

Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020

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, Michael de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport provide this human rights certificate with respect to the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020* made under the *Building Act 1975*, *Building Industry Fairness (Security of Payment) Act 2017*, *Plumbing and Drainage Act 2018*, *Queensland Building and Construction Commission Act 1991* and the *State Penalties Enforcement Act 1999*.

In my opinion, the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020* (the 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

The *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (BIFOLA Act) implements the government's responses to two independent reports into the building and construction industry: the Building Industry Fairness Reforms Implementation and Evaluation Panel report and the Special Joint Taskforce (Taskforce) report. It also amends Queensland's building and construction legislation to improve standards and integrity in the building and construction industry, and strengthen the building certification, engineering and architectural professions.

As outlined below, the Regulation makes changes to subordinate legislation, largely to support the commencement of the BIFOLA Act reforms.

Building Industry Fairness (Security of Payment) Regulation 2018 (BIF Regulation)

The Regulation amends the BIF Regulation to prescribe the detail to support the new trust account framework implemented by the BIFOLA Act. This includes key definitions, information to be included in notices and directions given under the Act, trust records that must be kept explaining the activities for the trust account, and the independent auditing and reporting requirements for retention trust accounts.

Building Regulation 2006 (Building Regulation)

Amendments to the Building Regulation will:

- ensure all mandatory parts of the Queensland Development Code (QDC) are referenced in a single legislative instrument
- ensure the current provisions of the QDC that regulate the design and siting of residential buildings will continue to apply to those buildings pending possible regulatory changes in the future
- extend the requirement for a certifier to keep the record of decision about the assessment of a competent person from 5 years to 7 years
- prescribe all accreditation standards bodies that may issue accreditation to individuals proposing to apply to be building certifiers
- create a demerit point scheme including the listing of offences and number of demerit points per offence
- make minor administrative amendments such as updating Council names and
- amend the code of conduct to clarify that a certifier's primary duty is to act in the public interest.

Further amendments to the Building Regulation will approve amendments of the QDC that will ensure Queensland adopts an approach that is consistent with the national approach reflected in the National Construction Code in relation to separate annual heating and cooling load limits for the thermal performance of a new dwelling. The amendments will update the QDC, improve the year-round performance and comfort of new dwellings in Queensland and assist with minimising household energy costs.

Plumbing and Drainage Regulation 2019 (PD Regulation)

The Regulation makes minor amendments to the scopes of work of certain plumbing and drainage licences under the PD Regulation to allow those licensees to install fire collars that are incidental to their work. This will prevent duplication in licensing requirements following the commencement of the new QBCC Act definition of 'fire protection equipment', which includes fire collars, and ensure a separate fire protection occupational licence will not be required for this work.

Queensland Building and Construction Commission Regulation 2018 (QBCC Regulation)

The BIFOLA Act amends the definition of 'occupational licence' to clarify the occupational licences that may be granted to a person. Consequential amendments are required to the QBCC Regulation to prescribe the Acts under which an occupational licence may be granted.

The Regulation also amends the QBCC Regulation to enable plumbers, drainers and fire protection occupational licensees to perform work on their own property. Schedule 1 of the QBCC Regulation states the work that is not building work for which a QBCC contractor's licence is required. The consequential amendment to prescribe the *Plumbing and Drainage Act 2018* for the purpose of the definition of 'occupational licence' will prevent licensed plumbers and drainers from performing work on their own property without a QBCC contractor's licence. Therefore, the Regulation amends the QBCC Regulation to allow plumbers and drainers to perform work on their own homes within a certain threshold limit, without the need

for a QBCC contractor's licence. Fire protection occupational licensees will also be allowed to perform certain fire protection work on their own property within a certain threshold limit.

Finally, the QBCC Regulation amendments implement three Taskforce recommendations, aimed at enabling information-sharing between the Queensland Building and Construction Commission (QBCC) and interjurisdictional regulators and addressing gaps in the licensing application process to ensure the QBCC can verify the identity of applicants and those involved in running a licensed company.

State Penalties Enforcement Regulation 2014 (SPE Regulation)

The BIFOLA Act introduced new offences for the *Architects Act 2002* (Architects Act), *Building Act 1975* (Building Act) *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act), *Queensland Building and Construction Commission Act 1991* (BIF Act) and *Professional Engineers Act 2002* (PE Act).

Part 7 of the Regulation amends the SPE Regulation to make certain offences introduced by the BIFOLA Act offences for which a penalty infringement notice (PIN) may be issued under the *State Penalties Enforcement Act 1999*.

Human Rights Issues

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

The Regulation engages the following human rights protected by the HR Act:

- Recognition and equality before the law (section 15 of the HR Act)
- Property rights (section 24 of the HR Act)
- Right to privacy and reputation (section 25 of the HR Act)
- Fair hearing (section 31 of the Human Rights Act)
- Rights in criminal proceedings (section 32 of the HR Act).

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

Amendment of the QBCC Regulation

(a) the nature of the right

The right to privacy and reputation protects a person's right to not have their privacy and reputation unlawfully or arbitrarily interfered with. The nature of the right to privacy and reputation is very broad but contains internal limitations. The protection against interference with privacy is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

The human right is limited by clause 29 of the Regulation, which enables the QBCC to enter an information-sharing arrangement under section 28B of the QBCC Act with prescribed agencies. An information-sharing arrangement authorises the QBCC to ask for and receive

information held by another agency and likewise to disclose information to the other agency. A person's privacy may be interfered with to the extent that information shared between agencies includes personal information.

(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

Clause 29 gives effect to recommendation 7 of the Taskforce, which observed that fraudulent behaviour relating to subcontractor non-payment often involves conduct the significance of which could better be appreciated through acquiring information held by other agencies. The Taskforce considered QBCC's supervision of the industry would be enhanced by greater opportunities to collaborate with relevant investigating and prosecuting authorities throughout Australia.

As detailed in the Taskforce's report, fraud can cover a range of different activities and situations that are regulated under various state and federal legislation. Accordingly, the agencies prescribed for section 28B include Commonwealth and interstate agencies responsible for law enforcement, health and work health and safety, fair trading or regulating the building and construction industry, the Australian Securities and Investments Commission (ASIC) and the membership of the Australian Taxation Office's (ATO) Phoenix Taskforce.

Information held by interjurisdictional building regulators, law enforcement and fair trading agencies will help the QBCC perform its functions relevant to ensuring the integrity of industry participants. The QBCC Act provides strict eligibility criteria for licensees, aimed at protecting consumers and subcontractors from unscrupulous operators as well as individuals who cannot meet their payment or contractual obligations. Oversight of a person's criminal history and their commercial or other dealings outside of Queensland, provided through timely information-sharing, ensures the QBCC can effectively administer the licensing requirements and make decisions about whether someone remains a fit and proper person to hold a licence.

Greater collaboration with ASIC, as Australia's corporate regulator, and other Phoenix Taskforce members will help the QBCC to identify, manage and monitor illegal phoenix operators within the building and construction industry. "Phoenix activity" is the practice of one company taking over the business of another company that is wound up or abandoned where the controllers of both companies are the same people or their associates, and it is illegal if it involves a fraud upon creditors. In 2018, the ATO, Fair Work Ombudsman, ASIC and PricewaterhouseCoopers estimated the cost of phoenixing to the Australian economy to be between \$2.85 billion to \$5.13 billion annually. The Taskforce observed a common view among stakeholders is that this activity was widespread in the building industry and that it was having a significant and lasting detrimental effect on their businesses.

The purpose of facilitating information-sharing with relevant agencies is to deliver on the Taskforce's recommendation to ensure that QBCC can effectively perform its role as regulator and ensure it can identify and address offending behaviour.

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

The limitation will assist in the collection of information and evidence about possible fraudulent behaviour and will therefore help achieve the purpose.

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

No less restrictive reasonably available way to achieve the purpose has been identified.

Information obtained by an agency in the performance of its functions is unlikely to be available through sources other than the agency itself or the person to whom the information relates. In cases of suspected fraudulent or dishonest behaviour, there would be limited incentive for a person to incriminate themselves to an investigating or prosecuting authority and so reliance upon voluntary disclosure would not achieve the same result (and therefore not achieve the purpose).

The QBCC Act provides safeguards to restrict the impact of the limitation, in that an information-sharing arrangement may relate only to information that helps the QBCC or the other agency to perform its functions, or information the disclosure of which is reasonably necessary for protecting the health or safety of a person or property. The Regulation provides similar safeguards in relation to information-sharing with Phoenix Taskforce members, restricting the arrangement only to agencies' capacity as a member of the Taskforce.

(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 limitation is considered reasonable and is demonstrably justified. More collaborative enforcement between the QBCC and other agencies will improve the QBCC's ability to identify and address fraudulent or dishonest behaviour within the building and construction industry. The collection of information and evidence to ensure the integrity of industry participants does not constitute an arbitrary interference with privacy and the QBCC remains subject to the legal obligation to only ask for, and disclose, relevant information.

Having regard to the nature and extent of the potential limitation on the right to privacy, it is considered the importance ensuring the QBCC has the necessary information to effectively regulate the industry outweighs the potential negative impact on the right.

(f) any other relevant factors

Nil.

Amendment of the SPE Regulation

(a) the nature of the right

A person's right to own property is protected in Queensland. A person must not be arbitrarily deprived of their property. The right to property is subject to an internal limitation because the deprivation of property must not be arbitrary in the sense that it must not be capricious, unpredictable or unjust or otherwise disproportionate to the legitimate aim that is sought. The right to property protects the right of all persons to have the right to own property alone or in association with others. Property is likely to include all real and personal property interests recognised under general law and may include some statutory rights.

The right to recognition and equality before the law provides that every person has the right to recognition as a person before the law, has the right to enjoy his or her human rights without discrimination, is equal before the law and is entitled to the equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination.

Rights in criminal proceedings protects a person charged with a criminal offence to be presumed innocent until proven guilty according to law and is entitled without discrimination to receive certain minimum guarantees, including the right of accused persons to be informed of the nature and reason for a charge and to defend themselves personally or through legal assistance. This imposes on the prosecution the onus of proving the offence and guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt. A person has the right to appeal a conviction in accordance with the law. In Queensland a person charged with a criminal offence also has the right to have the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This right affirms the right of all individuals to procedural fairness and protects natural justice.

(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 Regulation limits the right to property by enabling the issuing of a PIN, the subsequent payment of which will deprive a person of their monies. Further, if a person fails to pay a PIN, they may be subject to enforcement action under the SPE Act. This may include, among other things, suspension of a person's driver licence, vehicle immobilisation or seizure and sale of property.

In this respect, the right to recognition and equality before the law may also be limited because this situation may disproportionately impact on the rights of individuals that have reduced capacity to pay a fine. Participants in the building and construction industry range from multinational companies to small family businesses and sole traders, all of which have varying levels of business and financial acumen. The SPE Regulation sets discrete PIN amounts with no discretion for regulators to recognise to particular circumstances of an individual who has committed an offence. This may result in an unfair outcome for the imposition of a PIN on a small business or sole trader as opposed to a principal contractor with a high level of industry sophistication and means to pay.

The right to fair hearing may be limited because a person issued with a PIN is issued a penalty for committing an offence without having a court or tribunal decide the charge. However, a person may choose to challenge the offence or penalty imposed in a PIN in court where they will receive the benefit of a fair hearing. As such, any limitation on this right is minor in nature.

The rights in criminal proceedings may be limited because a person issued with a PIN becomes liable for a penalty for committing an offence without a trial and the rights that accompany a criminal proceeding. However, a person may choose to challenge the offence or penalty imposed in a PIN in court where they will receive the benefit of a trial and the rights that accompany a criminal proceeding. Further, when a PIN is issued for an offence under the BIFOLA Act, no finding of guilt is made in respect to the alleged offence. As such, any limitation on this right is minor in nature.

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

There is a requirement to regulate the building and construction industry to uphold the maintenance of proper standards, fair payment and contracting practices and consumer confidence. This objective is consistent with a free and democratic society based on human dignity, equality and freedom. The option to issue a PIN provides the boards and QBCC with a further avenue through which they may enforce regulatory compliance with the relevant legislation. Fines are a viable punitive option for responding to minor or first offences and complement a flexible, facilitative regulatory approach.

The purpose of the Regulation is to implement effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the criminal courts in Queensland while maintaining the right to a fair hearing and a person's rights in criminal proceedings.

The Regulation will support compliance with the building legislation by ensuring there is an efficient system for issuing and enforcement fines. If the offences were not prescribed as infringement notice offences, the threat of enforcement may be less credible due to the cost to regulators associated with court proceedings. In this respect, the limitation through enforcement also acts as a deterrent to offenders and individuals that might otherwise consider offending in the same way.

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

The regulators utilise a range of responses to facilitate compliance with the building and construction legislation. Education, training and stakeholder engagement activities help promote awareness and understanding of a person's obligations under the BIFOLA Act, which contributes to greater compliance. A facilitative approach in the first instance will ensure people are not penalised for inadvertent noncompliance with the new reforms. For the new trust account framework under the BIF Act—one of the more significant changes for industry—the phased commencement will help equip smaller operators to prepare for the reforms, with full implementation of trust accounts for eligible contracts valued at \$1 million or more not occurring until 1 January 2023.

However, when noncompliance arises as a result of negligence or wilful misfeasance, a more punitive response may be warranted to deter recidivism and provide the industry and community with confidence that deliberate offending behaviour will be addressed.

Less restrictive enforcement responses available to the regulators include warnings or reprimands, agreed undertakings, the imposition of conditions on a person's licence or registration, and referral to the Queensland Civil and Administrative Tribunal. But there are few alternatives for lower level offending that warrants a greater sanction involving a financial penalty. An option which could potentially be considered less restrictive is to prosecute these offences through a court. Under the *Penalties and Sentences Act 1992*, a court is required to take into account the financial circumstances of the offender and the nature of the burden that payment of the fine will have on the offender before imposing a fine. But this approach would impose a significant additional burden on the courts and would not provide an immediate or effective enforcement response to the conduct due to the delays and resource considerations involved.

A further option would be to reduce the fine amounts associated with each offence prescribed under the SPE Regulation. However, the amounts are likely less than a court would impose, and to lower them further may result in some individuals factoring potential fines into the cost of doing business, which would not provide a sufficient disincentive to achieve the purpose of ensuring compliance with the building legislation. The fine amounts are also considered proportionate to the risk created by the offending behaviour. For example, administrative offences, such as those under the *Building Act 1975*, attract lower penalties consistent with comparable existing offences (such as sections 143, 147 and 148), while more serious contraventions of the BIF Act, such as those relating to the misuse of a beneficiary's money, are set at 20 penalty units.

Importantly, once a PIN has been issued to a person, there are several protections built into the SPE Act, including the ability for persons to elect to have the matter heard in court at various stages of the process. Further, there are supports and options available to assist persons who are experiencing hardship and unable to pay their fines. These protections ensure enforcement action such as the immobilisation of vehicles or seizure and sale of property would only occur infrequently. Accordingly, issuing a PIN will not lead to the deprivation of property on an arbitrary basis and is unlikely to limit a person's right not to be arbitrarily deprived of their property. These safeguards also reduce the extent to which the issuing of a PIN limits the right to recognition and equality before the law.

(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 nature and extent of the limitations on human rights are minor and are adequately addressed through existing safeguards in the SPE Act including the ability to elect to challenge a PIN in court, the ability to appeal enforcement orders and mechanisms that allow individual circumstances to be taken into account and alternative methods of satisfying the debt to be agreed, including instalment plans and work and development orders.

For this reason, it is considered the balance between protecting consumer and industry participants and ensuring an effective enforcement system for the new BIFOLA Act offences outweighs the potential negative impact on the outweighs any limitations on the right to

recognition and equality before the law, right to property, fair hearing and rights in criminal proceedings., and as a result, any limitation to be reasonable and demonstrably justified.

(f) any other relevant factors

Nil.

Conclusion

I consider that the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020* is compatible with the *Human Rights Act 2019* because while it does limit, human rights, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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