

19 April 2022

Our ref: [SS: C&amp;I/P&amp;D]

Committee Secretary  
Transport and Resources Committee  
Parliament House  
George Street  
Brisbane Qld 4000

**By email:** trc@parliament.qld.gov.au

Dear Committee Secretary

### **Building and Other Legislation Amendment Bill 2022**

Thank you for the opportunity to provide feedback on the Building and Other Legislation Amendment Bill 2022 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

#### **Executive summary**

- ) QLS welcomes the decision to reinstate the exemption under section 8 of Schedule 1A of the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**).
- ) QLS considers that the exemption should be retained until the review of developers under section 115D of the QBCC Act has been conducted and its findings considered.
- ) However, we are concerned with the breadth of the proposed regulation-making power in subsection 8(4) in Schedule 1A of the QBCC Act, which grants power to prescribe, by regulation, when the exemptions under subsections 8(1) and 8(2) do not apply.
- ) In our view, subsection 8(4) does not have proper regard to the institution of Parliament.
- ) We recommend postponing the enactment of subsection 8(4) until the review of developers has been completed.

#### **Concerns with regulation-making power in proposed subsection 8(4) of the QBCC Act**

QLS is aware that the Department of Energy and Public Works is presently undertaking a review of developers under section 115D of the QBCC Act.

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QLS considers that the exemption under section 8 of Schedule 1A of the QBCC Act should be retained until the review of developers has been conducted and its findings considered.

As the review is yet to be completed, we consider that it is premature to proceed with enacting subsection 8(4) in Schedule 1A of the QBCC Act, which grants power to prescribe, by regulation, when the exemptions under subsections 8(1) and 8(2) do not apply.

According to the Explanatory Notes for the Bill, this regulation-making power will be used to require particular head contractors such as “those engaged in high-risk work” to be licensed “where the exemption should not apply, due to the circumstances outlined above.” Those circumstances refer to concerns regarding misuse of the exemption to circumvent the requirement to hold a licence.

Subsection 8(4), as currently drafted, is not limited to the circumstances when the exemption could potentially be misused. Instead, subsection 8(4) is unlimited in scope. This creates a power much broader than is necessary to address the issues raised in the Explanatory Notes. Such a broad power creates uncertainty as to when the regulation-making power will be utilised, which could adversely impact entities that legitimately rely on the licensing exemption.

Further, the Explanatory Notes do not provide any indication as to when the power may or might be used. While the Explanatory Notes refer to requiring “those who engage in high-risk work” to be licensed, there is insufficient detail as to what might be considered to constitute “high-risk work”.

QLS submits that the legislation must include sufficient detail and clarity about the scope of any potential regulation to be made under this head of power.

It is critical that regulations are not used as a mechanism for circumventing the legislative process for passing Acts of parliament or for addressing matters which are appropriately dealt with in primary legislation.

Regulations made under such a wide provision could impose significant restrictions on a person’s rights to conduct their business. Provisions having such a significant effect should not be in regulations but in primary legislation.

As noted in the Office of Parliamentary Counsel’s *“Principles of Good Legislation: OQPC guide to FLPs”*:

“Section 4(5)(c) of the *Legislative Standards Act 1992* states that subordinate legislation should contain only matters appropriate to that level of legislation. Although an Act may legally empower the making of particular subordinate legislation, there remains the issue of whether the making of particular subordinate legislation under the power is appropriate. For example, an Act’s empowering provision may be broadly expressed so that not every item of subordinate legislation that could be made under it is necessarily appropriate in every circumstance that arises.”<sup>1</sup>

In our view, subsection 8(4) does not have proper regard to the institution of Parliament. Providing for circumstances where a legislative exemption does not otherwise apply does not

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<sup>1</sup> Accessed on 14 April 2022 at:

[https://www.legislation.qld.gov.au/file/Leg\\_Info\\_publications\\_FLP\\_Institution\\_of\\_Parliament\\_subordinate\\_legislation.pdf](https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Institution_of_Parliament_subordinate_legislation.pdf)

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provide the same level of parliamentary scrutiny as in the primary legislation. Further, these provisions could commence before Parliament had the opportunity to disallow them, meaning that persons affected by the regulation will be prevented from conducting their business until the issue is addressed by Parliament.

If such a regulation was disallowed after commencement, this could create difficulties for persons who relied on the exemption before they were disallowed.

The Explanatory Notes also refer to broad concerns regarding misuse of the exemption, but do not provide any specific examples of when the exemption has been misused. This suggests that further inquiries, including completing the review of developers, are required to establish the particular circumstances of misuse that are intended to be addressed by subsection 8(4).

While we recognise the desire for flexibility to respond quickly to issues as they arise, this flexibility must be balanced with certainty.

In this respect, we recommend postponing the enactment of subsection 8(4) until the review of developers has been completed.

We expect that the review will provide greater clarity around these issues, including whether any further legislative response is actually required.

However, if the decision is made to enact this provision, we strongly recommend that the scope of the power to make a regulation under subsection 8(4) be limited to specific circumstances, described in the authorising legislation, so as to provide appropriate limits on the exercise of the power. As a minimum, the authorising legislation should prescribe the circumstances contemplated in the Explanatory Notes about “high risk work” and include a definition of this concept.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on (07) [REDACTED]

Yours faithfully



Michael Brennan  
**Deputy President**