Occupational Licensing National Law (Queensland) Bill 2010

Explanatory Notes

Short Title

The short title of the Bill is the Occupational Licensing National Law (Queensland) Bill 2010.

Policy Objectives

The objective of this Bill is to apply the Occupational Licensing National Law set out in the schedule to the *Occupational Licensing National Law Act 2010* of Victoria (the Law) as a law of Queensland. The Law is the legislative framework for a national occupational licensing system (NLS).

The purpose of the NLS is to remove overlapping and inconsistent regulation between jurisdictions for the licensing of the specified occupational areas. By so doing, it aims to improve business efficiency and the competitiveness of the national economy, reduce red tape, improve labour mobility and enhance productivity. The NLS will promote consumer confidence and protection without imposing unnecessary costs on consumers or substantially lessening competition.

Reasons for the Bill

Licensing of occupational areas is predominately a State and Territory function and is conducted by a range of regulatory bodies in each State and Territory. For historical reasons, licensing systems have developed in different ways in each jurisdiction so that approaches to licensing are not consistent. Regulatory bodies currently have responsibility for administering threshold licence entry criteria and ongoing conduct requirements for licensees. They monitor compliance and administer disciplinary procedures, maintain registers of licensees and oversee skills maintenance requirements such as continuing professional development.

Due to differing jurisdictional policies and practices, licences issued for the same occupational area by individual jurisdictions often have different

parameters, eligibility requirements and permitted scopes of work. Different licence nomenclature, duration, licence structures and fee structures generally apply. The costs that arise from overlapping and inconsistent regulations are borne by individuals and businesses, and eventually consumers. These include the costs of multiple licence fees and complying with multiple regulatory regimes.

Both direct and indirect costs are particularly high for small to medium sized businesses where they constitute a significant proportion of total costs.

Under the *Mutual Recognition Act 1992* (MRA), individual occupational licence holders from one jurisdiction can apply to be registered in a second jurisdiction on the basis of their existing licence and without further assessment of their skills. Regulators in a second jurisdiction have an obligation, under mutual recognition requirements, to issue an applicant with a licence to undertake activities that are 'substantially the same' as those permitted under their licence in the first jurisdiction. Regulators may use conditions on licences to achieve equivalence.

Despite mutual recognition, while each State and Territory maintains different licensing regimes, licensees who want to move between jurisdictions must still apply for a licence, meet different non-skills requirements and pay a separate licence fee for the equivalent licence(s) in each jurisdiction in which they wish to work. In certain circumstances they may also need to satisfy other additional requirements not covered by mutual recognition. These arrangements are particularly difficult for individuals and/or businesses operating in multiple jurisdictions and for those working in border areas, both of which must comply with different licensing and regulatory requirements. They are also a disincentive to pursuing work in other jurisdictions – particularly work of a shorter duration.

In this context, the Council of Australian Governments (COAG) entered into the *National Partnership Agreement to Deliver a Seamless National Economy* (NPA) on 3 July 2008. As part of that Agreement, COAG agreed to develop a NLS that would remove inconsistencies across jurisdictional borders and allow for a more mobile workforce. COAG agreed to develop a NLS with the following characteristics:-

(a) cooperative national legislation;

(b) national governance arrangements to handle standard setting and policy issues and to ensure consistent administration and compliance practices;

(c) all current holders of State and Territory licences having their licences automatically recognised under the new licence system at its commencement;

(d) the establishment of a publicly available national register of licensees; and

(e) the Commonwealth having no legislative role in the establishment of the new system.

On 30 April 2009 COAG agreed to the *Intergovernmental Agreement for a National Licensing System for Specified Occupations* (COAG Agreement). The COAG Agreement sets out the legislative framework for the NLS and contains the objectives that are set out in the Law (see section 3). Under the COAG Agreement a licensing body is to be established to develop policy and administer the NLS. The National Occupational Licensing Authority (Licensing Authority) is established by section 97 of the Law.

Achievement of the Objectives

The model chosen for the NLS under the COAG Agreement is the "delegated agency model". This means that the Licensing Authority may delegate all of its regulatory functions for licensing to existing regulatory agencies (for example the issuing of licences). Extensive delegation arrangements are provided in the Law to enable this to occur. To ensure a nationally consistent approach for occupational licensing, the Law does not permit the delegation of the Licensing Authority's function for policy development.

The COAG Agreement provides that the NLS will initially be applied to seven broad occupational areas:

(a) air conditioning and refrigeration;

(b) electrical;

(c) plumbing and gasfitting;

(d) property-related occupations;

(e) building and building-related occupations;

(f) land transport (passenger vehicle drivers and dangerous goods only); and

(g) maritime.

The first phase of occupations that will be admitted to the NLS are those occupations listed above at paragraphs (a) to (d). As some of the occupations proposed to be covered by the NLS are the subject of separate and related COAG activity, they may ultimately be transferred to other national reform initiatives. For this reason, only the first phase occupations are listed in the Law. However, the Law has been designed to allow for additional occupational areas to be included in the NLS over time, by regulation made under the Law (national regulations).

When an occupation is prescribed by the national regulations as being a licensed occupation it is envisaged that each jurisdiction will need to return to Parliament to make consequential and transitional amendments to existing legislation regulating the occupation. This is because jurisdictional legislation will still provide for matters not covered by the Law, such as conduct. When these amendments are enacted, amendments to the Law can be made to include the occupation in the definition of "licensed occupation" in section 4 of the Law so that the Law will contain a reference to all of the licensed occupations within the NLS.

In accordance with the COAG Agreement, Interim Advisory Committees (IACs) have been established for each first phase occupational area. The IACs are comprised of union, employer, regulator and consumer representatives. They are providing advice on licensing policy for specific occupational areas and this will lead to national regulations being made under the Law. The IACs are being supported in this task by Regulator Working Groups (RWGs) which are made up of regulators from all jurisdictions. Further national regulations, for example, "general" regulations that will apply to all occupations, and transitional regulations, will be developed and enacted prior to coverage of the phase one occupations under the NLS. Coverage of phase one occupations is expected to occur from 1 July 2012.

The national regulations are to be made by the Ministerial Council responsible for the NLS, which is currently the Ministerial Council for Federal Financial Relations. Prior to approval by the Ministerial Council, the national regulations will be subjected to the Regulation Impact Statement (RIS) process, which will include a public consultation process. The RIS process will be undertaken by the COAG National Licensing

Taskforce on behalf of the COAG National Licensing Steering Committee. The regulations will be published on the New South Wales legislation website after they are made by the Ministerial Council.

The member of the Ministerial Council representing the participating jurisdiction is to make arrangements for the tabling of a regulation made under the Law in each House of the Parliament in the participating jurisdiction. Any legislative requirement of a participating jurisdiction relevant to the disallowance of a regulation in that jurisdiction is to be complied with in that jurisdiction in relation to a national regulation, as if the regulation had been made under an Act of the jurisdiction. However, disallowance of the regulation will not take effect unless the majority of participating jurisdictions have disallowed the regulation. This is to ensure legislative consistency across participating jurisdictions.

As discussed above, prior to implementation of the national scheme for the relevant occupations, jurisdictions will be required to enact amendments to their jurisdictional legislation, in particular, consequential and transitional amendments, to enable commencement of the NLS.

Alternative ways of achieving the policy objectives

The policy objectives in this Bill can only be achieved through legislative amendment.

Estimated Cost for Government Implementation

The implementation of the Law is one of several reforms covered by the NPA. The NPA provides for the States and Territories to receive national partnership payments from the Commonwealth. These comprise facilitation payments for net set-up costs and revenue foregone by the States and Territories associated with reform implementation, and reward payments contingent on achievement of key milestones.

For the full raft of NPA reforms, Queensland received $20.1 million in facilitation payments for 2008-09, and is eligible for reward payments of up to $92.6 million over five years to 2012-13.

Funding for the establishment of the Licensing Authority is to be shared equally per capita amongst States and Territories. Nationally, $2 million was required for the year 2009-10 and a further $5 million in 2010-11. Queensland's contribution is $1.4 million over the two years. This

contribution is being funded from the facilitation payment received from the Commonwealth under the NPA.

Additional funding for the years 2011-12, again shared equally per capita, is likely to be required to establish the Licensing Authority, however the financial arrangements for this have yet to be determined. There may be significant information and communication technology (ICT) infrastructure establishment costs associated with the implementation of the national register of licensees under the NLS. Jurisdictions are in the process of agreeing on the appropriate IT infrastructure to allow the necessary interoperability between jurisdictions, which will enable an assessment of ICT cost implications for Queensland.

Upon commencement of the NLS, Queensland may experience a decrease in revenue from licence fees, as licensees trading across multiple jurisdictions will no longer pay multiple licence fees. However, this represents a saving to industry and is expected to be offset to some extent by savings from transferring certain functions to the Licensing Authority.

Consistency with Fundamental Legislative Principles

Aspects of the Bill that may raise issues regarding the fundamental legislative principles are outlined below.

Sufficient regard to the rights and liberties of individuals

Criminal history (sections 4 and 19 of the Law)

Section 19(2)(a) of the Law provides that national regulations may provide for matters relating to criminal history of applicants, licensees, nominees or relevant persons for a body corporate, that is an applicant or licensee. The definition of "criminal history" in section 4 of the Law is broad as it includes pleas of guilty, charges and traffic offences. However the scope of this definition is narrowed by the operation of section 19(2)(a) as the criminal history of a person can only be considered to the extent that there is a connection between the criminal history of the person and the inherent requirements of the occupation. The general national regulations will provide the criteria for how criminal history can be assessed and used when determining a person's eligibility.

As a further safeguard, the note to section 19(2)(a) states that matters relating to criminal history will also be subject to legislation of

participating jurisdictions that prohibits, or does not require, the disclosure of spent convictions.

The definition of "criminal history" is necessarily broad as it must be wide enough to capture occupation specific requirements. For example, a public passenger driver (school bus driver) who is charged with a sexual offence against minors or a real estate agent who pleads guilty to misappropriation or theft of trust monies, represent significant risks to the public and consumers. Further, a record of traffic offences is relevant to the occupation of a public passenger driver. Accordingly, the Licensing Authority must have the capacity to consider information such as pleas, charges and traffic offences and make an assessment in all the circumstances in relation to whether the person should be licensed, or alternatively, whether there is a need to restrain a person's scope of work until such matters are settled.

Consideration of criminal history that relates to "pleas" and "charges" (both pending or old charges that resulted in an acquittal or where a prosecution did not proceed), when those offences have not been finalised, is considered contrary to the presumption of innocence. However, such arrangements have been accepted by Parliaments when it can be justified on safety/interest grounds.

It must be noted that each criminal history offence in the national regulations will be prescribed in the occupational specific regulation as being an offence that is relevant for that occupation. Furthermore, the offence categories that will apply for each category or type of licence will be further refined to ensure that offences specified in each occupational specific regulation do not apply broadly over all subgroups. For example, the criminal offences that may be relevant for a building contractor will not have the same inherent risks as for an employee carpenter.

The Law also provides that natural justice is observed by providing an applicant and licensee with review and appeal rights on the basis of the person's suitability, including having had regard to any criminal history.

Automatic cancellation of licence (sections 48(2) and 160(2)(g)(iii) of the Law)

Section 48(2) of the Law provides that disciplinary action may not be taken against a licensee on a ground referred to in section 48(1) if the ground is prescribed under the regulations as being a ground for which the licensee's licence is automatically suspended or cancelled. Section 160(2)(g)(iii) will enable a regulation to be made prescribing the grounds for automatic

suspension or cancellation as well as the procedure for automatic cancellation of licences. The provision is designed to cater for administrative matters, for example the requirements relating to a corporate body losing its nominated person.

Sections 48(2) and 160(2)(g)(iii) are in potential breach of the fundamental legislative principles because the grounds for automatic suspension are not included in the principal legislation - they will be devolved to a regulation. Likewise, the procedure for automatic suspension is not included in the principal legislation and will be devolved to regulation.

This approach is necessary because a particular occupation may have a different ground for automatic cancellation or suspension. As discussed above, the work of the IACs is informing development of the national regulations. These IACs will provide guidance on the necessity to make national regulations under section 48(2) in relation to specific occupations. Please see also discussion below in relation to *Regulation making powers in the Law.*

Also, the Law does not presently provide an obligation to notify the person that the licence has been suspended or the reasons for the suspension, however, this may be provided for in a national regulation pursuant to section 160(2)(g)(iii).

Power to require information or attendance (sections 61 and 62 of the Law)

Part 4 of the Law provides for the monitoring and enforcement powers of authorised officers. Section 61 of the Law provides that if an authorised officer reasonably believes that an offence has been committed against the Law or a prescribed Act and a person may be able to give information about the offence, the authorised officer may, by written notice, require the person to give stated information or attend before the officer. Section 62 provides offences for failing to produce information or to attend before an authorised officer if the person does not have a reasonable excuse.

It may be argued that these provisions are contrary to the fundamental legislative principles as the powers apply to a "person" and are not limited, for example, to licensees or persons who might have access to a particular document or information. It is considered that the powers are necessarily broad because they are required to apply to a broad range of occupations with different business structures. Of note is the fact that some Queensland legislation also contains similar provisions. For example section 557 of the *Property Agents and Motor Dealers Act 2000* (PAMDA) provides

inspectors with broad powers to require information and sections 87 and 88 of the *Taxation Administration Act 2001* also provide the commissioner and investigators with broad powers to require information or documents. Also, section 62(3) of the Law has a safeguard by providing that it is a reasonable excuse to fail to give stated information, answer a question or produce a document if, by doing so, the individual may incriminate themselves.

Directions power (section 101 of the Law)

Section 101 of the Law provides that the Licensing Authority may give a direction to a licensee or a class of licensee, about a matter relating to the way in which the licensee or a class of licensees carries out a licensed occupation. It could be argued that the directions power is not sufficiently defined and provides a broad power to the Licensing Authority to affect the rights of a licensee and impose obligations on a licensee, thus being contrary to the fundamental legislative principles. There is no detailed procedure provided for imposing a direction or other limits on the power. However, the power may be justified, as the power to give a direction has been inserted into the Law to enable the Licensing Authority to proactively address compliance issues before they manifest into disciplinary matters. Also, the decision to make a direction under this section is reviewable under section 88(g) of the Law.

Subdelegation (section 102(3) of the Law)

Section 102(1) of the Law provides that the Licensing Authority may delegate any of its functions to an entity or the chief executive of an entity or department of government of a participating jurisdiction nominated by a member of the Ministerial Council that represents that jurisdiction. Section 102(3) provides that an entity or the chief executive to whom a function has been delegated by the Licensing Authority may sub delegate the function. The provision does not specify to whom.

This is arguably contrary to the fundamental legislative principle that whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons. As discussed above, prior to coverage by the NLS for each occupation, it will be necessary to enact transitional and consequential amendments to the legislation that relates to that occupation. It is intended that when this occurs, the provisions relating to sub delegation will take account of the

need for a sub delegation to be made in appropriate cases and to an appropriately qualified person.

Privacy (section 139 of the Law)

Section 139 of the Law provides that a person exercising functions under this Law may disclose protected information (defined in section 136) to a jurisdictional regulator or another Commonwealth, State or Territory entity. However, this disclosure is strictly limited by section 139 to disclosure that is in connection with the functions exercised by that entity.

Immunity (section 151 of the Law)

Section 151 of the Law provides that a protected person (defined in section 151(3)) is not personally liable for anything done or omitted to be done in good faith in the exercise of a function under this Law or in a reasonable belief that the act or omission was the exercise of a function under this Law. It may be considered that this provision is inconsistent with the legal principle that all people should be equal before the law. It is important to note however, that section 151(2) provides that any liability resulting from an act or omission that would, but for section 151(1) attach to a protected person, attaches instead to the Licensing Authority.

Time limit for starting proceedings (section 152 of the Law)

The Law provides that the time limit for commencing proceedings for offences is within six years after the commission of the offence. The time limits for commencing proceedings in various Queensland licensing statutes vary. For example, section 589 of the PAMDA provides that a proceeding for an offence under the Act must be taken within the later of:- one year after the offence is committed, or six months after the commission of the offence comes to the complainant's knowledge, but within two years of the commission of the offence.

Section 187 of the *Electrical Safety Act 2002* (ES Act) has a similar provision to section 589 of the PAMDA but provides that a proceeding must be taken within three years after the commission of the offence. The ES Act has a further provision at section 187(c) that if the offence involves a breach of an obligation causing death and the death is investigated by a coroner under the *Coroners Act 2003*, the proceeding must be taken within two years after the coroner makes a finding in relation to the death. This may allow prosecution action being instituted outside the three year limit.

Section 111 of the *Queensland Building Services Authority Act 1991* (QBSA Act) provides that a prosecution for an offence may be started

within two years after the alleged date of the commission of the offence or within one year after the offence comes to the knowledge of the authority, whichever is the later.

Given the differing limitation periods in this existing licensing legislation, it is considered that a time limit that would be suitable for the diverse occupational groups would be six years from the commission of the offence.

Criminal offences

The Law creates a number of criminal offences. The offences, together with the penalties are set out below.

Section	Offence	Maximum penalty
9	Offence for individual to carry out prescribed work unless licensed or exempt	(a) for an offence involving a specified licensed occupation – (i) for a first or second offence - $50,000; or (ii) for a third or subsequent offence - $50,000 or 12 monthsimprisonment or both (b) for any other offence - $50,000
10	Offence for body corporate or partnership to enter into a contract for prescribed work unless licensed or exempt	$250,000
11	Offence to advertise or offer to do prescribed work unless licensed or exempt	(a) for an individual for offence involving a specified licensed occupation – (i) for an individual for a first or second offence - $50,000; or (ii) for a third or subsequent offence - $50,000 or 12 months imprisonment or both (b) for an individual for any other offence - $50,000 (c) for a body corporate - $250,000

12	Offence to hold out unlicensed person as being licensed	(a) for an individual for offence involving a specified licensed occupation – (i) for an individual for a first or second offence - $50,000; or (ii) for a third or subsequent offence - $50,000 or 12 months imprisonment or both (b) for an individual for any other offence - $50,000 (c) for a body corporate - $250,000
14	Licensee must not lend or otherwise allow use of licence by another person	(a) for an individual for offence involving a specified licensed occupation – (i) for an individual for a first or second offence - $50,000; or (ii) for a third or subsequent offence - $50,000 or 12 months imprisonment or both (b) for an individual for any other offence - $50,000 (c) for a body corporate - $250,000
28	Change in details or circumstances	(a) individual - $10,000 (b) body corporate - $50,000
29	Return of licence	(a) individual - $5,000 (b) body corporate - $25,000
62	Offence for failing to produce information or attend before authorised officer	(a) individual - $10,000 (b) body corporate - $50,000
63	Power to require licensee to produce documents	(a) individual - $10,000 (b) body corporate - $50,000
71	Offences for failing to comply with requirement under section 70	(a) individual - $10,000 (b) body corporate - $50,000
73	Power to stop and search vehicles	$10,000
76	Securing evidence	$10,000
77	Tampering with seized things	$25,000

84	False or misleading information	(a) individual - $25,000 (b) body corporate - $125,000
85	False or misleading documents	(a) individual - $25,000 (b) body corporate - $125,000
86	Obstructing authorised officers	(a) individual - $25,000 (b) body corporate - $125,000
87	Impersonation of authorised officers	$25,000
131	Return of identity card	$5,000
138	Duty of confidentiality	(a) individual - $25,000 (b) body corporate - $125,000
149	General duties of persons exercising functions under this Law	$25,000

It is important to note that similar offences to these are contained in current Queensland licensing statutes. For example, section 56 of the ES Act provides that a person must not conduct a business or undertaking that includes the performance of electrical work unless the person is a holder of an electrical contractor licence. Further, section 581 of the PAMDA provides that it is offence to lend or borrow a licence.

In addition, section 71(3) of the PAMDA provides that a person whose licence has been suspended or cancelled must return the licence to the chief executive within 14 days after the suspension or cancellation, unless the person has a reasonable excuse. Section 195 of the ES Act provides that a person must not give an official entity a document the person knows is false or misleading in a material particular. Section 104 of the QBSA Act provides that an inspector must return their identity card after ceasing to be an inspector.

The penalties in sections 9, 10, 11 and 12 are the highest monetary penalties imposed under the Law as the offences committed under these provisions go to the foundation of the national licensing system. Failure to comply with these provisions puts at risk public and worker health and safety as well as consumer protection. Similarly, the offence "lending a licence" carries a higher penalty to curtail or, as far as possible, minimise the practice of licensees lending their licences to other persons.

Also of note is that some offences in the Law provide for a term of imprisonment for offences committed with respect to "prescribed licensed

occupations". Section 9(1)(a) of the Law for example, provides for a penalty of up to $50,000 and/or 12 months imprisonment where an individual repeatedly carries out work that must be undertaken by a licensed person. It is not the intention that maximum penalties of imprisonment apply to all licensed occupations that are covered by the NLS. Instead, the penalty of imprisonment can only apply to those licensed occupations that have been prescribed in national regulations for this purpose. A possible occupation might be the electrical occupation where public safety would be at risk from repeated performance of unlicensed work.

Sufficient regard to the institution of Parliament

Non-application of the *Acts Interpretation Act 1954* section 15DA (clause 2(3) of the Bill)

Clause 2 of the Bill provides that this Act commences on a day or days to be fixed by proclamation and that different days may be appointed for the commencement of different provisions of the Occupational Licensing National Law set out in the schedule to the *Occupational Licensing National Law Act 2010* of Victoria. Subclause (3) provides that section 15DA of the *Acts Interpretation Act 1954* does not apply to this Act.

Section 15DA of the *Acts Interpretation Act 1954* provides for automatic commencement of Acts within one year of assent, unless a regulation is made to extend the time for commencement. As stated above, it is anticipated that the commencement date for the first phase occupations will be 1 July 2012. Although it will be necessary to commence certain provisions in the Bill prior to this date, for example to provide for the operation of the Licensing Authority, it will not be possible to commence the majority of provisions until the national regulations are completed, as well as consequential and transitional amendments to Queensland legislation.

National Scheme Legislation

The introduction of national legislation in a State or Territory Parliament for adoption by other participating States and Territories is a standard approach to implementing national schemes in areas such as licensing, where Constitutional powers rest with States and Territories, and not the Commonwealth.

Although the legislation for national schemes may take a number of forms, concerns about abrogating the rights of Parliaments tend to be greatest

when, as in this case, the proposed law includes pre-determined legislative provisions based on an agreement between governments. A number of Scrutiny of Legislation Committees have previously noted that national scheme legislation may raise concerns about the authority of a State government to respond to, or distance itself from, the actions of a joint Commonwealth and State regulatory authority and the effect of executive pressure upon Parliaments to merely ratify the legislation.

The COAG Agreement identifies Victoria as host of the Law. The Law incorporates the COAG Agreement made between the Premiers and Chief Ministers of all States and Territories. The Law is not Commonwealth law, and participating States and Territories are not referring powers to the Commonwealth.

The institution of Parliament is supreme, and the Queensland Parliament will ultimately, through debate of this Bill, decide whether the proposed legislation will be passed to enable full implementation of the NLS. Other participating Australian States and Territories are expected to bring applied laws or mirror legislation for passage through their respective Parliaments by the end of 2010. Again, Parliaments of each participating jurisdiction are sovereign and will decide whether to pass a Bill to apply or mirror the Law as a law of that jurisdiction.

The Law, and the application of the proposed Law, represent an important step towards improving national licensing regimes through fully implementing the NLS. However, until the NLS's anticipated implementation date (1 July 2012) for the first phase occupations, current State and Territory based legislation will continue to apply for the licensing of occupational areas.

Exclusion of jurisdictional legislation (clause 5 of the Bill)

The *Acts Interpretation Act 1954* will not apply to the proposed Law. Given the nature of the national system, consistency of interpretation across jurisdictions is critical. Consequently, uniform interpretation provisions of a kind usually contained in the Interpretation Act of a State or Territory will apply in accordance with Schedule 1 to the Law.

Other Queensland statutes such as the *Information Privacy Act 2009* and the *Ombudsman Act 2001* will not apply to the Occupational Licensing National Law (Queensland) or to instruments made under the Law, other than to the extent that functions are being exercised under the Law by a State entity. These provisions are necessary because certain functions will not be delegated by the Licensing Authority, for example administration of

the national register. If jurisdictional provisions were to apply to non-delegated functions being exercised by the Licensing Authority, there would be potential for conflicts to occur between State and Commonwealth legislation. The Law therefore provides that certain Commonwealth Acts will apply to functions that are not delegated. See for example, section 150 of the Law (Application of Commonwealth Ombudsman Act).

Therefore, under the "delegated agency model," jurisdictional legislation such as the *Information Privacy Act 2009* will apply when functions are being exercised under the Law by a Queensland entity.

Regulation making powers in the Law (sections 160 and 161)

Sections 160 and 161 of the Law provide broad regulation making powers which would normally be regarded in Queensland as "Henry VIII" provisions. For example, section 161(1)(a) of the Law provides that the national regulations may provide for the different categories of licence, registration and accreditation that may be granted for licensed occupations. Also, section 161(1)(b) provides that national regulations may provide for the scope of work that may be carried out under the authority of the different categories of licences, registration and accreditation.

The Queensland Scrutiny of Legislation Committee in its Report No. 3 *The Use of 'Henry VIII Clauses' in Queensland Legislation* reviewed the use of Henry VIII clauses in national schemes of legislation. While generally opposed to Henry VIII clauses, in determining whether there is a possibility of a legitimate role for Henry VIII clauses in certain circumstances, the Committee considered that a justifiable use may be to facilitate the application of national schemes of legislation. The Report also stated that it would continue to closely scrutinise all Henry VIII clauses on their merits.

The broad regulation making powers may be justified because the Law is attempting to provide a framework for a number of diverse occupational licences within national legislation. It would be inefficient, complex and potentially confusing to provide specific provisions for a broad range of occupations in the one piece of primary legislation. Flexibility will be needed in the legislation across different occupational areas. For example, eligibility requirements for the electrical trades, which include qualifications, skills and knowledge, will be significantly different to those for property-related occupations.

Parliamentary scrutiny of national regulations (section 164 of the Law)

The *Statutory Instruments Act 1992* will only apply to the extent provided for in section 164 of the Law (Parliamentary scrutiny of national regulations). This may call into question whether the proposed legislation sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Queensland Parliament.

A national Law regulation may be disallowed in a participating jurisdiction by a House of Parliament. However, if a national regulation is disallowed under this process, it will not cease to have effect in any participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions. This approach is consistent with the protocol for the development of national scheme legislation and is to ensure that national legislation is applied consistently in each participating jurisdiction. The approach was adopted in the *Health Practitioners Regulation National Law Act 2009.* The approach for providing for disallowance by a majority of jurisdictions is also a concession to national scheme legislation which previously did not allow for any disallowance of national regulations.

Consultation

In the development of the Law, two preliminary stakeholder consultation sessions were held in each State and Territory during both July and October 2008 with sessions for regulators involved in policy development and the other sessions for a broader range of stakeholders, including employer and employee representatives and training organisations. The July session was to provide preliminary information on the COAG decision of 3 July 2008 and to gain stakeholder feedback on aspects of the system described by COAG. Stakeholders were invited to submit written comments on the proposed system and 15 submissions were received as a result of the consultations held in July 2008.

The October session was to seek stakeholder feedback on the Consultation RIS following the additional work undertaken by the COAG National Licensing Steering Committee on researching and developing possible models for the national licensing system. The sessions were attended by 425 people and 55 written submissions were received.

Prior to the release of the Exposure Draft National Law, operational and policy personnel from all jurisdictional regulatory authorities were invited to participate in a number of workshops. These workshops were to assist in

the development of key criteria for the regulation powers that would be required in the Law. The workshops were well supported with 215 participants and were held at:

- Adelaide – 12 February 2009;
- Adelaide - 14-15 May 2009;
- Melbourne - 17 June 2009; and
- Adelaide - 30 October 2009.

Following release of the Exposure Draft National Law, further public information sessions were held in each capital city, during 25 November - 8 December 2009. Participants were provided with an update concerning NLS progress, associated issues and detailed information on the provisions of the draft Law. An opportunity was given to participants to comment on and discuss the draft legislation.

The public information sessions were attended by 238 participants from government, employer associations, unions and licensees. A total of 39 written submissions were received from the public and private sectors on the Exposure Draft of the Law. Stakeholder feedback helped to clarify matters where further work will occur as part of the occupational specific regulations and was instrumental in the development of the Law.

As discussed above, the IACs are involved in the process of advising on occupation-specific regulations under the Law. National regulations will be subject to the RIS process prior to approval by the Ministerial Council.

Government

Regular consultation has been undertaken with relevant Queensland Government agencies during the development of the Law, primarily through an Interdepartmental Committee comprised of relevant regulators and the Department of the Premier and Cabinet.

The agencies which were consulted were the Departments of Public Works (Queensland Building Services Authority), Justice and Attorney-General (Electrical Safety Office and Strategic Policy), Transport and Main Roads, Infrastructure and Planning (Building Codes Queensland), Environment and Resource Management (State Valuation Services) and Employment and Economic Development and Innovation (Office of Fair Trading and Mines and Energy).

Uniform or complementary with legislation of the Commonwealth or another State

The Law is co-operative national legislation and will be uniform across the States and Territories. The Law was prepared by the Australasian Parliamentary Counsel's Committee in consultation with the Commonwealth, States and Territories. All jurisdictions except for Western Australia are expected to enact legislation that will apply the Law as enacted in the Parliament of Victoria. Western Australia will enact legislation that mirrors the Law.

Notes on Provisions

Part 1 Preliminary

1 Short title

Clause 1 provides that the short title of the Act is the *Occupational Licensing National Law (Queensland) Act 2010.*

2 Commencement

Clause 2 provides for the commencement of the Act. Subclause (1) provides that the Act commences on a day to be fixed by proclamation.

Subclause (2) provides that different days may be appointed under subclause (1) for the commencement of different provisions of the Occupational Licensing National Law set out in the schedule to the *Occupational Licensing National Law Act 2010* of Victoria.

It is anticipated that commencement of the majority of the provisions in this Bill and the schedule to the *Occupational Licensing National Law 2010* of Victoria will not occur until 1 July 2012. Subclause (3) therefore provides that section 15DA of the *Acts Interpretation Act 1954* does not apply to this Act.

3 Definitions

Clause 3 provides for definitions for this Act and provides that terms used in this Act and also the Occupational Licensing National Law set out in the schedule to the *Occupational Licensing National Law Act 2010* of Victoria have the same meanings in this Act as they have in that Law.

Part 2 Adoption of National Law

4 Adoption of Occupational Licensing National Law

Clause 4 provides that the Occupational Licensing National Law, as in force from time to time, and set out in the schedule to the *Occupational Licensing National Law Act 2010* of Victoria, applies as a law of Queensland and so applying may be referred to as the Occupational Licensing National Law (Queensland), and so applies as if it were a part of this Act.

5 Exclusion of legislation in this jurisdiction

Clause 5 provides that certain Queensland Acts do not apply to the Occupational Licensing National Law (Queensland) or to instruments made under the Law. The legislative scheme provided for by the NLS is that the Licensing Authority will operate by way of a "delegated agency model". Where functions under the Law are exercised by State or Territory entities, jurisdictional provisions will continue to apply.

6 Relevant tribunal or court

Section 4 of the Occupational Licensing National Law (Queensland) defines *relevant tribunal or court* to mean a tribunal or court that has been declared by a law of that jurisdiction to be the relevant tribunal or court for that jurisdiction for the purposes of this Law. Clause 6 provides that the entities mentioned in the schedule are declared to be relevant tribunals or courts for Queensland for the purposes of the provisions of the Law and the licensed occupations stated in the schedule.

7 Penalty at end of provision

Clause 7 provides that in the Occupational Licensing National Law (Queensland) a penalty stated at the end of a provision indicates that a contravention of the provision is punishable on conviction by a penalty of not more than the stated penalty.

Part 3 Miscellaneous

8 Information from commissioner of police service

Clause 8 provides that the Licensing Authority may ask the commissioner of the police service for criminal history information relevant to whether a person satisfies personal probity requirements under the Occupational Licensing National Law, whether as applied in this or another jurisdiction.

In this regard, the national regulations will define the extent to which criminal history information can be obtained with respect to a particular occupation.

9 Proceedings for offences

Clause 9 provides that proceedings for an offence against the Occupational Licensing National Law (Queensland) must be taken in a summary way under the *Justices Act 1886.*

10 Regulation-making power

Clause 10 provides that the Governor in Council may make regulations under this Act.