

Subordinate legislation tabled between 4 September 2019 and 22 October 2019

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Transport and Public Works Committee
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Transport and Public Works Committee

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¹ Mr Joe Kelly MP, Member for Greenslopes, was the substitute Member and Chair replacing Mr Shane King MP, Member for Kurwongbah, for the period 10 May 2019 to 17 May 2019.

1. Introduction

1.1 Role of the committee

The Transport and Public Works Committee is a portfolio committee established by the Legislative Assembly of Queensland on 15 February 2018. The committee's primary areas of responsibility are Transport and Main Roads, Housing, Public Works, Digital Technology and Sport.²

Pursuant to section 93(1) of the *Parliament of Queensland Act 2001*, the committee is responsible for examining each item of subordinate legislation within its portfolio areas and considering:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles (FLPs) to the legislation, and
- the lawfulness of the subordinate legislation.

Section 93(2)(a) of the *Parliament of Queensland Act 2001* confers responsibility on the committee to monitor the content of explanatory notes in its portfolio areas to ensure they comply with part 4 of the *Legislative Standards Act 1992*.

1.2 Aim of this report

This report advises on subordinate legislation examined and, where applicable, presents any concerns the committee has identified in respect of subordinate legislation tabled between 4 September 2019 and 22 October 2019.

1.3 Subordinate legislation examined

SL No	Subordinate Legislation	Tabled Date	Disallowance Date*
186	Transport Operations (Passenger Transport) Amendment Regulation (No. 1) 2019	15 October 2019	20 February 2020
201	Transport Operations (Road Use Management – Vehicle Registration) and Other Legislation Amendment Regulation 2019	15 October 2019	20 February 2020
207	Transport Infrastructure (Public Marine Facilities) (Fees) Amendment Regulation 2019	22 October 2019	19 March 2020
208	Building (Approval of Amendment of QDC) Amendment Regulation 2019	22 October 2019	19 March 2020

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

² Schedule 6 – Portfolio Committees, *Standing Rules and Orders of the Legislative Assembly* as amended on 15 Feb 2018.

2. Subordinate legislation examined

2.1 Transport Operations (Passenger Transport) Amendment Regulation (No. 1) 2019 (SL 186)

The objectives of the amendment regulation are to:

- ensure some types of scheduled passenger services, to and from Cairns, Gold Coast, Sunshine Coast and Townsville airports, no longer require service contracts, and
- extend the period that a substitute taxi can be used under a peak demand exemption notice, from 30 September 2019 to 30 September 2020.³

Serviced airports

In regard to the first objective, the explanatory notes advise:

Scheduled passenger services provided for a restricted group or for one specific purpose are not considered general route services. As a result, these services are not subject to market entry restrictions and consequently, do not require a service contract with the Department of Transport and Main Roads (the Department) to operate.

However, scheduled passenger services at Brisbane, Cairns, Gold Coast, Sunshine Coast and Townsville airports (serviced airports) are still considered general route services, even if they are provided for one specific purpose (for example, for air travellers), unless they are accommodation, tourist or tourist transfer services or are pre-booked. These services require a service contract with the Department to operate at serviced airports. The policy intent was to ensure that the market for 'walk up' bus passengers at these airports was protected from competition by requiring a service contract with the State to operate these services.

Independent analysis was undertaken to review the effectiveness of the current service contract requirement framework at serviced airports. This analysis indicated that the current framework at serviced airports was unnecessary. The analysis indicated there would be causal benefits from removing the requirement for services to hold a service contract, including evidence that competition pressures may result in lower fares for customers and improved innovation within the public passenger service market.⁴

Extension period for substitute taxis

The second objective would extend the operation of a transitional provision used to maintain the current arrangements until the implementation of new, more flexible, taxi service licences. The explanatory notes further state:

The implementation of the new taxi service licences is underway, but will not be completed by 30 September 2019. Therefore, the transitional period when an authorised booking entity can use a substitute taxi in accordance with a peak demand exemption notice, is being extended until 30 September 2020.⁵

It means operators can continue to use substitute taxis to provide services during peak periods.

Consultation

In regard to consultation on the serviced airport amendments, the explanatory notes state:

...as part of the independent market analysis, several relevant stakeholders were consulted including all current contracted operators, potential competitor operators, airport infrastructure owners (including all five serviced airports), and non-contracted and personalised transport operators. Generally there was support for the amendment,

³ Explanatory notes, p 1.

⁴ Explanatory notes, pp 1-2.

⁵ Explanatory notes, p 2.

although some operators raised concerns about increased competition with that removal of service contract requirements. It should be noted the current contracts at impacted serviced airports do not provide for exclusivity.⁶

Comment

No fundamental legislative principles (FLP) issues were detected and the explanatory notes tabled with the amendment regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.2 Transport Operations (Road Use Management – Vehicle Registration) and Other Legislation Amendment Regulation 2019 (SL 201)

The objectives of the amendment regulation are to:

- introduce the option of a one month vehicle registration term for persons who agree to pay their vehicle's registration renewal by direct debit and to receive electronic communications about their vehicle registration renewal
- support the introduction of a one month vehicle registration term by rationalising and streamlining vehicle registration surcharges and late payment fees
- introduce a requirement that persons opting for a three month registration term must pay their vehicle registration renewal by direct debit and agree to receive electronic communications about their vehicle registration renewal
- remove provisions that impose a \$10 minimum on insurers' premiums for registration periods of less than one year
- enable the Department of Transport and Main Roads (TMR) to provide to compulsory third party insurers (CTP) the email addresses of registered operators of vehicles who have chosen one-month registration terms
- remove the requirement for TMR to include a CTP insurer nomination form in the vehicle registration renewal notice, and
- introduce a power for the chief executive to recall for exchange a number plate that might infringe the rights of a third party or contravene the Australian Consumer Law (Queensland).⁷

Potential FLP issue

Where a caption on a personalised plate is found to be inappropriate, the chief executive has the power to require the plate be returned and exchanged for a more appropriate plate. The explanatory notes provide more detail on this policy objective:

From late 2019, the purchasers of personalised number plates will have the option of including a caption to appear along the lower edge of their number plate. The caption will be of smaller font than the number plate combination and will not form part of the vehicle's registration number. Customers will be able to create their own caption, with an average maximum length of 32 characters (depending on the letters chosen). Detailed procedures will be adopted to minimise the risk of an inappropriate caption appearing on a number plate. Number plates should not infringe a third party's intellectual property rights, give rise to a cause of action for passing off or defamation, or contravene the misleading and deceptive conduct provisions or the false and misleading representation provisions in the Australian Consumer Law (Queensland). An amendment will provide that if a plate is inadvertently issued that gives rise to any of those circumstances, the chief executive will

⁶ Explanatory notes, p 3.

⁷ Explanatory notes, pp 1-2.

*have the power to require the plate be returned and exchanged for a more appropriate plate.*⁸

The explanatory notes suggest that this might potentially involve a breach of an individual's rights and liberties to use a number plate with a caption of their choice; however, the explanatory notes state:

*The new provision strikes an appropriate balance between the right of individuals to have a number plate of their choosing and the rights of other people to have their intellectual property and unregistered trademarks protected, to not be defamed and to not be exposed to any misleading and deceptive conduct or false and misleading representations.*⁹

Additionally, it can be noted that the provision that a plate remains the property of the State already exists.¹⁰ The committee considered a similar potential brief of FLP during its examination of subordinate legislation 11 for 2018, Transport Legislation Amendment Regulation (No 1) 2018 (SL 11), in its report no 6. In that report, the committee was satisfied that the SL 11 did not raise any significant issues relating to policy, fundamental legislative principles or lawfulness.¹¹

Consultation

The explanatory notes advise that the Royal Automobile Club of Queensland was consulted on the amendments and did not raise any concerns.¹²

Comment

In regards to SL 209 for 2019, the committee is satisfied that any breach of fundamental legislative principle that might arise is justified. The explanatory notes tabled with the amendment regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.3 Transport Infrastructure (Public Marine Facilities) (Fees) Amendment Regulation 2019 (SL 207)

The objective of the amendment regulation is to enable compliance with an Australian Tax Office Ruling of 22 March 2019 by including a Goods and Services Tax (GST) component in certain fees currently set out in schedules 2 and 3 of the Transport Infrastructure (Public Marine Facilities) Regulation 2011. These fees relate to the usage of boat harbours. The fees in schedules 2 and 3 increase by the GST amount of 10%.¹³

The committee notes that all the fee increases are of 10%, apart from several that are above 10%, which can be explained to rounding.

Comment

No FLP issues were detected and the explanatory notes tabled with the amendment regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.4 Building (Approval of Amendment of QDC) Amendment Regulation 2019 (SL 208)

The objectives of the amendment regulation are to:

- reduce the risk to building certifiers from the use of certain aluminium composite panels

⁸ Explanatory notes, p 5.

⁹ Explanatory notes, p 7.

¹⁰ Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010, section 104.

¹¹ Transport and Public Works Committee, Report No 6, Subordinate legislation tabled between 25 October 2017 and 6 March 2018, tabled June 2018, p 4.

¹² Explanatory notes, p 7.

¹³ Explanatory notes, p 1.

- support the aim of making professional indemnity insurance for building certifiers more available and appropriate for the level or risk
- make buildings safer for occupation and use in Queensland.¹⁴

Potential FLP issue

The committee considered a potential FLP issue relating to section 4(5)(e) *Legislative Standards Act 1992* – Sufficient regard to the institution of Parliament. The Regulation adopts a new Queensland Development Code (QDC) Part 2.5 – Use of external cladding, which will ban the use of certain highly flammable materials in external cladding, external insulation or facades.

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.¹⁵

Part of the rationale for this issue is to ensure sufficient parliamentary scrutiny of a delegated legislative power.¹⁶

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

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

Authorised by an Act

Section 13 of the *Building Act 1975* provides that the chief executive may amend the QDC by adding another part to it or amending or replacing a part. The amendment has no effect until the chief executive publishes the amendment on the department’s website and a regulation approves the amendment.¹⁷

The sub-delegation is authorised. Further, the committee considers that any concerns that the Parliament might have about the content might be met by the ability to move disallowance of the subordinate legislation.

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 considered 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.¹⁸

Part 2.5 itself is only 5 pages long. However, it is but one part of the code which is a large document containing detailed information.

¹⁴ Explanatory notes, pp 1, 2.

¹⁵ Section 4(5)(e) of the *Legislative Standards Act 1992*

¹⁶ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p170.

¹⁷ Section 13 *Building Act 1975*.

¹⁸ See the 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.

The committee accepts that it is appropriate for practical reasons for its content to be set out in a document other than in subordinate legislation.

Availability of document and parliamentary scrutiny

Concerns about sub-delegation are reduced where the document in question could only be incorporated under subordinate legislation (which could be disallowed) and was attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection. Neither of these features are present here.

Pursuant to section 13(3) the chief executive must ensure that the amendment is published on the department's website. The entire code is available on the Department of Housing and Public Works website.

Further, as mentioned above, the approval of an amendment to the QDC Code has no effect unless the chief executive publishes the amendment on the department's website and a regulation approves the amendment.¹⁹ Any concerns that the Parliament might have about the content might be met by the ability to move disallowance of the notice.

The committee also noted that under consideration here is an amendment to an existing code.

Comment

Although the content of the QDC is not contained in the subordinate legislation, the committee considers that—given any amendment to the QDC has no effect until the chief executive publishes the amendment on the department's website and a regulation approves the amendment, and that disallowance could be moved in the House if there was concern about the subordinate legislation—the subordinate legislation has sufficient regard to the institution of parliament.

In regard to the explanatory notes tabled with the amendment regulation, under the heading *Consistency with fundamental legislative principles*, the explanatory notes state:

*The Amendment Regulation has been drafted in accordance with fundamental legislative principles as defined in section 4 of the Legislative Standards Act 1992.*²⁰

Part 4 of the *Legislative Standards Act 1992* requires explanatory notes to include:

*a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.*²¹

The committee considered that the explanatory notes do not adequately address the issue of consistency and reasons for any consistency, if any. In this regard, the committee wrote to the Department of Housing and Public Works seeking further information in relation to the subordinate legislation's consistency with fundamental legislative principle. The department advised:

The amendment to the Building Regulation 2006 was made to adopt a new part to the Queensland Development Code (QDC). The new QDC Part 2.5 - Use of External Cladding (QDC Part 2.5) bans the use of aluminium composite panels with greater than 30 per cent polyethylene core by mass in external walls and the use of expanded polystyrene on class 2 - 9 buildings of Type A or B construction in external walls.

The ban was intended to limit exposure to these products and the use of highly-flammable products on external walls.

The new QDC Part 2.5 was also introduced as part of a range of measures to assist building certifiers to obtain compliant professional indemnity (PI) insurance. The Committee will

¹⁹ See section 13(3) *Building Act 1975*.

²⁰ Explanatory notes, p 3.

²¹ *Legislative Standards Act 1992*, section 24(1)(i).

recall recent amendments made to the Building Regulation 2006 to permit building certifiers to be licensed if they hold PI insurance with temporary exclusions relating to cladding.

The new QDC Part 2.5 is consistent with fundamental legislative principles in that the ban is sufficiently defined and does not impose obligations retrospectively. Furthermore, the ban supports efforts to make buildings safer, thereby protecting the rights of Queenslanders and people visiting Queensland to live, work and play in safe and well-constructed buildings.²²

The committee is satisfied with the department's response.

The explanatory notes otherwise comply with the requirements with part 4 of the *Legislative Standards Act 1992*.

3. Recommendation

Recommendation 1

The Transport and Public Works Committee recommends that the Legislative Assembly notes the contents of this report.



Mr Shane King MP
Chair

²² Department of Housing and Public Works, correspondence dated 17 January 2020.