



## Education, Employment and Small Business Committee

### Report No. 7, 56<sup>th</sup> Parliament

#### Subordinate legislation tabled between 13 June 2018 and 21 August 2018

#### 1 Aim of this report

This report summarises the committee's examination of subordinate legislation tabled from 13 June 2018 to 21 August 2018. It reports on any issues identified by the committee in relation to the policy to be given effect by the legislation, its consistency with fundamental legislative principles (FLPs), and its lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).

#### 2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
81	Contract Cleaning Industry (Portable Long Service Leave) (Levy) Amendment Regulation 2018	21 August 2018	1 November 2018
93	Electrical Safety and Other Legislation (Fees) Amendment Regulation 2018	21 August 2018	1 November 2018
94	Work Health and Safety (Certificates of Authority) Amendment Regulation 2018	21 August 2018	1 November 2018
99	Work Health and Safety (Codes of Practice) Amendment Notice (No. 1) 2018	21 August 2018	1 November 2018

#### 3 Committee consideration of the subordinate legislation

The committee has examined the policy to be given effect by the subordinate legislation, the application of FLPs, and its lawfulness. No significant issues regarding consistency with FLPs or the lawfulness of the subordinate legislation were identified in respect of subordinate legislation (SL) No. 93.

In respect of SL No. 81, the committee noted that the explanatory notes did not provide all of the detail required by section 24 of the LSA regarding the nature and outcomes of the consultation undertaken in relation to the Amendment Regulation. The Office of Industrial Relations (OIR) subsequently addressed the committee's concerns in this regard by providing the requisite information in written correspondence to the committee.

In respect of SL No. 94 and SL No. 99, the committee identified potential FLP issues, which are discussed in this report.

### **3.1 Contract Cleaning Industry (Portable Long Service Leave) (Levy) Amendment Regulation 2018 – SL No. 81**

Queensland's contract cleaning industry is subject to a portable long service leave scheme which is administered by the Contract Cleaning Industry (Portable Long Service Leave) Authority (Authority).<sup>1</sup>

All industry employers are required to pay a levy to the Authority based on the ordinary wages of their employees, with the collected levy amounts then invested by the Authority, and the accumulated funds in turn used to pay workers' long service leave claims.<sup>2</sup> This levy rate is set by regulation and is required to be reviewed at least every two years,<sup>3</sup> in order to ensure the Authority has the ability to make long service leave payments to registered workers when they seek to take long service leave.<sup>4</sup>

The objective of SL No. 81 is to reduce the levy rate payable by an employer, from 1.0 per cent to 0.75 per cent, effective from 1 July 2018.<sup>5</sup> The change was determined by the Authority following its most recent investigation of the adequacy of its funds, and the adequacy of the prescribed levy rate.<sup>6</sup>

The explanatory notes state that consultation was undertaken with both of the major industry stakeholder groups: the Building Service Contractors Association of Australia (BSCAA), which represents contract cleaning industry employers, and the United Voice Union (UVU), which represents the interests of workers in the contract cleaning industry.<sup>7</sup>

However, the explanatory notes do not provide information regarding the way in which the consultation was carried out; the outcome of the consultation; or any changes made to the subordinate legislation as a result of the consultation, as is required by sections 24(2)(i) to 24(2)(iii) of the LSA.

The committee wrote to OIR to request that it provide the additional information required by the LSA.

In response, OIR advised:

*In February 2018, the Contract Cleaning Industry (Portable Long Service Leave) Authority (the Authority) investigated the adequacy of its funds and the adequacy of the levy rate percentage with its actuary, Mercer. The actuarial assessment recommended the Authority reduce the levy rate to 0.5%...*

*... The Contract Cleaning Industry (Portable Long Service Leave) Authority Board (the Board) consists of two directors representing employers through the BSCAA and two directors representing workers through the UVU. Two other Board directors, the Chairperson and Deputy Chairperson, are independent.*

*At the Authority's Board meeting on 22 February 2018, the Board discussed the levy rate reduction recommended by the actuary and the potential impact on both employers and workers. After further negotiation, a percentage rate was determined that balanced the*

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<sup>1</sup> Contract Cleaning Industry (Portable Long Service Leave) Act 2005.

<sup>2</sup> QLeave, 'Employers: How portable long service leave works', website, 2018, <https://www.qleave.qld.gov.au/contract-cleaning/employers/how-portable-long-service-leave-works>

<sup>3</sup> Section 42 of the Contract Cleaning Industry (Portable Long Service Leave) Act 2005 specifies that at least every two years, but otherwise as required by the board of the Authority, 'the authority must investigate the adequacy of the authority's funds and the adequacy of the percentage prescribed under a regulation as the rate of levy', including appointing an actuary to carry out the investigation and provide the Authority with a report stating the investigation outcome and an opinion on whether the rate of the levy should be reduced, increased, or stay the same. The Authority is then required to report to the Minister with its recommendations on the opinion stated by the actuary, and whether the funds available are adequate for the Authority to perform its functions.

<sup>4</sup> Contract Cleaning Industry (Portable Long Service Leave) (Levy) Amendment Regulation 2018, Explanatory Notes, p 1.

<sup>5</sup> Contract Cleaning Industry (Portable Long Service Leave) (Levy) Amendment Regulation 2018, Explanatory Notes, p 1.

<sup>6</sup> Contract Cleaning Industry (Portable Long Service Leave) (Levy) Amendment Regulation 2018, Explanatory Notes, p 1.

<sup>7</sup> Contract Cleaning Industry (Portable Long Service Leave) (Levy) Amendment Regulation 2018, Explanatory Notes, p 2.

*benefit to employers and assured workers of continuing growth and security of portable long service leave benefits into the future.*

*The Board endorses a staged reduction in the levy rate to forestall any instability in the industry.*

*The Board unanimously resolved to reduce the levy rate from 1.0% to 0.75% to be effective from 1 July 2018 (Board Meeting No 64 – Resolution 952/18).<sup>8</sup>*

**Committee comment**

The committee notes the additional information provided by OIR regarding the consultation on the levy rate. The committee notes that the explanatory notes to SL No. 81 otherwise comply with Part 4 of the LSA.

**3.2 Work Health and Safety (Certificates of Authority) Amendment Regulation 2018 – SL No. 94**

Under the *Work Health and Safety Act 2011* (WHS Act), a person conducting a business or undertaking is able to appoint as a work health and safety officer (WHSO) for that business or undertaking, a person who holds a certificate of authority for appointment as a WHSO. Certificates of authority are granted by the regulator to a WHSO applicant who has successfully completed an approved WHSO course.<sup>9</sup>

Prior to the amendments, an ‘approved WHSO course’ was defined in the *Work Health and Safety Regulation 2011* (WHS Regulation) as a Certificate IV in Work Health and Safety BSB41412; or another WHSO course approved by the regulator under section 31C.<sup>10</sup>

The explanatory notes state that this course code is not the most recent and was inserted in error. Accordingly, SL No. 94 amends the definition to remove the specific reference to BSB41412, such that an approved WHSO course now simply means ‘a work health and safety officer course approved by the regulator under section 31E’.<sup>11</sup>

The explanatory notes advise that the amendment will allow the regulator to more efficiently make updates where course code codes change or new courses are recognised as approved WHSO courses or recertification courses;<sup>12</sup> with the approved courses to be notified on the regulator’s website.<sup>13</sup>

In this regard, the explanatory notes further advise:

*The regulator intends on approving Certificate IV in Work Health and Safety BSB41415 and another WHSO course developed by the regulator, as approved courses on its website.<sup>14</sup>*

To reduce the regulator’s administrative burden in issuing certificates of authority, SL No. 94 also amends the WHS Regulation to enable approved registered training organisations to issue certificates of authority to a person on their successful completion of an approved WHSO course or recertification course.<sup>15</sup>

***Potential fundamental legislative principle issue***

Prior to the commencement of SL No. 94, any person who completed the BSB41412 course would have expected that their studies would be recognised as a WHSO course. However, the amendment to the

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<sup>8</sup> Office of Industrial Relations (OIR), correspondence, 4 October 2018.

<sup>9</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 1.

<sup>10</sup> *Work Health and Safety and Other Legislation Amendment Act 2017*, section 31B(3).

<sup>11</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 2.

<sup>12</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 2.

<sup>13</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, section 31C.

<sup>14</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 2.

<sup>15</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 2.

chapter 2A definition of an ‘approved WHSO course’ means that people who have completed the BSB41412 course will no longer automatically be eligible to be appointed as a WHSO, with the explanatory notes highlighting ‘considerable changes to assessment conditions’ in the updated version of the course, BSB41415.<sup>16</sup>

This could arguably be seen as adversely affecting the rights and liberties of these individuals.

In this respect, the explanatory notes emphasise that BSB41415, which supersedes BSB41412, ‘has been available since 2010’.<sup>17</sup> The explanatory notes also make clear that a person who has completed the BSB41412 course may still be able to meet the standards of a WHSO if they are able to demonstrate that they have the qualifications or experience necessary to satisfactorily perform the functions of a WHSO.<sup>18</sup>

Further, the Office of Best Practice Regulation ‘has determined that there are no significant impacts arising as a result of the Amendment Regulation’.<sup>19</sup>

### **Committee comment**

Noting that the superseded BSB41412 was incorrectly prescribed as an approved course; that the current version of the course has been available for some time; and that any BSB41412 certificate holders are still able to qualify as a WHSO through other means; the committee is satisfied that the subordinate legislation has sufficient regards to the rights and liberties of individuals.

The committee recognises the importance of WHSOs having up-to-date qualifications, to inform the important role they play in Queensland workplaces.

### **3.3 Work Health and Safety (Codes of Practice) Amendment Notice (No. 1) 2018 – SL No. 99**

The Work Health and Safety (Codes of Practice) Amendment Notice (No. 1) amends a number of codes of practice in the Work Health and Safety (Codes of Practice) Notice 2011, following on from a limited internal review of the codes, to support their status as the minimum standard for managing workplace hazards and risks from 1 July 2018.<sup>20</sup>

A total of 38 codes are affected by the changes, having been varied and approved to implement a number of minor amendments to correct legislative inconsistencies and technical inaccuracies that were identified through the review process.<sup>21</sup>

### ***Potential fundamental legislative principle issue***

Section 4(5)(e) of the LSA provides that whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

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

The significance of the sub-delegation of matters to an approved code, as opposed to dealing with such matters in full within the subordinate legislation, is that since the code itself is not ‘subordinate legislation’, it is not subject to the tabling and disallowance provisions of Part 6 of the *Statutory*

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<sup>16</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 3.

<sup>17</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 3.

<sup>18</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 3.

<sup>19</sup> Work Health and Safety (Certificates of Authority) Amendment Regulation 2018, Explanatory notes, p 3.

<sup>20</sup> Work Health and Safety (Codes of Practice) Amendment Notice (No. 1) 2018, Explanatory notes, p 1.

<sup>21</sup> Work Health and Safety (Codes of Practice) Amendment Notice (No. 1) 2018, Explanatory notes, pp 1-2.

*Instruments Act 1992* (SIA), and its contents therefore may not be subject to the same degree of parliamentary scrutiny.

#### Authorisation by an Act

Section 274 of the WHS Act provides that the Minister may approve a code of practice for the purposes of the Act and may vary or revoke an approved code of practice. The approval of a code of practice has no effect unless the Minister gives notice of its making, and any such notice is considered to be subordinate legislation.<sup>22</sup>

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

It would therefore appear that the sub-delegation is authorised.

#### Appropriate cases and to appropriate persons

In considering whether it is appropriate for matters to be dealt with by an instrument that is not subordinate legislation, and therefore not subject to parliamentary scrutiny, committees have had regard to such factors as:

- the importance of the subject matter dealt with
- the commercial or technical nature of the subject-matter, and
- the practicality or otherwise of including those matters entirely in subordinate legislation.<sup>23</sup>

Here, there are multiple codes covering a range of work environments and issues, with many of the codes containing considerable technical detail, drawings and supporting examples. It can be accepted that it is appropriate for practical reasons for such detailed matters to be set out in a document other than in subordinate legislation.

Additionally, the provision for such matters in a code, as opposed to in regulation, provides duty holders with greater flexibility to implement the measures most appropriate to their individual workplace and conditions, given that the codes are not binding or prescriptive in character.<sup>24</sup> That is, while a code provides practical guidance on how to achieve the standards required under the WHS Act and effective ways to identify and manage risk; duty holders are able to follow an alternative method to manage risks, as long as the alternative method provides an equivalent or higher standard of work health and safety to the standard required in the code.<sup>25</sup>

#### Availability of documents and parliamentary scrutiny

Committees have identified that concerns about sub-delegation are reduced where the document in question could only be incorporated under (disallowable) subordinate legislation, and was attached to the subordinate legislation, or was required to be tabled with the subordinate legislation and made available for inspection.

Pursuant to section 274(6) of the WHS Act, the regulator must ensure that a copy of any approved code of practice is available for inspection by members of the public without charge at the office of the regulator during normal business hours.

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<sup>22</sup> See: *Work Health and Safety Act 2011* (WHS Act), sections 274(4) and (4A).

<sup>23</sup> See: Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, pp 155-156, and Scrutiny of Legislation Committee, *Alert Digest 1999/04*, p.10, paras 1.65-1.67.

<sup>24</sup> See: OIR, cited in Education, Employment and Small Business Committee, *Report No. 4, 56th Parliament –Subordinate legislation tabled between 11 October 2017 and 6 March 2018*, May 2018, p 3.

<sup>25</sup> See WHS Act, section 275(4). See also: OIR, *Work Health and Safety Queensland, Codes of practice*, 2 July 2018, <https://www.worksafe.qld.gov.au/laws-and-compliance/codes-of-practice>

The Minister has provided some summary information in the explanatory notes explaining the reasons for and nature of the changes ('minor amendments to correct legislative inconsistencies and technical inaccuracies' identified in the internal review),<sup>26</sup> to help ensure that the House is informed and able to seek further information as required.

Noting that the approval of a code of practice has no effect unless the Minister gives notice of its making, and that any such notice is itself subordinate legislation;<sup>27</sup> any concerns that the parliament may have about the content of a code might thus be met or alleviated by the ability to move the disallowance of the notice.

### **Committee comment**

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

However, the committee acknowledges that codes of practice are recognised as the appropriate mechanism for addressing the matters involved, and that the overall effect of the SL No. 99 is to implement only minor variations to ensure the accuracy of existing codes of practice, consistent with the WHS Act's object of providing a framework for continuous improvement in work health and safety.

The committee is therefore satisfied that SL No. 99 has sufficient regard to the institution of parliament.

## **4 Explanatory notes**

With the exception of the lack of detail regarding consultation in relation to SL No. 81, which was subsequently addressed by information provided by the OIR, the explanatory notes tabled with each of the items of subordinate legislation broadly comply with the requirements of section 24 of the LSA.

## **5 Recommendation**

The committee recommends that the Legislative Assembly notes this report.



Leanne Linard MP

**Chair**

**October 2018**

### **Education, Employment and Small Business Committee**

Chair	Ms Leanne Linard MP, Member for Nudgee
Deputy Chair	Mrs Jann Stuckey MP, Member for Currumbin
Members	Mr Bruce Saunders MP, Member for Maryborough
	Mrs Simone Wilson MP, Member for Pumicestone
	Mr Michael Healy MP, Member for Cairns
	Mr Nick Dametto, Member for Hinchinbrook

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<sup>26</sup> Work Health and Safety (Codes of Practice) Amendment Notice (No. 1) 2018, Explanatory notes, p 1.

<sup>27</sup> See WHS Act, sections 274(4) and (4A).