

State Development and Public Works Organisation (Particular Works for Borumba Pumped Hydro Energy Storage Project Exploratory Works) Amendment Regulation 2023

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Steven Miles, Deputy Premier, Minister for State Development, Infrastructure, Local Government and Planning and Minister Assisting the Premier on Olympic and Paralympic Games Infrastructure, provide this human rights certificate with respect to the *State Development and Public Works Organisation (Particular Works for Borumba Pumped Hydro Energy Storage Project Exploratory Works) Amendment Regulation 2023* (Amendment Regulation) made under the *State Development and Public Works Organisation Act 1971* (SDPWO Act).

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019* (HR Act). I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Background

On 28 September 2022, the Queensland Government announced the Queensland Energy and Jobs Plan (QEJP). The QEJP outlines the State's pathway to a clean, reliable and affordable energy to provide power for generations, targeting 50 per cent renewable energy by 2030, 70 per cent by 2032, and 80 per cent by 2035.

A significant part of this transition to renewable energy is the development of pumped hydro energy storage (PHES) as the key long-duration 'deep storage' component of the transitioned Queensland energy grid.

The proposed Borumba PHES project is a cornerstone piece of infrastructure to enable the transformation of the energy system. The Queensland Government's plan, under the QEJP, is to deliver the Borumba PHES project by 2030. Queensland Hydro Pty Ltd (Queensland Hydro), a publicly owned proprietary company created to develop state owned PHES infrastructure, is the project proponent.

A program of exploratory works for the Borumba PHES Project is proposed to commence in 2023 and be completed by mid-2025, providing essential geotechnical data to determine feasibility for the project. Establishment of two temporary workers accommodation camps (TWACs) is scheduled to commence from October 2023 to enable the exploratory works.

Purpose

The objective of the Amendment Regulation is to create a new division in the *State Development and Public Works Organisation Regulation 2020* that directs Queensland Hydro to undertake particular works in accordance with sections 99 and 100 of the SDPWO Act and also directs the Coordinator-General to undertake reserved works in accordance with sections 108 and 109 of the SDPWO Act.

The intent is that Queensland Hydro will construct the TWACs and the Coordinator-General will assist facilitation of works to support the TWACs using various powers of the Coordinator-General. These powers include, but are not limited to, the opening or closure or otherwise rearrangement of roads.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion the human rights under the HR Act that are relevant to the Amendment Regulation are:

- section 19 – freedom of movement
- section 21 – freedom of expression
- section 24 – property rights
- section 25 – privacy and reputation
- section 28 – cultural rights – Aboriginal and Torres Strait Islander peoples
- section 31 – fair hearing.

Human rights potentially limited by the Amendment Regulation

The decision will potentially limit (or interfere with) the identified human rights:

- section 21 – freedom of expression
- section 24 – property rights
- section 28 – cultural rights – Aboriginal and Torres Strait Islander peoples
- section 31 – fair hearing.

Consideration of reasonable limitations on human rights (section 13 *HR Act*)

Freedom of expression (section 21)

(a) the nature of the right

Section 21 of the HR Act provides that every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information of all kinds. It protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication).

It may be argued that the right to freedom of expression may be restricted because a consequence of the Amendment Regulation is that third party consultation and appeal rights under the *Planning Act 2016* (Planning Act) would be removed for development of the TWACs.

The Amendment Regulation is a direction to Queensland Hydro and the Coordinator-General to undertake particular works. Local categorising instruments will be prohibited from stating the particular works are assessable development by operation of Schedule 6 of the *Planning Regulation 2017* (Planning Regulation). TWAC construction will therefore progress without a requirement for Queensland Hydro, as the local body, to seek development approvals from the respective local councils, which would have otherwise been subject to public notification requirements.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The removal of the requirement for a statutory public notification process is a consequence of the statutory framework under the Planning Act and Planning Regulation that enables significant projects to proceed on a streamlined and urgent basis. The Amendment Regulation employs this existing statutory pathway.

Given the Amendment Regulation utilises existing statutory pathways, and the on-time delivery of the Borumba PHES Project is instrumental for provision of a reliable renewable energy system under the QEJP, the purpose of the potential limitation is considered consistent with a democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The potential limitation on freedom of expression, which may occur as a consequence of the Amendment Regulation, will ensure the timely establishment of necessary accommodation so that the exploratory works for the Borumba PHES Project may proceed.

The need to provide temporary workers accommodation for exploratory works for the project is in line with community expectations and broader government objectives regarding timely delivery of the transition to a renewable energy system.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive ways to achieve the purpose of the Amendment Regulation. Sections 100 and 109 of the SDPWO Act require directions to be made by regulation. Administrative arrangements would not provide the streamlining benefits that can be provided through the Amendment Regulation or enliven the Coordinator-General's powers.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The Amendment Regulation employs an existing statutory pathway in the Planning Regulation that enables significant projects to proceed on a streamlined and urgent basis.

The amendment will facilitate a temporary element (the TWACs) required to progress exploratory works that will provide essential geotechnical data to determine feasibility for the Borumba PHES Project, which is an important renewable energy project intended to assist the State transition to clean, reliable and affordable energy and achieve its renewable energy targets.

When balancing the right to freedom of expression in relation to the development of the TWACs with the urgent need to facilitate the commencement of exploratory works for the Borumba PHES, the Amendment Regulation is considered to be in line with community expectations.

For the Borumba PHES Project, the QEJP states that, environmental, including water, approvals are key and that engagement with community is vital and environmental, cultural, community and technical factors will all be considered before proceeding.

Property Rights (section 24)

(a) the nature of the right

Section 24 of the HR Act protects the right of all persons to own property alone or in association with others, and to not be arbitrarily deprived of property.

It may be argued that property rights may be restricted by the Amendment Regulation as it enlivens the Coordinator-General's powers in relation to compulsory acquisition and rearrangement of roads.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purposes for which the Coordinator-General may exercise powers under the SDPWO Act and impact the right under the Amendment Regulation are limited to works to support the project works and does not extend to Queensland Hydro's wider program of exploratory works.

Queensland Hydro has indicated it has, or will have, established tenure agreements and rights to access the properties with landholders on which the TWACs are located. The Borgan Camp is located on freehold land owned by the Department of Regional Development, Manufacturing and Water (formerly used for grazing, currently unoccupied). The Walkers Top Camp is located on freehold land owned by Queensland Hydro and currently used for beef cattle grazing under an agistment arrangement with a neighbouring grazier. Property acquisition is not therefore envisaged for the properties on which the TWACs are located.

The Amendment Regulation enables the Coordinator-General to open, close or otherwise rearrange roads. Any potential acquisition of land for the road would only occur if necessary to facilitate the road upgrades to support the TWACs.

Potential land acquisition would require further consultation with, and consideration by, the Coordinator General, as well consultation with affected landowners. The exercise of powers is subject to the process under the SDPWO Act and/or the *Acquisition of Land Act 1967* (ALA) and payment of compensation.

The process and compensation provisions are outlined within the SDPWO Act and ALA and provide a framework for the implementation of compulsory acquisition. The compulsory acquisition powers are therefore limited by the statutes' provisions, which provide a safeguard to limit impacts on a person's human rights.

The need for timely provision of temporary workers accommodation for exploratory works for the project is in line with community expectations and broader government objectives regarding timely delivery of the transition to a renewable energy system. The purpose of the limitation is considered consistent with a democratic society based on human dignity, equality, and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Any potential limitation on property rights may arise to ensure the timely establishment of necessary accommodation so that the exploratory works for the Borumba PHES Project may proceed.

The need to provide temporary workers accommodation for exploratory works for the project is in line with community expectations and broader government objectives regarding timely delivery of the transition to a renewable energy system.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive ways to achieve the purpose of the Amendment Regulation. Project works may not be able to be delivered within required timeframes without the use of the Coordinator-General's functions and powers under the SDPWO Act. Sections 100 and 109 of the SDPWO Act require directions to be made by regulation.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The Amendment Regulation enlivens an existing statutory pathway in the SDPWO Act that enables significant projects to proceed on a streamlined and urgent basis. The amendment will facilitate a temporary element (the TWACs) required to progress exploratory works that will provide essential geotechnical data to determine feasibility for the Borumba PHES Project, which is an important renewable energy project intended to assist the State transition to clean, reliable and affordable energy and achieve its renewable energy targets.

When balancing property rights in relation to development of the TWACs with the urgent need to facilitate the commencement of exploratory works for the Borumba PHES, the Amendment Regulation is considered to be in line with community expectations.

Cultural rights – Aboriginal and Torres Strait Islander peoples (section 28)

(a) the nature of the right

Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right, with other members of their community, to maintain their distinctive spiritual practices, material or economic relationship with the land or water to which they have a connection.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

If any rearrangement of roads is required that may affect native title interests (native title parties are required to be afforded same procedural fairness as though they held freehold title), it is expected that the parties may continue to exercise and enjoy native title rights, except during any construction, for health and safety reasons.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The purposes for which the Coordinator-General may exercise powers under the SDPWO Act and impact the right under the Amendment Regulation are limited to works to support TWAC construction, operation and decommissioning and does not extend to Queensland Hydro's wider program of exploratory works.

The potential limitation of the right allows the Coordinator-General to facilitate significant economic and infrastructure projects to benefit both the region, state and residents within.

In Queensland, the rights of Aboriginal people and Torres Strait Islander peoples are lawfully established through a range of legislative mechanisms. In the context of planning and development, these rights are primarily achieved through the *Native Title Act 1993 (Cth)*, *Native Title (Queensland) Act 1993*, *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*, but also enabled via other legislative and statutory mechanisms.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive ways to achieve the purpose of the Amendment Regulation. Project works may not be able to be delivered within required timeframes without the use of the Coordinator-General's functions and powers under the SDPWO Act. Sections 100 and 109 of the SDPWO Act require directions to be made by regulation.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The Amendment Regulation enlivens an existing statutory pathway in the SDPWO Act that enables significant projects to proceed on a streamlined and urgent basis. The amendment will facilitate a temporary element (the TWACs) required to progress exploratory works that will provide essential geotechnical data to determine feasibility for the Borumba PHES Project, which is an important renewable energy project intended to assist the State transition to clean, reliable and affordable energy and achieve its renewable energy targets.

When balancing of cultural rights of Aboriginal peoples and Torres Strait Islander peoples in relation to development of the TWACs with the urgent need to facilitate the commencement of exploratory works for the Borumba PHES, the Amendment Regulation is considered to be in line with community expectations.

Fair hearing (section 31)

(a) the nature of the right

Section 31 of the HR Act is directed at the procedure of trials for criminal offences and civil proceedings. It protects the right to a fair and public hearing by an impartial decision maker. Section 31 provides that a person has the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

It may be argued that the right to a fair hearing may be restricted by the Amendment Regulation as the potential for third party consultation and appeal rights would be removed for development of the TWACs.

The Amendment Regulation is a direction to Queensland Hydro and the Coordinator-General to undertake particular works. Local categorising instruments will be prohibited from stating the particular works are assessable development by operation of Schedule 6 of the Planning Regulation. TWAC construction will therefore progress without a requirement for Queensland Hydro, as the local body, to seek development approvals from the respective local councils, which would have otherwise been subject to public notification requirements.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The removal of the requirement for a statutory public notification process and the ability to make a submission that then enlivens appeal rights is a consequence of the statutory framework under the Planning Regulation that enables significant projects to proceed on a streamlined and urgent basis. The Amendment Regulation employs this existing statutory pathway.

Given the Amendment Regulation utilises existing statutory pathways, and the on-time delivery of the Borumba PHES Project is instrumental for provision of a reliable renewable energy system under the QEJP, the purpose of the potential limitation is considered consistent with a democratic society based on human dignity, equality, and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The potential limitation on the right to a fair hearing, which may occur as a consequence of the effect of the Amendment Regulation, will ensure the timely establishment of necessary accommodation such that the exploratory works for the Borumba PHES Project may proceed.

The need to provide temporary workers accommodation for exploratory works for the project is in line with community expectations and broader government objectives regarding timely delivery of the transition to a renewable energy system.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive ways to achieve the purpose of the Amendment Regulation. Sections 100 and 109 of the SDPWO Act require directions to be made by regulation. Administrative arrangements would not provide the streamlining benefits that can be provided through the Amendment Regulation or enliven the Coordinator-General's powers.

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When balancing the right to a fair hearing in relation to the development of the TWACs with the urgent need to facilitate the commencement of exploratory works for the Borumba PHES, the Amendment Regulation is considered to be in line with community expectations.

Human rights potentially relevant to the Amendment Regulation but not limited

The Amendment Regulation is relevant to, but will not potentially limit (or interfere with), the identified human rights in the sections outlined below:

- section 19 – freedom of movement

Section 19 of the HR Act provides that every person has the right to move freely within Queensland and the freedom to choose where to live.

- section 25 – privacy and reputation

Section 25 of the HR Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked.

The Amendment Regulation itself does not limit these rights but they may be a proper consideration for the Coordinator-General in the exercise of any powers under the SDPWO Act to facilitate the construction of the TWACs and upgrade of roads depending on the factual circumstances.

Conclusion

I consider that the *State Development and Public Works Organisation (Particular Works for Borumba Pumped Hydro Energy Storage Exploratory Works) Amendment Regulation 2023* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

STEVEN MILES MP
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Infrastructure, Local Government and Planning
and Minister Assisting the Premier
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