

LOCAL GOVERNMENT AMENDMENT BILL 1994

EXPLANATORY NOTE

GENERAL OUTLINE

Objective of the Legislation

The Bill amends the *Local Government Act 1993* to clarify the powers of entry of authorised persons and to provide for other miscellaneous matters.

Reasons for the Bill

The *Local Government Act 1936* contained provisions which allowed local government officers to enter land or premises at all reasonable times in the exercise of a local government's jurisdiction. These powers were very broad.

The *Local Government Act 1993* (the Act) introduced new powers of entry for local government which commenced on 26 March 1994. The new provisions were drafted having regard to the fundamental legislative principles in the *Legislative Standards Act 1992*. One of the principles on which legislation is based is to ensure sufficient regard is given to the rights and liberties of individuals. This includes the conferring of powers of entry to premises, and search for and seizure of documents or other property, only with a warrant issued by a judge or other judicial officer.

As a result the Act permits entry to land or a structure for local government purposes or for performing work for an owner or occupier with the agreement of the owner and occupier or under an order issued by a Magistrate. This general position is only relaxed if it is not practicable to obtain the agreement of the owner or occupier and the circumstances dictate that urgent action needs to be taken in the interests of public health or safety.

A number of concerns have been raised by local governments in relation to these powers. Local governments have identified the need for flexibility in the powers of entry in a range of specific circumstances.

As an evolving area of law, the Bill draws on models developed in other recent legislation to enable local government to exercise its jurisdiction at the same time as recognising the rights of individuals.

The Act also contains provisions which require amendment to clarify their intention, correct minor errors and extend dates in certain sunset clauses. The Bill provides for these amendments.

Estimated Cost for Government Implementation

There are no additional costs incurred by the Government.

Consultation

A discussion paper containing proposals for the powers of entry was developed by the Department in conjunction with the Department of Justice and Attorney General, the Office of Parliamentary Counsel and Office of the Cabinet and comments were sought from local government peak bodies and a number of local governments.

Consultation with these groups was based on the Department's discussion paper and subsequent drafts of the Bill.

The Local Government Association of Queensland (Inc.) has also been consulted on the proposed miscellaneous amendments and has no objection to them proceeding.

NOTES ON PROVISIONS

Clause 1 sets out the short title of the Act.

Clause 2 provides for miscellaneous amendments contained in Schedule 2 of the Bill to commence on assent with the balance of the amendments to commence on a date fixed by proclamation.

Clause 3 provides for amendments to the *Local Government Act 1993*.

Clause 4 inserts a new Part 2 to Chapter 11 dealing with powers of entry. Section 655A provides that the power to enter a place must not be exercised using force except by authority of an order made under section 658 or a warrant issued under Part 5.

Clause 5 amends section 658 which deals with orders on occupiers who refuse entry. The section applies to occupiers but does not limit the application to owners where the owner is the occupier for the purposes of the law (e.g. the owner of vacant land is the owner for the purposes of the law and an order may be sought under this section).

The section is amended in a number of respects.

Section 658(2) is amended so that a person making an application for an order must give written notice to the owner as well as the occupier of the land or structure. This is an important element of natural justice to inform the concerned persons action has been sought to be taken against them. They may then respond to the proposed action.

Sections 658(3)—(4) are replaced with the following process for the application and issue of an order by a Magistrate:—

The new sections 658(3) and (4) provide for particular information to be included in an application for an order to enter land or structures and for a Magistrate to require more information if necessary to consider the application eg. supporting information may be required to be given by statutory declaration.

Sections 658(5) and (6) provide for the Magistrate to make an order. The order must contain particular information about its terms. The purpose of these terms is to enable the applicant to enter but only at reasonable times and within a time period set by the court.

Section 658(7) provides that an order may also authorise a person to use necessary and reasonable help and force to enter the land or structure.

Section 658(8) requires a Magistrate to record the reasons for making the order.

Section 658(9) requires the occupier to comply with the order. Maximum penalty: 50 penalty units (currently equivalent to \$3000).

Clause 6 inserts a new section 661. The purpose of this section is to enable a local government to enter a place to perform work ordered by the local government to be performed. The section also deals with the conditions applying to these powers of entry. If a local government has issued a notice for an owner or occupier to perform work and the local government wants to monitor compliance with the notice, entry is not made under this section but under section 680H (described below).

Section 661(1) provides that a Local Government employee or agent may enter land or a structure to perform work where an owner or occupier has failed or both the owner and occupier have failed to perform work required by an Act under which a local government exercises jurisdiction.

Section 661(2) requires the consent of the owner and occupier or an order to be obtained as a condition of entry .

Neither of these conditions apply if:—

- (a) urgent action is necessary for local government purposes such as public health and safety; or
- (b) reasonable notice has been given by the local government of its intention to enter the land or structure to carry out the work eg. entry for the purpose of the clearing of overgrown allotments required under a local law.

Section 661(3) provides a restriction on entry to a structure or part of a structure used for residential purposes. The section operates by only allowing entry with the agreement of the owner and occupier or under a court order. This restriction is designed to protect the rights of the individual in relation to the control over entry to a residence.

Sections 661(4) and (5) provide for costs incurred by the local government in carrying out work to be paid to the local government by the person who failed to perform the work. Where both the owner and occupier fail to perform the work, the parties are jointly liable for the payment of the debt.

Clause 7 inserts a new section 665 dealing with entry on land for local government purposes. The purpose of the section is to provide a local government with powers of entry in the exercise of its jurisdiction under an Act.

Section 665(1) provides a broad power for an employee or agent of a local government to enter land or structures for local government purposes to exercise the jurisdiction of local government. The jurisdiction of local government includes the jurisdiction under the Local Government Act and other Acts. If another Act confers jurisdiction and particular entry powers are contained in the Act then the powers of entry in this section and in the Local Government Act do not override those specific powers.

Some examples of the purposes of entry that may be needed by local government under this section are provided.

Section 665(2) requires the consent of the owner and occupier or a court order as a condition of entry.

Neither of these conditions apply if:—

- (a) entry is made for routine operations (eg. inspect, operate, change, maintain, remove, repair or replace local government facilities on the land or to investigate the future placement, removal, repair or replacement of facilities); or
- (b) urgent action is necessary for local government purposes such as public health and safety eg. to remove a tree which is likely to fall and cause injury or damage.

Section 665(3) provides that the exemption from obtaining consent of the owner and occupier or a court order in subsection (2) for routine operations cannot be used for entry to a structure or part of a structure used for residential purposes. The section operates by only allowing entry to these structures with the agreement of the owner and occupier, or under a court order, or if urgent action is necessary for local government purposes such as in the interests of public health and safety.

Clause 8 replaces Part 4 of Chapter 11 with a new Part dealing with enforcement of Acts conferring jurisdiction on local government. The purpose of this Part is to provide powers of entry for specially appointed local government employees (called authorised persons) in the following circumstances:—

- (a) investigations about offences;
- (b) monitoring compliance with approvals and notices issued by a local government; and

- (c) carrying out inspection programs approved by the local government.

Division 1—Interpretation

Section 674 provides for the meaning of various terms used in this Part.

Section 675 clarifies references to “local government” and “authorised person” in this Part.

“Authorised person” refers to a person appointed by the local government and “a local government” refers to the local government that appointed the authorised person.

Section 676 provides for the appointment of authorised persons by the local government. The local government must specify the circumstances for which the authorised person is appointed—investigating offences, monitoring approvals and notices or carrying out inspection programs. An appointment may be for any one or more of these circumstances. The power of appointment is a matter that may be delegated by the local government, in accordance with the powers of delegation in the Act.

Section 677 provides for a limitation to be placed on an authorised person’s appointment in the instrument which confirms the appointment.

Section 678 provides the conditions upon which authorised persons are appointed. The appointment of an authorised person is separate from the process for appointment of a person as an employee of a local government. The office of authorised person may be linked as a condition of appointment to the position as employee of the local government, eg an employee who ceases holding a particular office and is appointed to hold another office could also automatically cease to be an authorised person.

Section 679 requires a local government to issue an identity card to each authorised person. The identity card must contain particulars to describe the person. It also provides for the card to be returned to the local government within 21 days after the person ceases to be an authorised person. The local government may take action against the person if the card is not returned within the time specified. Maximum penalty: 10 penalty units (currently equivalent to \$600)

The identity card may be used by a person for purposes other than for the powers set out in this Part.

Section 680 requires an authorised person to display the identity card whenever the authorised person is acting under this Part.

Section 680A provides for an offence if a person pretends to be an authorised person. Maximum penalty: 50 penalty units (currently equivalent to \$3000)

Division 3—Infringement Notice Offences

Section 680B allows an authorised person to ask a person to state the person's name and address. This is only possible if the authorised person believes the person has committed or suspects the person has committed an infringement notice offence. In doing so the authorised person may require proof of the identity of the person. It is an offence to fail to give the name and address unless the person has a reasonable excuse. Maximum penalty: 35 penalty units (currently equivalent to \$2100)

Division 4—Investigations about offences

Section 680C enables an authorised person to enter a place for the purpose of investigating offences provided the occupier is in agreement or entry is permitted by a warrant. Entry by agreement or a warrant is not necessary where entry is to a public place at a time when it is open to the public or it is necessary to enter the place to seek the agreement of the occupier to the entry. Entry to a place used for residential purposes to investigate an offence would require the occupier's consent or a warrant.

Section 680D requires an authorised person to inform the occupier of a place of the purpose for which entry is sought and to outline the occupier's rights in relation to the entry request. If an occupier consents to the entry an authorised person may request the occupier to evidence the consent by completing an appropriate form of acknowledgment.

Section 680E provides for a court, in proceedings against an occupier, to assume the occupier did not consent to the entry by an authorised person unless an acknowledgment of consent can be produced in evidence.

Division 5—Warrants

Section 680F provides for an authorised person to apply to a Magistrate for a warrant to authorise entry to a place. The provision sets out the requirements of the application, conditions for issue of a warrant by a Magistrate and the details to be included in a warrant including the reasons for the warrant being issued.

Section 680G provides for an authorised person to apply to a Magistrate for a warrant by other means such as phone, facsimile, radio or in another form of communication in urgent circumstances or where other special circumstances exist e.g. the location of the place is remote. An authorised person must prepare an application for a warrant but may apply to the Magistrate before the application is sworn.

The provision sets out the administrative procedure to be followed by a Magistrate and authorised person in relation to the issue of a warrant under this section. It also provides for a Court in proceedings against an occupier to assume the warrant was not issued unless the warrant is produced as evidence.

Division 6—Monitoring authorisations and notices and processing applications

Section 680H provides for an authorised person to enter a place at any reasonable time during the day for the purposes of inspecting the place to process an application made under an Act conferring jurisdiction on local government or to monitor compliance with or inspect work being carried out under an authorisation or notice. Entry for these purposes can occur at night if the place is a public place and is open to the public at the time of the entry or at the occupier's request or in accordance with a lawfully imposed condition of an authorisation.

If an authorised person enters a place under this section for a monitoring purpose and in so doing identifies an offence related to that monitoring purpose the authorised person may proceed under section 680N to gather evidence of an offence.

There is no obligation on the authorised person to apply the process for investigation about offence provisions in Division 4 in these circumstances.

However, if the authorised person identifies an offence not related to the monitoring authorisation power the authorised person is obliged to apply the process set out in Division 4 relating to investigations about offences. Re-entry at a later point may be required for this purpose. If the authorised person was not appointed by the local government to operate under Division 4, an authorised person appointed for the purpose of that Division would have to take up the matter.

Section 680I limits the powers of entry of an authorised person under this Division in relation to a structure or part of a structure used for residential purposes. Entry to such a structure may occur only if the authorised person is accompanied by the occupier. This general position does not apply if the authorised person gives the occupier reasonable notice of the intention to enter and the occupier is unavailable or unwilling to accompany the authorised person at that time or for some other reason the occupier is unable to accompany the authorised person (eg the occupier is disabled but permits the authorised person to enter the place).

Division 7—Approved inspection programs

Section 680J provides for authorised persons to enter places under programs approved by resolution of a local government for the purpose of monitoring compliance with an Act or a particular aspect of an Act conferring jurisdiction on a local government. Examples are where a local government monitors compliance with requirements of private swimming pools under the Building Act 1975 or monitors compliance with limits on the number of dogs that may be kept under a local law.

An approved inspection program may be either a selective or systematic program. A selective program may be carried out on a selective basis throughout the area or part of the area e.g. each third house in each street in a particular part of the area. The local government would need to set out the criteria for selecting places to be inspected. A systematic program would include all places (or classes of places) in the local government area or part of the area e.g. all commercial land used for snack bars in the area.

The local government must include a number of matters in an approved inspection program to properly describe its intent, purpose, operation and the period over which it is to be conducted. An inspection program must not operate for more than 3 months or another period prescribed by Regulation.

If an authorised person enters a place under an approved inspection program and in so doing identifies an offence related to the inspection program the authorised person may proceed under section 680N to gather evidence of an offence.

There is no obligation on the authorised person to use the investigation about offence provisions in Division 4 in these circumstances.

However, if the authorised person identifies an offence not related to the inspection program entry can only be effected under the requirements set out in Division 4 relating to investigation about offences. Re-entry at a later point may be required for this purpose. As indicated in section 680H, this entry, could only be effected by an authorised person appointed to operate under Division 4.

Section 680K requires a local government to publish a notice in a newspaper circulating in the area at least 14 days but not more than 28 days before the program commences of the intention to implement a selective or systematic inspection program. The provision includes the particulars to be included in the notice. The purpose of this requirement is to inform the public that an inspection program will occur.

Section 680L provides for details about the approved inspection program to be available for inspection or purchase at the local government public office during the period the program is to be carried out.

Section 680M provides for an authorised person to enter premises under an approved inspection program, other than a structure or part of a structure used for residential purposes, at any reasonable time of the day.

Division 8—Powers on entry

Section 680N provides for general powers of authorised persons after entering a place for the following purposes:—

- investigation about offences under Division 4;

- monitoring authorisations and notices and processing applications under Division 6; and
- undertaking approved inspections under Division 7.

The provision specifies the powers which may be exercised by an authorised person in respect of the entry to places under the respective Divisions 4, 6 and 7.

When entry is made to investigate offences under Division 4 an authorised person may exercise any of the following powers:—

- (a) search any part of a place; or
- (b) inspect, test, photograph or test anything in the place; or
- (c) copy documents; or
- (d) obtain samples; or
- (e) take persons, equipment and materials required to exercise the powers; or
- (f) require the occupier to give reasonable help to exercise the powers listed above.

When entry is made to monitor authorisations and notices or to process applications under Division 6 or under an approved inspection program under Division 7, an authorised person may only exercise those powers at (b), (c), (d), (e) and (f) listed above.

An authorised person may require the occupier to give reasonable assistance in the exercise of the powers and a person must comply with the requirement unless the person has a reasonable excuse. Maximum penalty: 8 penalty units (currently equivalent to \$480).

It would be a reasonable excuse to fail to comply if supplying information or producing a document (other than a document required to be kept under the Act) might incriminate a person.

These powers cannot be exercised by an authorised person if entry is made under section 680C(2)(b) merely to obtain the agreement of an occupier for entry to investigate an offence.

Division 9—Other enforcement matters

Section 680O requires an authorised person to give notice to a person if any damage to property occurs as a result of the exercise of the powers by the authorised person or persons assisting the authorised person under this Part.

Section 680P enables a person who incurs a loss or expense as a result of the exercise of the powers by an authorised person under this Part to claim compensation from the local government for the loss or expense. It provides for a Court to order compensation according to the circumstances of the particular case and regulations may prescribe matters to be taken into account by the Court in making a decision to order compensation.

Division 10—Special provision for local laws about dogs

Section 680Q provides for a local government to include in a local law about dogs (or which includes the control of dogs) powers which permit authorised persons to enter a place (including a place used for residential purposes) with the force that is reasonable and necessary to seize or destroy a dangerous dog within the meaning of the local law.

The power to seize dogs is not limited by other sections of this Chapter. The provisions dealing with damage to property and compensation under Division 9 apply.

The Division has a sunset clause of two years.

A model local law provision will be developed to assist local governments in their consideration of the use of this power.

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

The following amendments to the Act are necessary as a consequence of amendments in *clause 8* of the Bill:—

Clause 1 inserts a cross reference to “approved inspection program” in the definitions under section 4.

Clause 2 inserts a cross reference to “authorised person” in the definitions under section 4.

Clauses 3 and 4 amend the numbering of Chapter 11 so that Parts 2 and 3 become Parts 3 and 4 and Parts 5 to 7 become Parts 6 to 8.

Clause 5 provides for renumbering of the Act from section 680A in the next reprint of the Act under section 43 of the *Reprints Act 1992*. The renumbering is likely to occur within several months of proclamation of this section of the Act and will mean that section 680A is renumbered as section 681 and section 680B as section 682 and so on to section 680Q.

SCHEDULE 2

OTHER AMENDMENTS

Implementation of the new Act will be assisted by a range of miscellaneous amendments to:—

- clarify certain provisions to ensure the meaning is clear;
- better achieve the desired intention;
- correct minor errors; and
- extend dates in certain sunset clauses.

The following miscellaneous amendments are included in this schedule of the Bill:—

Clause 1 corrects the reference to section 410 in the meaning of “permissible company” by substituting “411” for “410”.

Clause 2 corrects the citation to the *Transport Infrastructure Act 1994* in the definition of “road” by substituting “1993” with “1994”.

Clause 3 includes a reference to local law policies in the meaning of “State interest” in section 4. This brings the definition of State interest into line with section 112, which enables a regulation to be made declaring that a local law policy ceases to have effect in order to protect State interests.

Clause 4 extends section 195(3) so that a councillor must tell the chief executive officer of particulars of interests (or of correct particulars) in accordance with requirements in the regulations e.g. the regulations could set different time periods for initial registration of interests and for updating a register, or could require the use of approved forms by councillors.

Clause 5 corrects section 350(3) so that subsection “(1)” is replaced by subsection “(2)” where reference is made to action taken to implement a reviewable local government matter.

Clause 6 clarifies section 397(2)(a) so that a delegate of a local government may enter into a contract provided the cost of the contract is included in an approved budget or if it is within the limits stated in the resolution delegating the power to make or vary a contract and is incurred under section 436.

This means that from 1 July each year until the time when the budget for that year is adopted by the local government (by 31 August), a local government’s delegate may be able to make, vary or discharge a contract.

Clause 7 corrects wording in section 451(2)(a) to “open to inspection” rather than “open for inspection”.

Clause 8 amends the heading for Chapter 8, Part 2 so that “Local Law” is inserted before “Policies”.

Clauses 9 and 10 clarify the local law policy making process under sections 483 to 489 so that notice may be given of a proposed local law policy either at the time a local law is proposed or at some later time before the process for making the proposed local law is finished. The provision

also clarifies the steps to be followed by a local government during the making of a local law policy before the authorising local law is made.

The current provisions do not allow a local government to propose to make a local law policy at the same time it proposes to make a local law (under which the policy is made). The local law would have to be in place first and this is considered an unnecessary constraint. The amendment will minimise delays in the making of local law policies.

Clause 11 extends the expiry date to 31 March 1997 for provisions dealing with local government control over levee banks.

Clauses 12 and 13 clarify that local governments may make and levy a differential general rate on “rateable” land in the area. The word “rateable” was previously inadvertently omitted.

Clause 14 clarifies section 579(2) so the term “statement” is incorporated consistent with its use in section 579(1).

Clauses 15 and 16 require local governments to acquire land for which a resolution has been passed to remove valueless land from the land record.

However, a local government may not acquire an interest in land held on a tenure prohibiting a corporation from holding an interest in the land e.g. a mining claim.

Clause 17 amends section 604(3)(a) so that a local government may levy a utility charge for the supply of gas at intervals it considers appropriate. In this respect, the Act requires utility charges to be levied on an annual, half yearly or quarterly basis, but a utility charge for water may be levied at other intervals. The amendment will enable the same flexibility to apply to a utility charge for gas.

Clause 18 extends section 614(2) to allow local governments to adopt another method for the calculation of interest on overdue rates other than on a daily compounding basis (e.g. periods on which interest is compounded may be weekly, monthly or yearly). This is provided the amount of interest obtained by that method is the same or lower than that obtained using daily compounding.

Clause 19 clarifies section 629(2) so that circumstances justifying the use of the rating concession powers under sections 627 or 628 are limited to those specified in this provision.

Clause 20 clarifies section 632(1) so that the amount of the rate levied in a year can be limited to the amount of the rate levied in the previous year. Therefore a local government may resolve to apply a zero percent increase, effectively capping rates to the amount levied in the previous year.

Clause 21 clarifies section 634(2) so that a person is not liable to imprisonment if default occurs in satisfying an order of a court arising from a local government's recovery of overdue rates.

Clause 22 amends section 637(1) so that a local government must give notice to an owner of its intention to sell land for overdue rates but must do so as soon as practicable after taking the decision to sell the land.

Clause 23 deletes the requirement in section 638(4) for a local government to resolve to end sale of land procedures where overdue rates are paid in full. A resolution by the local government is unnecessary because the payment constitutes the end of the sale of land procedures.

Clause 24 clarifies section 639(1) by substituting the term "auction" for "public auction". Qualification of this term is unnecessary as the meaning of "auction" is a public sale.

Clauses 25 to 27 change the word "certificate" to "notice" in sections 645(1) to (3). This term more accurately describes the notice given to the Registrar of Titles which is on a form and not on a certificate. There is no obligation for the notice to contain the seal of the local government.

Clause 28 amends section 647 by clarifying the purpose of provisions dealing with the procedure for acquisition of valueless land by a local government.

Clause 29 amends section 648(1) so that a local government must, as soon as practicable after resolving to remove valueless land from its land record, provide notice to the owner of its intention to acquire the land.

Clause 30 deletes section 649(6) which is now provided for in section 647. (Refer to *clause 28* of this Schedule).

Clause 31 deletes wording which is no longer required as a consequence of the provisions in *clause 8* of the Bill dealing with enforcement of Acts conferring jurisdiction on a local government.

Clause 32 inserts the word "matter" so that the section refers to a local government matter.

Clause 33 clarifies section 696(4) which limits a local government's ownership of materials, structures or works carried out in the exercise of its jurisdiction. A local government does not own anything that is the outcome of work which it performs on a cost recovery basis on behalf of an owner or occupier under section 661 of the Act.

Clause 34 extends sections 713(4) and (5) so that a local government employee must tell the chief executive officer (or the chief executive officer tells the mayor) of particulars of interests (or of correct particulars) in accordance with the regulations, e.g., the regulations could set different time periods for initial registration of interests and for updating a register, or could require the use of approved forms by employees.

Clause 35 extends the expiry date to 25 March 1996 for regulations made to facilitate transitional arrangements as a result of the repeal of the Local Government Act 1936. The Local Government (Transitional) Amendment Regulation (No.2) 1994 has the effect of preserving the provisions dealing with the establishment and operation of cattle feedlots until 6 December 1994. It will also enable extension of other provisions in the Local Government (Transitional) Regulations e.g. impounding of animals provisions pending the making of local laws by local governments.