crennan and Kiefel JJ (with whom Bell J agreed on this point at [224]
17 *Carbines v Powell* (1925) 36 CLR 88 at 92 per Isaacs J
18 Pearce & Argument (2012) pp 215-216

to widen the purposes of the Act, to add new and different means of carrying out or to depart from or vary the plan which the legislature has adopted to attain its ends.[19]

Parliamentary committee consideration of validity of subordinate legislation

[13] The Scrutiny Committee queried the validity of a power to confiscate students' property included in the *Education (General Provisions) Amendment Regulation (No. 1) 2010*. The Committee noted the relevant regulation-making power in section 434(2) of the *Education (General Provisions) Act 2006* was expressed in general terms and allowed a regulation to be made about 'the management, administration and control of the operations of a State educational institution'. In the absence of any specific regulation-making power governing the confiscation of property, the Scrutiny Committee invited the Minister to provide information about the validity of the amendment regulation.[20]

[14] The Scrutiny Committee also considered whether the *Local Government Amendment Regulation (No. 2) 2007* was valid. Section 159ZZA of the (since repealed) *Local Government Act 1993* provided that section 159ZY of the Act expired on 31 December 2011 or at an earlier time fixed by regulation. The amendment regulation inserted a new section into the *Local Government Regulation 2005* (since repealed) that provided for the expiry of section 159ZY. The Scrutiny Committee regarded the provision as arguably invalid at common law, as it was inconsistent with the provisions of the Act.[21] The Scrutiny Committee stated that the expiry of the part of the Act was specifically provided for under the Act, and therefore the regulation providing for a new time may be repugnant to the Act which dealt with the matter.[22] The Scrutiny Committee noted that subordinate legislation should be within the scope of the regulation-making power.[23]

[15] The Scrutiny Committee considered a similar question about the validity of the *Legal Profession (Transitional) Amendment Regulation (No. 1) 2007*. The amendment regulation inserted a new section 2A into the *Legal Profession (Transitional) Regulation 2007* (since repealed), which had the effect of amending the *Legal Profession Act 2007*. Section 751 of the *Legal Profession Act 2007* allowed for the passage of transitional regulations that would expire 1 year after they commenced. However, the Scrutiny Committee considered that section 2A was not 'required or permitted to be prescribed' by the general terms of the transitional regulation.[24] The Committee considered the regulation to be arguably invalid because it was repugnant to the effect of the Act.[25]

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19 *Shanahan v Scott* (1957) 96 CLR 245 at 250; [1957] HCA 4

20 LA 2010 No 11 p 32 paras 15-17

21 Scrutiny Committee Report No 33 (2007) p 3 para 5.8

22 Scrutiny Committee Report No 33 (2007) p 3 para 5.8

23 Scrutiny Committee Report No 33 (2007) p 4 para 5.13

24 Scrutiny Committee Report No 36 (2008) p 2 para 4.4

25 Scrutiny Committee Report No 36 (2008) p 2 para 4.5

Validity of subordinate legislation imposing fees

[16] A regulation that imposes a fee for a service may be invalid on the ground that the amount of the fee does not reflect the actual cost of providing the service.[26]

[17] A fee is not automatically invalid merely because it is disproportionate to the cost of service provision. In *Harper v Minister for Sea Fisheries*, the High Court held a regulation imposing a fee for capturing abalone on the basis of the number of abalone caught was valid because the

fee was collected on the basis that it allowed for the taking of a limited natural public resource for commercial purposes.[27]

[18] However, if a regulation purports to levy what is essentially a tax, the regulation must have Parliament's authority.[28] Whether an amount levied is a tax or a fee is a question of interpretation. Taxation is 'a compulsory exaction of money by a public authority for public purpose, enforceable by law and is not a payment for services rendered'.[29] A fee is a payment for, or in respect of, services rendered. At common law, the courts have held a fee to be invalid where it bears no resemblance to the cost of administering the relevant system on the basis that this put it beyond the scope of the authorising law. In *Marsh v Shire of Serpentine-Jarrahdale*, Barwick CJ held:

> ... the fee bears no resemblance to the cost of administering a licensing system. It is evidently not a charge fixed as a reasonable fee for the issue of licenses. Whilst that consideration may not always be decisive, in my opinion, the statute in this case authorised no more than fees which fall within this description. ... [T]he Act does not authorize the imposition of a fee of the nature and dimension of that fixed by [the relevant by-law].[30]

[19] In *Levingston v City of Hobart*, it was held that a licence fee of £114 imposed exceeded the actual administrative cost which was estimated to be around £10.[31] The court concluded it was a revenue-raising device and, as such, it was a tax and not a fee.[32]

[20] In its Annual *Report 1995-1996*, the Scrutiny Committee discussed the imposition of fees through subordinate legislation.[33] In contrast to its opposition to the imposition of taxes by subordinate legislation, the Scrutiny Committee did not object to fees being imposed by subordinate legislation provided:

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26 Pearce & Argument (2012) p 278 and see *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572; [1966] HCA 77.

27 *Harper v Minister for Sea Fisheries* [1989] HCA 47; (1989) 168 CLR 314 at 325 per Mason CJ, Deane and Gaudron JJ and 336-337 per Dawson, Toohey and McHugh JJ. Brennan J described the fee as being akin to a *profit a prendre*: (1989) 168 CLR 314 at 335.

28 Pearce & Argument (2012) p 276; *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 421 endorsing *Attorney-General v Wilts United Dairies* (1922) LJKB 897

29 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 38 at 276 cited in Scrutiny Committee *Annual Report 1995-1996* No 1 (1996) p 40 para 5.23. For further discussion of imposing taxes in subordinate legislation see the discussion at [47] to [53].

30 (1966) 120 CLR 572 at 581; [1966] HCA 77

31 (1931) 26 Tas LR 164

32 Scrutiny Committee *Annual Report 1995-1996* No 1 (1996) p 41

33 Scrutiny Committee *Annual Report 1995-1996* No 1 (1996) p 39-50

- there is sufficient regulation-making power in the authorising Act to impose a fee; and
- the fee imposed is appropriate and reasonable.[34]

[21] The parliamentary portfolio committees regularly seek advice from departments about the fee increases imposed in subordinate legislation, and consider the impost of the fees.[35] For example, the *Public Trustee (Fees and Charges Notice) (No.1) 2012* set fees for services provided by the Public Trustee under the *Public Trustee Act 1978*. Section 17(3) and (4) of the Act provided that any fees charged under the Act must be reasonable having regard to the circumstances in which the service is provided, the type and complexity of the service and the degree of care, responsibility, skill or special knowledge required to perform the service. The Legal Affairs and Community Safety Committee (the ***LACSC***) concluded that in this case, the fee amounts were not unreasonable '... given the work, complexity and skill involved in carrying out the required work'.[36] In contrast, section 14 of the *Environmental Protection Legislation Amendment Regulation (No. 1) 2010* inserted new fees of $120,000 and $100,000 for submitting draft terms of reference for an Environmental Impact Statement and for giving an EIS amendment notice respectively. The Scrutiny Committee commented that the magnitude of the new fees means the amendment may not be within the legislative power of the Act as the fees did not appear to relate to the cost of providing the services.[37]

Compliance with procedures prescribed by empowering Act

[22] If an Act prescribes a procedure for the making of a statutory instrument, courts will generally require strict compliance with the prescribed procedure.[38] Parliamentary committees also comment on any non-compliance with relevant statutory procedures.

[23] The question of non-compliance arose in relation to the *Nature Conservation (Protected Areas) Amendment Regulation (No. 1) 2010*. Section 32 of the *Nature Conservation Act 1992* required that the size of a protected area could be reduced by regulation if the Legislative Assembly resolved to request the making of the regulation. The *Nature Conservation (Protected Areas) Amendment Regulation (No. 1) 2010* proposed to reduce the size of the Cliff Island National Park by 5.1 hectares. As the Legislative Assembly had not requested the amendment regulation be made, the Scrutiny Committee sought information from the Minister about whether the amendment regulation was lawful.[39]

[24] A similar issue arose in relation to the *Land Sales Amendment Regulation (No. 1) 2010*, which extended the time period for giving a registrable instrument relating to the sale of a proposed

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34 For further discussion on parliamentary consideration of the appropriateness of imposing fees, see [44] to [45].

35 The AREC considered whether the fees imposed by the *Natural Resources and Mines Legislation Amendment Regulation (No. 1) 2013* would have an effect on business and reflected the administrative cost to the department processing applications: AREC Report No 23 (2013) p 2.

36 LACSC Report No 13 on Subordinate Legislation (2012) p 10

37 LA 2011 No 2 p 22 paras 9 and 10

38 *Attorney-General for the State of South Australia v Corporation for the City of Adelaide* [2013] HCA 3; *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291; Pearce and Argument (2012) para 13.5

39 LA 2010 No 3 p 10 paras 7- 9

lot. However, the regulation only applied if the vendor's agent gave the purchaser a notice in the approved form stating the period extended by the regulation.[40] As there were no Explanatory Notes, it was not clear whether the prescribed requirements for making the regulation had been complied with and the Scrutiny Committee invited the Minister to provide further information about compliance.[41]

Compliance with legislative tabling requirements when making subordinate legislation

[25] It is important that any legislative tabling requirements for subordinate legislation are observed when the legislation is made. This issue arose in the LACSC's consideration of the *Professional Standards (College of Investigative and Remedial Consulting Engineers Australia Professional Standards Scheme) Notice 2013*, which gave notice of the approval of The College of Investigative and Remedial Consulting Engineers Australia Professional Standards Scheme by the Professional Standards Council of New South Wales. Section 14(3) of the *Professional Standards Act 2004* required that a copy of the scheme be attached to the Notice. A copy of the scheme was not attached to the subordinate legislation, and was not subsequently tabled in Parliament, although a note to section 2 of the Notice referred to the URL where the scheme could be downloaded. The LACSC noted the failure to comply with section 14(3) and said that greater care should be taken to ensure that the requirements of the principal legislation were fulfilled.[42]

Whether subordinate legislation is consistent with objectives of the authorising law

[26] Section 4(5)(b) of the *Legislative Standards Act 1992* states that subordinate legislation should be consistent with the policy objectives of the authorising law. This FLP issue reflects the common law principle that subordinate legislation is invalid if it is inconsistent with, or repugnant to, the Act under which it is made, another Act or the general law.[43]

[27] A common basis on which subordinate legislation has been found to be repugnant to its authorising Act is where the subordinate legislation deals with a matter subsidiary to the principal Act in such a way as to run counter to the effect of the Act. The High Court considered this question in *Morton v The Union Steamship Company of New* Zealand *Ltd*. In that case, the High Court held that the authorised Act had 'covered the field' on a particular issue and to supplement it in the regulations was an attempt to interfere with the express wishes of the legislature. The Court noted the distinction between Acts that were broadly drafted and those that included detailed provisions, stating that:

> ... [i]n an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of

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40 *Land Sales Act 1994*, sn 28(3), quoted in LA 2010 No 6 p 68 para 4.

41 LA 2010 No 6 p 68 paras 4-5; *cf* LA 2010 No 6 p 67 paras 3-6 and LA 2010 No 3 p 8.

42 LACSC Report No 29 (2013) p 8 but *cf* the *Statutory Instruments Act 1992*, section 28.

43 *Gentel v Rapps* [1902] 1 KB 160

Parliament which deals specifically and in detail with the subject matter to which the statute is addressed. [44]

[28] The High Court revisited this question in *Plaintiff M47-2012 v Director-General of Security*.[45] The case concerned the relationship between provisions of the *Migration Act 1958* (Cwth) and the *Migration Regulations 1994* (Cwth). The Act authorised the Minister to cancel a person's visa if the person failed the 'character test' and, under the Act, one reason a person could fail the character test was if the person was considered likely to represent a danger to the community. Under the regulations, the Minister could also cancel a visa if the Australian Security Intelligence Organisation (***ASIO***) conducted a security assessment and found that the person was a direct or indirect risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cwth). A majority of the Court held that the regulation was invalid as it was inconsistent with section 501 of the *Migration Act 1958* (Cwth).[46] French CJ said that the existence of reasonable grounds for regarding a person to be a threat to the security of the host country, or for reasons of public order, are subsumed in the concept contained in section 501(6)(d)(v) of the *Migration Act 1958* (Cwth), which provided for the refusal of a grant on the basis that the person was a threat to national security.[47] As the power to refuse a visa based on the public interest criteria 4002 in the regulation is based on an ASIO assessment that leaves no basis for the Minister to apply the test under section 501, the Act and regulation were inconsistent.[48]

[29] The Scrutiny Committee has also commented on subordinate legislation it considered to be inconsistent with, or repugnant to, the Act under which it was made. An example is provided by the Scrutiny Committee's consideration of the *Legal Profession (Transitional) Amendment Regulation (No. 1) 2007* .[49] The *Legal Profession Act 2007* contained a provision prohibiting a person from engaging in legal practice in Queensland unless the person was an Australian legal practitioner. The amendment regulation, which was made under a regulation-making power that provided for regulations of a savings or transitional nature to be made for matters for which the Act had not made sufficient provision, sought to qualify this prohibition. It proposed to allow non-legally qualified property agents to conduct certain activities (including preparing real estate contracts) that would otherwise be considered to be engaging in legal practice. The Scrutiny Committee considered the main purposes of the Act, which included '... to provide for the regulation of legal practice ... for the protection of consumers of the services of the legal profession and the public generally'.[50] The Scrutiny Committee concluded that to exempt real estate agents in certain circumstances from the prohibition on engaging in legal practice would appear to be in direct conflict with the effect of the Act.[51]

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44 (1951) 83 CLR 402; [1951] HCA 42 at [5]- [6]
45 (2012) 292 ALR 243; [2012] HCA 46
46 French CJ, Hayne, Crennan and Kiefel JJ; Gummow, Heydon and Bell JJ held that the regulation was valid.
47 (2012) 292 ALR 243; [2012] HCA 46 at [40]
48 (2012) 292 ALR 243; [2012] HCA 46 at [71] per French CJ, at [206] per Hayne J, at [396] per Crennan J and at [458] per Kiefel J
49 *Legal Profession Act 2007*, s 751 (provision expired on 1 July 2008 – see reprint 1B for former s 751)
50 *Legal Profession Act 2007*, s 3(a)
51 Scrutiny Committee Report No 36 (2008) p 3, para 4.7— the Scrutiny Committee did not consider whether the regulations breached the FLP in the *Legislative Standards Act 1992*, s 4(5)(b)

Subject matter appropriate for the level of legislation

[30] Section 4(5)(c) of the *Legislative Standards Act 1992* states that subordinate legislation should contain only matters appropriate to that level of legislation. Although an Act may legally empower the making of particular subordinate legislation, there remains the issue of whether the making of particular subordinate legislation under the power is appropriate.[52] For example, an Act's empowering provision may be broadly expressed so that not every item of subordinate legislation that could be made under it is necessarily appropriate in every circumstance that arises. Also, an empowering Act may have been enacted under different circumstances from the circumstances of the subordinate legislation and at a much earlier time.

[31] Of course, Parliament retains the right to disallow particular subordinate legislation on any ground.[53] However, it was the Scrutiny Committee's view that the power to disallow a regulation did prevent the Committee from objecting to a regulation on the basis that its subject matter would be more appropriately dealt with in an Act. The inappropriate matter will continue to be in the regulation if it is not disallowed.[54]

[32] The issue arose in the context of the Suncorp Insurance and Finance Amendment Bill 1996, which provided that a regulation could exempt entities from a liability to pay State tax. When the Scrutiny Committee sought further information from the Minister about the provision, the Minister responded that the regulations would be reviewed by Parliament and would be able to be disallowed by Parliament. However, the Scrutiny Committee maintained its view that only an Act should provide for an exemption from a liability the Act imposes.[55]

[33] The parliamentary portfolio committees have also expressed concern about the appropriateness of including particular types of provisions in subordinate legislation. Examples of the types of matters that have drawn the committees' attention include:

- important matters for the operation of the Act; and
- offences and penalties; and
- fees and taxation; and
- rights of appeal and review.

[34] Each of these examples is discussed in the following paragraphs.

Important matters for operation of Act prescribed by regulation

[35] The Nature Conservation (Protected Plants) and Other Legislation Amendment Bill 2013 provides an example of an important matter for the operation of an Act being included in

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52 This issue is similar to the FLP issue that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons: *Legislative Standards Act 1992*, s 4(4)(b).

53 *Statutory Instruments Act 1992*, s 50 states the procedure for a resolution disallowing subordinate legislation, and states that if the resolution is passed, the subordinate legislation ceases to have effect.

54 AD 1996 No 4 pp 39-40 para 11.7

55 AD 1996 No 4 p 40 para 11.8

subordinate legislation. The Bill sought to remove exemptions from the offence of taking protected plants. The Explanatory Notes stated that the purpose of the amendment was to relocate the exemptions to the offence set out in section 89 of the *Nature Conservation Act 1992* into the *Nature Conservation (Wildlife Management) Amendment Regulation 2006*.[56] The Explanatory Notes also stated that the regulation provisions would be subject to parliamentary review and would be subject to disallowance.[57] In its submission to the Agriculture, Resources and Environment Committee (the ***AREC***), the Queensland Law Society argued that this provision did not have proper regard to the institution of Parliament. In the Queensland Law Society's view, placing the exemptions in the regulation would not provide the same level of parliamentary scrutiny. Further, the exemptions could commence before Parliament had the opportunity to disallow them. If they were disallowed after commencement, this could create difficulties for persons who relied on the exemption before they were disallowed.[58] The AREC observed that:

> ... [n]otwithstanding the department's advice, the committee has serious concerns that exemptions to an offence with a maximum penalty of $330,000 and/or two years imprisonment will be contained in a regulation and not the Act itself. This could have serious implications for an individual's rights and liberties.[59]

The AREC recommended that the Minister consider removing clause 9 from the Bill in order to keep the exemption provisions in the Act.[60]

[36] Parliamentary portfolio committees have also expressed concern about matters relating to important powers in Acts being wholly or partly defined in subordinate legislation. This issue arose in the context of section 240 of the former *City of Brisbane Regulation 2012* and section 253 of the *Local Government Regulation 2012* as originally made which prescribed offences that were 'integrity offences'.[61] If an offence was prescribed as an integrity offence, a person who committed the offence could be disqualified from being a councillor. Section 240 of the *City of Brisbane Regulation 2012* and section 253 of the *Local Government Regulation 2012* prescribed the offence of failing to keep a list of registered interests correct as an integrity offence.

[37] The Transport, Housing and Local Government Committee (the ***THLGC***) stated that, in its view, the nature of the offence meant that it should not be an integrity offence. In addition, the THLGC was of the view that offences that would disqualify a person from being a councillor should be located in the Act so that it was not necessary to refer to the regulation.[62] Therefore, the THLGC recommended that the provisions prescribing the integrity offences in each regulation be deleted and that the power to prescribe integrity offences by regulation be

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56 Nature Conservation (Protected Plants) and Other Legislation Amendment Bill 2013 Explanatory Notes pp 2-3

57 Nature Conservation (Protected Plants) and Other Legislation Amendment Bill 2013 Explanatory Notes p 3

58 AREC Report No 27 (2013) pp 11-12: the Queensland Resources Council expressed similar concerns in its submission: AREC Report No 27 (2013) p 12

59 AREC Report No 27 (2013) pp 12-13

60 AREC Report No 27 (2013), Recommendation 5 p 13

61 Those provisions have since been deleted: see paragraph [37] and the current reprints for the *City of Brisbane Regulation 2012* and the *Local Government Regulation 2012*.

62 THLGC Report No 23 (2013) p 6

removed from the *City of Brisbane Act 2010* and the *Local Government Act 2009*.[63] In response to the THLGC's comments in the report, the provisions providing for integrity offences to be prescribed by regulation in the Acts and section 240 of the *City of Brisbane Regulation 2012* and section 253 of the *Local Government Regulation 2012* were repealed.[64]

[38] The AREC raised similar concerns about schedule 5 of the *Vegetation Management Regulation 2012* which prescribed grassland regional ecosystems for the definition of vegetation contained in section 8(b) of the *Vegetation Management Act 2009*. The AREC stated that, as the definition of vegetation was a concept that was important for the operation of the Act and a sanction could apply for breaching a provision of the Act, the definition of that term should be included in the Act.[65] The AREC referred to the former Scrutiny Committee's view that if an important term for an Act was to be defined primarily in the regulation then it was an

[39] inappropriate delegation of power.[66] In response, the department stated that the advantage of including a power to prescribe regional ecosystems in the Act was that the definition could be flexibly updated to take into account updating mapping and other changes.[67]

Appropriateness of including particular offences and penalties in subordinate legislation

[40] The Scrutiny Committee adopted a formal policy that legislative power to create offences and prescribe penalties could be delegated in limited circumstances, if the safeguards set out in the policy were observed. [68] The safeguards included requirements that:

- rights and liberties of individuals should not be affected by the delegation of the power; and
- the obligations imposed on a person under the delegated power be limited; and
- the maximum penalties generally ought not to exceed 20 penalty units.[69]

[41] The Scrutiny Committee considered the application of this policy when it considered the *Fisheries (East Coast Trawl) Management Plan 1999* (since repealed). The Management Plan imposed penalties for offences of 300 and 500 penalty units. The department justified the imposition of such substantial penalties on the basis that the potential consequences for non-

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63 THLGC Report No 23 (2013) Recommendation 1 p 7

64 See the *Local Government and Other Legislation Amendment Act 2013*, s 5 and 13 and item 1 of the amendments to the *City of Brisbane Regulation 2010* and the *Local Government Regulation 2009*. The Explanatory Notes state that the department was implementing the THLGC's recommendation: see the Local Government and Other Legislation Amendment Bill 2013 Explanatory Notes p 4.

65 AREC Report No 12 (2012), pp 8-9

66 AREC Report No 12 (2012), p 8; see the Scrutiny Committee's comments relating to clause 4 of the School Uniform Bill 1999 (P), which was a private Member's Bill that provided a regulation-making power for the setting of sanctions for contravening a dress code. The Scrutiny Committee considered the power as an inappropriate delegation of legislative power, and that the sanctions for breaching the dress code should be included in the Act: AD 1999 No 2 p 4 para 1.28-1.29.

67 AREC Report No 12 (2012), p 9

68 Policy No. 2 of 1996—AD 1996 No 4 pp 6-7 para 1.30-1.32

69 The issue is also relevant to the FLP regarding penalties.

compliance were extremely serious.[70] The Scrutiny Committee recognised that including the provisions in the Act could cause practical difficulties for the department, but concluded that '...any matter that is sufficiently serious to warrant a penalty as substantial as 300 or 500 penalty units is more appropriate for inclusion in an Act".[71] The Scrutiny Committee referred to Parliament the question of whether the penalties were justified in the circumstances.[72]

[42] The Scrutiny Committee expressed similar concerns in relation to the *Environmental Protection (Air) Policy 1997* (since repealed). The Policy did not contain offence provisions itself but the Act imposed significant penalties for breaches of the Policy.[73] The Scrutiny Committee stated:

> The committee has long held the view that subordinate legislation should only contain matter appropriate to it. In light of the substantial penalty provisions, the committee believes that the declared class 2 environmental offence provisions would be more appropriate for inclusion in the *Environmental Protection Act*.
>
> The committee therefore requests consideration be given to relocating the declared class 2 environmental offence provisions to the *Environmental Protection Act* to take account of the principle contained in s.4(5)(c) of the *Legislative Standards Act*.[74]

[43] This issue also arose in the AREC's consideration of the *Waste Reduction and Recycling and Other Legislation Amendment Regulation (No. 1) 2013*. The regulation inserted a new section 9 in the *Waste Reduction and Recycling Regulation 2011*, which prescribed all the waste disposal sites for section 52 of the *Waste Reduction and Recycling Act 2011*. The effect of this was that every waste disposal site operator was required to provide a waste data return detailing the amount of waste deposited, and the operation of the weighbridge, at the site. The maximum penalty for failure to provide the waste data return was 300 penalty units.[75] The AREC reiterated the Scrutiny Committee's view that the principal means of creating offences should be through an Act and concluded:

> ...on the basis of this principle, it is preferable for an entire offence to be contained in an Act, and not have aspects of an offence provision prescribed by regulation. This is especially the case where breach of a provision has a significant penalty.[76]

The AREC considered that prescribing the waste disposal sites in a regulation may not have sufficient regard to the institution of Parliament and sought comment from the department.[77]

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70 Scrutiny Committee's Report No 15 (1999) p 3 para 3.17
71 Scrutiny Committee's Report No 15 (1999) p 4 para 3.20
72 Scrutiny Committee's Report No 15 (1999) p 4 para 3.21
73 The *Environmental Protection Act 1994*, s 124 (as then in force) provided that a contravention of the policy was an offence with a maximum penalty of 165 penalty units; wilful contravention of the policy was an offence with a maximum penalty of 835 penalty units.
74 Scrutiny Committee Report No 8 (1998) p 3 para 2.11-2.12
75 *Waste Reduction and Recycling Act 2011*, s 52(2)
76 AREC Report No 36 (2014) p 3
77 AREC Report No 36 (2014) p 3

Appropriateness of including particular fees in subordinate legislation

[44] The Scrutiny Committee took the view that the level of fees imposed should be appropriate because fees are not intended to be a means of raising revenue.[78] It also considered that compliance with administrative requirements in the process of imposing a fee was relevant to deciding if the level of the fee was appropriate.[79]

[45] A substantial fee that is not related to administrative costs may be better stated in an Act rather than in subordinate legislation. The *Liquor and Other Legislation Amendment Regulation (No. 1) 2009* inserted a new section 36CA in the *Liquor Regulation* 2002 that prescribed additional fees of between $5,000 and $20,000 for licensees who had a poor compliance history. The Scrutiny Committee stated that, where a fee is to extend beyond administrative cost-recovery, there should be appropriate detail in the Act which stated the nature and purpose of the fee to be levied.[80] While the Scrutiny Committee recognised that the fee was imposed as being part of a risk-based licence fee regime, the Scrutiny Committee regarded that the fee may be more appropriate for the principal Act rather than prescribed in subordinate legislation.[81]

[46] If fees are to be increased substantially beyond government policy, it is prudent to include an explanation for the increase in the Explanatory Notes.[82] This issue arose in the LACSC's consideration of the *Status of Children Regulation 2012*. The regulation provided for an increase in a number of fees beyond the Cabinet Budget Review Committee's policy that fees should increase by 3.5% a year.[83] The LACSC commented that the Explanatory Notes did not '... satisfactorily explain why the fee increases exceed the Government endorsed indexation factor'.[84] The committee sought advice from the Minister as to why the fees had been increased substantially from the fees charged under the previous legislation. The Minister responded that there had been no increase in the fee levels since 2002. Moreover, the Minister explained, the new fee amounts accurately reflected the administrative costs for filing and searching the documents.[85] The LACSC commented:

> While the Committee was satisfied there were no issues in relation to the lawfulness of the Regulation, the Committee considers that a fuller explanation in the Explanatory Notes would have been desirable setting out the basis for the significant percentage increase in fees. After considering the further explanation, the Committee is satisfied with the explanation provided . . .[86]

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78 For a discussion of the validity of fees prescribed by regulation see paragraphs [16]-[21].

79 Scrutiny Committee Annual Report 1995-1996 No 1 (1996) p 42 para 5.36

80 LA 2009 No 6 p 14 para 9

81 LA 2009 No 6 p 14 para 11

82 LACSC Report No 21 (2013) p 3 A similar issue was raised by the THLGC when it considered the *Heavy Vehicle (General) National Regulation*: Transport, Housing and Local Government Committee Report No 32 (2013) pp 39-40.

83 LACSC Report No 21 (2013) p 3

84 LACSC Report No 21 (2013) p 3

85 See the Acting Attorney-General's response dated 21 January 2013 quoted in the LACSC Report No 21 (2013) p 3.

86 LACSC Report No 21 (2013) p 3

Appropriateness of imposing a tax in subordinate legislation

[47] As noted in paragraph [18], subordinate legislation can only *lawfully* impose a tax if authorised under an Act. However, parliamentary committees have also expressed their views on when it is *appropriate* for subordinate legislation to impose a tax that it is authorised to impose.

[48] The firm view of the Scrutiny Committee was that taxation should normally be dealt with by primary legislation. The Scrutiny Committee acknowledged there may be circumstances in which it is appropriate for subordinate legislation to prescribe the rate of a tax. However, in the Committee's view, subordinate legislation should prescribe rates of tax only in situations where there is an overwhelming justification for so doing. The justification should be properly documented and fully explained in the Explanatory Notes, and the principal legislation should prescribe either the maximum rate or a method of calculating the maximum rate.[87]

[49] The Scrutiny Committee considered that provisions of the Racing and Other Legislation Amendment Bill 2010 may provide for a matter inappropriate for a regulation by providing for the amount of wagering tax to be paid into the community investment fund to be prescribed by regulation.[88] Clause 31 of the Racing and Other Legislation Amendment Bill 2010 amended the (now repealed) section 169 of the *Wagering Act 1999* to provide that the amount be: [89]

- the percentage prescribed by regulation of all amounts received as wagering tax for the previous month; and
- a further percentage prescribed by regulation of all amounts received as wagering tax for the period from 1 July 2010 to 30 June 2014.

[50] Clause 34 of the Racing and Other Legislation Amendment Bill 2010 amended section 9 of the now repealed *Wagering Regulation 1999* to provide that the percentage each month was 8.5%, and the second percentage applying from 1 July 2010 to 30 June 2014 was 45.75%.[90]

[51] The Scrutiny Committee considered that the percentages should have been included in the Act, given the magnitude of the percentages that would be charged as wagering tax, stating that '... [i]t may be inappropriate for legislation to delegate legislative power allowing such a large percentage to be allocated by way of regulation'.[91]

[52] A similar issue was raised by the Scrutiny Committee in the *Casino Control Amendment Regulation (No.1) 2009*. The regulation inserted a new section 19B (subsequently repealed) into the *Casino Control Regulation 1999* that prescribed a new casino tax rate of 8.5% to be paid into the Community Investment Fund.[92] The Scrutiny Committee stated that, as the rate

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87 Scrutiny Committee *Annual report 1997-1998* No 10 (1998) p 11 para 3.11; AD 2005 No 13 pp 12-13 paras 32-45; AD 2005 No 4 pp 1-2 paras 3-10; AD 2003 No 6 p 2 para 6-15

88 LA 2010 No 6 pp 37 and 44 para 3 and 60

89 See the reprint of the *Wagering Act 1999* current as at 1 May 2013.

90 See the reprint of the *Wagering Regulation 1999* current as at 5 April 2013.

91 LA 2010 No 6 p 44 para 60

92 See the reprint of the *Casino Control Regulation 1999* current as at 13 July 2012 for a similar provision.

significantly increased the amount of casino tax paid under the casino agreements, prescribing the tax rate in subordinate legislation may be inappropriate.[93]

[53] The Justice and Other Legislation Amendment Bill 2005 amended the *Professional Standards Act 2004* to provide that a fee included a tax. The Explanatory Notes for the Bill justified the imposition of a tax by stating that it was designed to allow the cost recovery of the activities of the Professional Standards Council.[94] After the Scrutiny Committee restated its view that taxes should be imposed in primary legislation, it said that, as the legislation was designed to recover the costs, the primary legislation should provide specifically for fees to be set for cost recovery and should not allow for a regulation to provide for a tax.[95]

[54] The Scrutiny Committee considered that the imposition of a tax should be included in the Act rather than in subordinate legislation when considering the Environmental Legislation Amendment Bill 1995.[96] In clause 11 of the Bill the definition of a 'fee' was inserted that allowed for the payment of a tax. The Scrutiny Committee sought further information from the Minister about whether it was appropriate to allow taxes to be set by regulation.[97]

Appropriateness of including appeal or review rights in subordinate legislation

[55] Under section 29 of the *Statutory Instruments Act 1992* a statutory instrument may provide for a review or right of appeal against a decision made under:

- the statutory instrument; or
- the Act or other statutory instrument under which the statutory instrument is made.[98]

[56] However, the Scrutiny Committee considered that review of decisions and appeals should be established in an Act rather than by subordinate legislation. The basis of the Scrutiny Committee's concern was that no formal avenue of appeal under an Act would exist until appropriate regulations were made.[99]

Subdelegation

[57] Section 4(5)(e) of the *Legislative Standards Act 1992* provides that subordinate legislation should allow the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act. Parliamentary portfolio committees have considered that this principle is infringed by subordinate legislation that authorises another person to decide the content of the subordinate legislation. In the committees' view,

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93 LA 2009 No 6 p 15 para 6

94 Justice and Other Legislation Amendment Bill 2005 Explanatory Notes p 35

95 AD 2005 No 13 p 13 para 42

96 AD 1995 No 1 p 4 para 2.10

97 AD 1995 No 1 p 4 para 2.10

98 This includes conferring jurisdiction on a court, tribunal, person or body to hear the review or appeal: *Statutory Instruments Act 1992*, s 29(2).

99 See the Scrutiny Committee's comments regarding the Financial Intermediaries Bill 1996, where, in response to the Scrutiny Committee's comments, a part was inserted dealing with review and appeal rights rather than allowing them to be prescribed by regulation: AD 1996 No 5 p 15 para 4.26.

provisions of this kind amount to an improper subdelegation of legislative power.[100] Part of the rationale for this view is the committees' concern to ensure sufficient parliamentary scrutiny of a delegated legislative power and the exercise of delegated legislative power.[101]

[58] In deciding whether it would be appropriate for matters to be dealt with by an instrument that is not subject to parliamentary scrutiny, the former Scrutiny Committee took into account the importance of the subject matter and practicalities dealing with that subject matter entirely in subordinate legislation.[102] For example, clause 72 of the Coal Mining Safety and Health Bill 1999 provided for 'recognised standards' to be made by a Minister and notified in the gazette. The Scrutiny Committee said that it was not entirely clear that the subject matter of the standards could not be included in legislation and sought information from the Minister about this question. [103]

[59] A closely related issue arises when subordinate legislation subdelegates law-making power to another body and instruments made by that body are not subject to parliamentary scrutiny. An example of a provision having this effect is the *Sustainable Planning Amendment Regulation (No. 3) 2013*, which provided that the chief executive administering the *Sustainable Planning Act 2009* would in many cases be the person responsible for assessing development applications. In assessing the application, the chief executive was required to consider a document called 'State development assessment provisions'. The State Development, Infrastructure and Industry Committee (the **SDIIC**) commented that a document referred to in a regulation that directs the exercise of a power is a subdelegation of legislation.[104] The SDIIC considered the provision amounted to a subdelegation that had insufficient regard to the institution of Parliament. The SDIIC expressed concern that, while the document would be available online, it would not be tabled or subject to parliamentary scrutiny.[105] The SDIIC recommended therefore that the document be tabled.[106]

[60] Another example of this type of provision is the *Plant Protection Amendment Regulation (No. 3) 2013*, which sought to insert a new provision in the *Plant Protection Regulation 2002* allowing the chief executive to approve a method for treating banana plants. Other methods for treating banana plants were already specified in schedule 5 of the *Plant Protection Regulation 2002*. The AREC noted that treatment methods were already prescribed in the regulation and observed the proposed provision appeared to amount to a subdelegation of legislative power that would not be reviewable by Parliament.[107] In responding to the AREC's inquiry about this issue, the department sought to justify the proposed provision on the grounds that it enabled

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100 AREC Report No 24 (2013) p 6, in which AREC commented on the *Plant Protection Amendment Regulation (No. 3) 2013*, considered in paragraph [60].

101 See SDIIC Report No 30 (2013) p 6; AREC Report No 24 (2013) p 6, AD 1999 No 4 p 10 para 1.65-1.67; AD 1999 No 4 p 10 para 1.68-1.69

102 AD 1999 No 4 p 10 para 1.65-1.67

103 AD 1999 No 4 p 10 para 1.68-1.69

104 SDIIC Report No 30 (2013) p 5

105 SDIIC Report No 30 (2013) p 6

106 SDIIC Report No 30 (2013) Recommendation 2 p 7

107 AREC Report No 24 (2013) p 6

the department to move quickly and to embrace new methods of treating banana plants.[108] The AREC was satisfied by the department's response.[109]

[61] The *Building Amendment Regulation (No. 3) 2012* amended the *Building Regulation 2006* to prescribe the number of continuing professional development (***CPD***) points that a pool safety inspector must earn, and the types of activities that earn an inspector CBD points for a renewal or restoration of a licence under section 246BN or 246BR of the *Building Act 1975*. New section 16DE of the *Building Regulation 2006* provided that the Pool Safety Council could decide which activities earned CPD points. The THLGC considered that the power to decide the activities that earned CPD points created in the *Building Amendment Regulation (No. 3) 2012* amounted to a subdelegation of legislative power, and sought advice from the department about whether the power was authorised by the Act and whether it was appropriate.[110] The Minister responded that, among other things, the provisions provided flexibility in allowing the Pool Safety Council to control the CPD point system as they had oversight of the system and responsibility for assessing the appropriateness of proposed activities thereby ensuring the maintenance of satisfactory standards.[111] The THLGC considered the response and considered that no further action was required.[112]

[62] Parliamentary portfolio committees have also commented when a regulation creates offences that are dependent on a matter outside the regulation that are not subject to sufficient review by the Legislative Assembly. The *Nature Conservation and Other Legislation Amendment and Repeal Regulation (No. 1) 2013* created new offences dependent on the declaration by the chief executive of a temporary special management area. The power to declare a temporary special management area was contained in section 17 of the amendment regulation. An area could be declared for an initial period of 60 days, with the ability to provide an extension of 120 days. The AREC expressed concern that the issuing of the temporary declarations was not subject to the scrutiny of the Legislative Assembly, and expressed concern that the provision was an inappropriate subdelegation of legislative power.[113]

Other FLP issues with subordinate legislation

[63] In the course of considering subordinate legislation, the parliamentary portfolio committees have considered other matters associated with subordinate legislation. This section deals with those matters raised by the committees that do not fall within the examples outlined in section 4(5) of the *Legislative Standards Act 1992*.

108 AREC Report No 24 (2013) pp 7-8
109 AREC Report No 24 (2013) p 10
110 THLGC Report No 17 (2013) p 5 para 2.2
111 THLGC Report No 17 (2013) p 6 para 2.2
112 THLGC Report No 17 (2013) p 6 para 2.2
113 AREC Report No 24 (2013) p 3

Tabling of documents

[64] Parliamentary portfolio committees have expressed concerns about documents referred to or approved in subordinate legislation that are not included in the subordinate legislation or are not tabled in Parliament.[114]

Subordinate legislation anticipating Parliament passing principal legislation

[65] Section 2 of the *Electricity and Another Regulation Amendment Regulation (No. 1) 2013* provided that part 3 of the amendment regulation commenced on the date of assent of the *Energy and Water Legislation Amendment Act 2013*, a Bill that was before Parliament and had not, at the time of the making of the regulation, been passed by Parliament. The SDIIC regarded the making of a regulation before the passage of a Bill did not have sufficient regard to the institution of Parliament as it presumed that the legislation would be passed.[115] The SDIIC did not consider that the administrative efficiencies afforded by passing the regulation before passage of the Bill addressed the SDIIC's concerns over the Bill.[116] The SDIIC recommended:

> ... the Minister ensure regulations are not made before the related bill has been considered and passed by the Legislative Assembly on the basis of gaining administrative efficiencies.[117]

Other matters considered by the committees

[66] The parliamentary committees would consider and comment on the following other matters affecting the operation of legislation:

- exemption of subordinate legislation from part 5 of the *Statutory Instruments Act 1992*[118] which requires the preparation of regulatory impact statements. For example, clause 195 of the Child Care Bill 2002 provided for an exemption from part 5 for the first version of the regulation. In the Scrutiny Committee's view, this was unobjectionable as it was only to the first version of the regulation, and the Minister said that extensive consultation had been conducted on the regulation;[119]

- exemption of subordinate legislation from the expiry of subordinate legislation on 1 September of the year after the 10th anniversary of the subordinate legislation's making under part 7 of the *Statutory Instruments Act 1992*. For example, the Scrutiny Committee's consideration of the *Statutory Instruments Amendment Regulation (No.2) 2010*, which exempted 3 pieces of subordinate legislation from expiry under the ordinary procedures. The Scrutiny Committee noted that the regulations had been exempted more than once, but also noted that each had been

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114 For example, see the LACSC's consideration of the *Professional Standards (College of Investigative and Remedial Consulting Engineers Australia Professional Standards Scheme) Notice 2013* at paragraph [25].

115 SDIIC Report No 30 (2013) p 4

116 SDIIC Report No 30 (2013) p 4

117 SDIIC Report No 30 (2013) Recommendation 1 p 4

118 Regulatory impact statements are now required as part of an administrative process. For the statutory regulatory impact statement regime see the *Statutory Instruments Act 1992*, part 5 (reprint 11D).

119 AD 2002 No 8 p 3 para 18-20

subject to a report tabled in Parliament about the need for review of the legislation;[120]

- exemption of subordinate legislation from disallowance procedures in section 50 of the *Statutory Instruments Act 1992*. The Industrial Relations Legislation Amendment Bill (No. 2) 1995 provided for the Governor in Council to issue proclamations about departmental arrangements. [121] The Bill inserted a new section 42B into the now repealed *Public Service Management and Employment Act 1988*, which excluded proclamations from disallowance motions. The Scrutiny Committee expressed 'disapproval' of the exclusion of section 50 and said that all subordinate legislation should be subject to all provisions of the *Statutory Instruments Act 1992*;[122]

- exemption of subordinate legislation from the (now repealed) section 58 of the *Statutory Instruments Act 1992*, which regulated the form and publication of forms.[123] The Scrutiny Committee noted clause 285 of the Land Valuation Bill 2010 provided that a form could be made before commencement and it would have been validly made under the Land Valuation Bill when it commenced;[124]

- subordinate legislation that postpones the commencement of an Act. For example, the AREC's consideration of the *Natural Resources and Other Legislation Amendment (Postponement) Regulation 2011*, where the AREC stated that the postponement of the commencement of an Act raises the issue of regard to the institution of Parliament.[125]

120 LA 2010 No 13 p 32 paras 3-6
121 The Bill lapsed.
122 AD 1995 No 3 pp 24 and 25 para 7.15-7.18
123 The provision was relocated as s 48 in the *Acts Interpretation Act 1954*.
124 LA 2010 No 11 p 28 para 88
125 AREC Report No 4 (2012) p 3