



Education, Employment and Small Business Committee

Report No. 6, 56th Parliament

Subordinate legislation tabled between 7 March 2018 and 12 June 2018

1 Aim of this report

This report summarises the committee's examination of subordinate legislation tabled from 7 March 2018 to 12 June 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
33	Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018	1 May 2018	5 September 2018
34	Education (General Provisions) (Woorabinda) Amendment Regulation 2018	1 May 2018	5 September 2018
35	Labour Hire Licensing Regulation 2018	1 May 2018	5 September 2018
39	Education (Overseas Students) Regulation 2018	1 May 2018	5 September 2018
44	Proclamation made under the <i>Education (Overseas Students) Act 2018</i>	1 May 2018	5 September 2018
59	Proclamation made under the <i>University Legislation Amendment Act 2017</i>	12 June 2018	17 October 2018
64	Workers' Compensation and Rehabilitation (QOTE) Notice 2018	12 June 2018	17 October 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 No. 34, No. 39, No. 44, No. 59, or No. 64.

In respect of subordinate legislation No. 33 and No. 35, the committee identified potential FLP issues, which are discussed in this report.

3.1 Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018 – SL No. 33

The objective of the Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018 is to adopt the *Managing Risks in Stevedoring Code of Practice* (stevedoring code) as a code of practice for the Queensland stevedoring industry from 31 March 2018, under section 274 of the *Work Health and Safety Act 2011* (WHS Act).

The stevedoring code is based on a national model code of practice that was developed by Safe Work Australia, in consultation with the Stevedoring Technical Advisory Group, to address the high rate of serious workplace injuries in the Australian stevedoring industry.¹ The national model code was approved for adoption by the Workplace Relations Ministers' Council in December 2016, as part of the harmonisation of work health and safety laws.²

The model code's adoption in Queensland was also recommended by the parliamentary Coal Workers' Pneumoconiosis Select Committee in a recent inquiry report on occupational respirable dust issues (recommendation 2).³ The Queensland Government supported the committee's recommendation and committed to the adoption of the model code from 31 March 2018, stating that this would:

*...provide certainty and clarity regarding work health and safety (WHS) obligations in relation to the management of respirable dust hazards within the stevedoring industry.*⁴

Potential fundamental legislative principle issue

As set out in the LSA, the FLPs include a requirement that legislation has sufficient regard to:

- (a) the rights and liberties of individuals, and
- (b) the institution of Parliament.⁵

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 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

¹ Explanatory notes, Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018, p 2.

² Office of Industrial Relations (OIR), Work Health and Safety Queensland, *Managing Risks in Stevedoring: Code of Practice 2018*, 31 March 2018, p 2, https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0020/154910/managing-risks-in-stevedoring-code-of-practice.pdf

³ Coal Workers' Pneumoconiosis Select Committee, *Report No. 4, 55th Parliament, Inquiry into occupational respirable dust issues*, September 2017. See: <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1855.pdf>

⁴ Queensland Government, *Coal Workers' Pneumoconiosis Select Committee, Report No. 4, 55th Parliament - Inquiry into occupational respirable dust issues: Government Response*, 9 March 2018, p 2. See: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2018/5618T311.pdf>

⁵ *Legislative Standards Act 1992* (LSA), s 4(2).

no effect unless the Minister gives notice of its making, and any such notice is considered to be subordinate legislation.⁶

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.⁷

Here, the stevedoring code includes 53 pages of detailed and sometimes technical information, including various forms included as appendices.⁸ 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, providing for such matters in a code, as opposed to in regulation, may also provide greater flexibility for duty holders to cope with technological changes and to implement measures most appropriate to their individual workplace, due to the fact that codes are not binding or prescriptive in character.⁹ 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 it provides an equivalent or higher standard of work health and safety to the standard required in the code.¹⁰

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. The stevedoring code is also available on the Worksafe website;¹¹ and whilst not tabled with its enabling notice, the Minister has provided some summary information in the explanatory notes regarding the reasons for and nature of the changes, to help ensure that the House is informed (and able to seek further information as required).

⁶ See: *Work Health and Safety Act 2011* (WHS Act), s 274(4) and (4A)

⁷ 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.

⁸ OIR, Work Health and Safety Queensland, *Managing Risks in Stevedoring: Code of Practice 2018*, 31 March 2018, p 2, https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0020/154910/managing-risks-in-stevedoring-code-of-practice.pdf

⁹ 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.

¹⁰ See WHS Act, s 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>

¹¹ OIR, Work Health and Safety Queensland, *Managing Risks in Stevedoring: Code of Practice 2018*, 31 March 2018, p 2, https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0020/154910/managing-risks-in-stevedoring-code-of-practice.pdf

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;¹² any concerns that the parliament might have about the content of the stevedoring code might thus be met by the ability to move disallowance of the notice.

Committee comment

Where an extrinsic document (such as the stevedoring code) 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.

In this instance, however, the committee notes that the stevedoring code appears to be the appropriate and endorsed mechanism by which to address the matters involved, recognising both the nature and extent of the information it contains, and the considerable stakeholder input and broader support for its adoption, to improve workplace health and safety within the stevedoring industry.¹³

In this respect, the committee also acknowledges the advice contained in the explanatory notes that:

The national Decision Regulation Impact Statement - Model Code of Practice: Managing Risks in Stevedoring (Decision RIS) identified that the stevedoring industry in Queensland has an average of 57 workers' compensation claims for serious injuries each year, at a total cost to employers, workers and the community of \$4,296,660 per year.

The adoption of a code of practice for the stevedoring industry in Queensland was estimated to provide a Net Present Value (NPV) of \$3,483,492; NPV savings to employers of \$201,024; NPV savings to workers of \$2,401,197; NPV savings to community and government of \$881,271.¹⁴

The committee also notes the public availability of the stevedoring code, and the scope to cease its effect by disallowing the notice of its making or any subsequent amendment notice.

The committee is therefore satisfied that the Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018 has sufficient regard to the institution of Parliament.

3.2 Labour Hire Licensing Regulation 2018 – SL No. 35

The recent *Labour Hire Licensing Act 2017* (LHL Act) established a mandatory licensing scheme to protect workers from being exploited by labour hire providers, and to improve the integrity of the labour hire industry.¹⁵

The policy objective of the Labour Hire Licensing Regulation 2018 (Regulation), which commenced on 16 April 2018, is to support the LHL Act by providing detail to the scope and the operational requirements of the scheme.¹⁶

¹² See WHS Act, s 274(4) and (4A).

¹³ Explanatory notes, Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018, p 2.

¹⁴ Explanatory notes, Work Health and Safety (Codes of Practice) (Stevedoring) Amendment Notice 2018, p 2.

¹⁵ See *Labour Hire Licensing Act 2017*, s 3.

¹⁶ Explanatory notes, Labour Hire Licensing Regulation 2018, p 1.

The Regulation sets out a range of definitional and technical matters to enable the effective administration of the LHL Act, including:

- clarifying the definition of a labour hire worker, including when a worker is not a labour hire worker for the LHL Act,¹⁷ and
- prescribing further detail regarding licence application and reporting requirements, such as:
 - clarifying what an applicant's declaration of financial viability means for the LHL Act, and examples of the types of financial documents an applicant must nominate to be able to make this declaration
 - details about how compliance with specified work health and safety, fair work, migration, anti-discrimination, transport and accommodation laws will be demonstrated
 - details to which the chief executive must have regard when considering if a person is fit and proper to be a provider of labour hire services
 - further details about what a licensee must report on, including specific details about accommodation, transport and services used by labour hire workers, and
 - renewal, restoration, and application fee tiers and amounts.¹⁸

The Regulation also introduces minor offences relating to record keeping requirements.¹⁹

Potential fundamental legislative principle issue

Section 4(5)(c) of the LSA provides that whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation contains only matters appropriate to subordinate legislation.

Provisions

Section 13 of the LHL Act provides for applications for a licence to provide labour hire services and sets out the information to be included in an application. This includes any other information, prescribed by regulation, that the chief executive reasonably requires in order to decide whether an applicant is a fit and proper person to provide hire services (section 13(3)(c)(iv)).

Various provisions in the Regulation relate to the information required under section 13 of the Act, as well as other accompanying requirements for licensees to provide information in periodic reports on the detail and nature of their operations, and their compliance with relevant laws. Some examples follow.

Section 9 of the Regulation requires the applicant to provide information about whether the applicant or an associate:

- holds a visa under the Commonwealth *Migration Act 1958*
- supplies workers who hold visas under the *Migration Act 1958*
- has in the preceding five years been convicted of an offence or issued an infringement notice under the *Migration Act 1958*.

¹⁷ Explanatory notes, Labour Hire Licensing Regulation 2018, p 2.

¹⁸ Explanatory notes, Labour Hire Licensing Regulation 2018, p 2.

¹⁹ See Labour Hire Licensing Regulation 2018, Division 4, 'Keeping of records and documents'. See also Explanatory notes, Labour Hire Licensing Regulation 2018, p 3.

Section 12 of the Regulation requires the applicant to provide information about, among other things, whether an applicant or associate person has been convicted of an offence against any of a number of laws, including:

- *Coal Mining Safety and Health Act 1999*
- *Electrical Safety Act 2002*
- *Residential Services (Accreditation) Act 2002*
- *Residential Tenancies and Rooming Accommodation Act 2008*
- *Safety in Recreational Water Activities Act 2011*, and
- a law of another State or Commonwealth that provides for the same matters or substantially the same matters as a law mentioned in section 12.

Section 13 requires the applicant to disclose information regarding any convictions in relation to anti-discrimination law (of themselves or an associate) in the preceding five years, and whether in that period they have been the subject of a complaint alleging sexual harassment under an anti-discrimination law.

Section 14 requires the applicant to provide miscellaneous information including:

- the applicant's date of birth
- whether an industry or professional body has taken disciplinary action against, or has refused, suspended or cancelled the applicant's or associate's membership, and
- whether the applicant is liable to make long service leave payments under the *Building and Construction Industry (Portable Long Service Leave) Act 1991* or the *Contract Cleaning Industry (Portable Long Service Leave) Act 2005*.

In sum, the LHL Act delegates considerable detail to regulation. The type and amount of information to be required was not detailed in the enabling Labour Hire Licensing Bill 2017 (Bill), or in the Bill's explanatory notes. In its report on the Bill, the Finance and Administration Committee of the 55th Parliament (FAC) noted that:

*Broadly submitters raised issue with the extent of, and limited detail concerning, evidentiary information requirements for applicants and the associated administrative burden and cost of applications and renewals. Specific concerns were raised in relation to the 'disciplinary action' requirement at clause 13 and the 'financial viability' requirement at clause 15 of the Bill.*²⁰

The FAC was ultimately satisfied with clarifying advice provided by the department regarding the requirements for licence applications and renewals and stated that it was '...also pleased to note the advice that the department has considered the administrative burden and sought to implement systems that limit the application and reporting burden for licensees'.²¹

It was acknowledged by the FAC that there would be opportunity for further scrutiny of any such provisions 'by way of committee scrutiny of subordinate legislation'.²²

²⁰ Finance and Administration Committee, report No. 41, 55th Parliament, *Labour Hire Licensing Bill 2017*, July 2017, p 15. See <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T1081.pdf>

²¹ Finance and Administration Committee, report No. 41, 55th Parliament, *Labour Hire Licensing Bill 2017*, July 2017, p 18. See <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T1081.pdf>

²² Finance and Administration Committee, report No. 41, 55th Parliament, *Labour Hire Licensing Bill 2017*, July 2017, p 42 See <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T1081.pdf>

Having reviewed the Regulation, this committee notes that its contents are consistent with the broad approaches and proposed requirements and fee structures for the scheme that were discussed in the Decision Regulatory Impact Statement undertaken to inform its development, and in associated legislative consultation processes.²³

The explanatory notes to the Regulation advise that the development of the Regulation itself was also informed by a further public consultation process inviting feedback on two consultation papers – ‘one presenting possible treatments for operational elements of the Act’ regarding technical requirements in relation to licence eligibility, application and record keeping requirements; and the second ‘discussing possible ways to clarify the scope of the Act’ through definitional specifications.²⁴

The explanatory notes state that 49 submissions were received from stakeholders in relation to ‘the proposals outlined in the consultation papers and any other matters they considered necessary or desirable in relation to the implementation of the Act’, and that ‘follow up consultation was also undertaken with relevant stakeholders’.²⁵

Whilst detailed, many of the provisions are primarily administrative in nature and include references to various legal instruments, documents and prescribed fee amounts which may be subject to change over time, suggesting their delegation to subordinate legislation may be appropriate.

With regard to the Regulation’s definitional clarification of when a worker is not a labour hire worker, the explanatory notes to the 2017 Bill also stated that the provision for certain persons or classes of labour hire providers or workers to be removed, by regulation, from scope of the scheme in particular circumstances:

*...recognises the complexity in defining labour hire services and is available to ensure coverage does not capture or extend to unintended classes of workers.*²⁶

In relation to the minor offences and associated penalties contained in the Regulation, its explanatory notes state that these are necessary to encourage compliance and ‘ensure the effective operation of the LHL Act’.²⁷

Committee comment

Noting the largely technical and administrative nature of the provisions contained in the Regulation, the committee is satisfied that the delegation of these matters to subordinate legislation seems appropriate and practical, as necessary to support the effective operation of Queensland’s labour hire licensing scheme.

The committee notes that both the general scope and requirements of the scheme and the specific provisions of the Regulation have been the subject of considerable stakeholder consultation, and that the provisions are consistent with the LHL Act’s important objectives of promoting the integrity and accountability of the labour hire industry, to protect workers from exploitation.

²³ See: OIR, *Labour Hire Licensing Scheme Decision Regulatory Impact Statement (Decision RIS)*, March 2017, <https://s3.treasury.qld.gov.au/files/labour-hire-licensing-scheme-decision-ris-march-2017.pdf>; Explanatory notes, Labour Hire Licensing Bill 2017, pp 6-7.

²⁴ Explanatory Notes, Labour Hire Licensing Regulation 2018, p 3. See also: OIR, *Labour Hire Licensing Scheme Queensland, Consultation Paper 1: Development of Operational Regulations*, January 2018, <https://s3.treasury.qld.gov.au/files/labour-hire-licensing-regs-consultation-paper-1.pdf>; OIR, *Labour Hire Licensing Scheme Queensland, Consultation Paper 2: Possible treatments to refine the scope of the labour hire scheme*, January 2018, <https://s3.treasury.qld.gov.au/files/labour-hire-licensing-regs-consultation-paper-2.pdf>

²⁵ Explanatory Notes, Labour Hire Licensing Regulation 2018, p 3.

²⁶ Explanatory Notes, Labour Hire Licensing Bill 2017, p 3.

²⁷ Explanatory Notes, Labour Hire Licensing Regulation 2018, p 3.

4 Explanatory notes

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

August 2018

Education, Employment and Small Business Committee

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Deputy Chair	Mrs Jann Stuckey MP, Member for Currumbin
Members	Mr Bruce Saunders MP, Member for Maryborough
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