

Building Industry Fairness (Security of Payment) Act 2017

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* (HR Act), I, the Honourable Mick de Brenni MP, Minister for Energy, Renewables and Hydrogen and Minister for Public Works and Procurement, provide this human rights certificate with respect to the Proclamation - *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) made under section 2 of the BIF Act.

In my opinion, the Proclamation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Section 2 of the BIF Act as amended by the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (BIFOLA Act) requires certain provisions of the Act to commence on a day to be fixed by proclamation, including the provisions within Chapter 9, Part 1, divisions 1 to 4. These divisions provide for the phased application of the new trust account framework (framework), which was inserted into the BIF Act primarily by section 63 of the BIFOLA Act. The framework replaced the former Project Bank Account (PBA) model under existing Chapter 2 of BIF Act with a more streamlined trust model.

The first phase of the framework began on 1 March 2021 and applies to eligible Queensland Government contracts valued between \$1 million and \$10 million (Phase 1B). These kinds of contracts used PBAs.

A Proclamation was made on 27 August 2020 and notified on 28 August 2020 (SL No. 159 of 2020) to fix the commencement dates of the later phases as follows:

- Chapter 9, part 1, division 1 commenced on 1 July 2021 [expansion to Queensland Government and Hospital and Health Services contracts valued at \$1 million or more (Phase 2A)].
- Chapter 9, part 1, division 2 commenced on 1 January 2022 [expansion to eligible private sector, local government, statutory authority, and government-owned corporations' contracts valued at \$10 million or more (Phase 2B)].
- Chapter 9, part 1, division 3 commences on 1 July 2022 [expansion to eligible private sector, local government, statutory authority, and government-owned corporations' contracts valued at \$ 3 million or more (Phase 3)].
- Chapter 9, part 1, division 4 commences on 1 January 2023 [expansion to all eligible contracts valued at \$1 million or more (full implementation) (Phase 4)].

A health check was undertaken of industry readiness before the framework expanded to the private sector on 1 January 2022. The health check found that the sector was broadly ‘ready’ for Phase 2B implementation, but some challenges exist for subsequent phases.

In light of the findings of the health check, the ongoing impacts of the COVID-19 pandemic, market capacity in the industry and, most recently, the significant natural disaster events in South-East Queensland, government approved an extension of the commencement dates for Phases 3 and 4 of the framework by nine months respectively. This will mean that Phase 3 will now commence on 1 April 2023 and Phase 4 on 1 October 2023.

This extension will allow more time for industry stakeholders to prepare and for government to better support industry with the transition.

The objective of the Proclamation is to replace the existing commencement dates for Phases 3 and 4 specified in the Proclamation made on 27 August 2020, with new dates that provide an additional nine months respectively. Another Proclamation will repeal the Proclamation made on 27 August 2020.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2, HR Act)

In my opinion, the human rights under the HR Act that are relevant to the Proclamation are:

- *Section 24- Property rights*
Extending the commencement dates could temporarily reduce protections for subcontractors who otherwise would have fallen within the framework in the coming months.

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

(a) the nature of the right

This right recognises that all persons have the right to own property alone or in association with others and a person must not be arbitrarily deprived of the person’s property.

(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 proposal to extend the commencement dates of Phases 3 and 4 of the framework could temporarily reduce protections for subcontractors who otherwise would have fallen within the framework in the coming months. However, this possible impact is justified as the extension will offer a smoother rollout for industry generally, which will in turn benefit subcontractors. Additionally, subcontractors can continue to utilise other security of payment protections including adjudication, subcontractors’ charges and payment withholding requests.

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

The health check of the framework found that some challenges exist for successful implementation of the next phases. The extension will allow more time for industry stakeholders to prepare and for government to better support industry with the transition. Measured and appropriate implementation of the framework will ensure the benefits can be fully realised.

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

There are no other less restrictive ways to achieve the purpose. For example, a less restrictive way would be commencing Phases 3 and 4 as currently scheduled. However, this does not achieve the purpose of the framework, because smaller contractors may not smoothly transition to the new requirements in the present timeframes. The extension will provide more time to manage and address the identified challenges for the framework, apply learnings from Phase 2B and allow these contractors to focus on recovery efforts.

(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

On balance, I consider that the importance of providing more time for smaller industry stakeholders to prepare, and for government to better support industry with the transition, outweighs any potential impact on the subcontractors right to property. Additionally, there are other security of payment protections including adjudication, subcontractors' charges and payment withholding requests that the subcontractors can use when required.

Conclusion

I consider that the Proclamation is compatible with the *Human Rights Act 2019* because it may impact a human right, but that impact is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

THE HONOURABLE MICK DE BRENNI MP
MINISTER FOR ENERGY, RENEWABLES AND HYDROGEN
MINISTER FOR PUBLIC WORKS AND PROCUREMENT

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