

Building Amendment Regulation 2022

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 Building Amendment Regulation 2022* (Amendment Regulation) made under the *Building Act 1975* (Building Act).

In my opinion, the Amendment Regulation 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

The Building Act, among other things, establishes the inspection and documentation requirements for the assessment and certification of building work as well as regulation of building certifiers. Section 10 and Chapter 4, Part 2, Division 2 of the Building Act prescribes the functions of building certifiers and private building certifiers, which includes carrying out building assessment work at particular stages of the building inspection and certification process.

The *Building Regulation 2021* supports the objectives of the Building Act and prescribes, among other things, matters relevant to the performance of building certifying and private certifying functions and the licensing of building certifiers.

The *Building Regulation 2021* commenced on 1 September 2021, remaking the expired *Building Regulation 2006*. The *Building Regulation 2021* generally preserved the matters prescribed in the *Building Regulation 2006*. For a single detached class 1a building such as a house, this includes giving a certificate in the approved form for the stage of building work that is after excavation of foundation material and before the footings for the building are laid.

Section 44 of the *Building Regulation 2021* defines the stages of assessable building work, for a single detached class 1a building and class 10 building or structure, that must be inspected. Section 44(1)(b) provides for a single detached class 1a building the mandatory stages of inspection include:

- i) after excavation of foundation material and before the concrete for the footings, or slab, for the building are poured (excavation stage);
- ii) if the building is to have footings—after the placement of formwork and reinforcement for the footings but before the concrete for the footings is poured (footing stage);
- iii) if the building is to have a slab—after the placement of formwork and reinforcement for the slab but before the concrete for the slab is poured (slab stage); and

vii) the final stage (after all aspects of the work are completed).

Section 46 of the *Building Regulation 2021* prescribes that a certifier can sign a certificate of inspection for a single detached class 1a building and class 10 building or structure. Consistent with the stages of assessable building work in section 44(1)(b)(i), (ii) and (iii), section 46 is intended to require a building certifier to sign the certificate of inspection for the excavation, footings and/or slab stages.

Currently section 46 of the *Building Regulation 2021* is unclear about whether a building certifier can sign a certificate of inspection for the excavation stage. The Amendment Regulation clarifies a building certifier may sign a certificate of inspection for the excavation stage, footing stage and/or slab stage.

Section 51 of the *Building Regulation 2021* prescribes who can inspect stage of assessable building work, which includes a certifier or a competent person.

Section 52 of the *Building Regulation 2021* prescribes the inspection procedure if a person inspects a stage of assessable building work. It is intended that section 52(4) enables the certifier to sign a certificate of inspection for certain stages of assessable building work, without personally inspecting the stage, if they rely on aspect inspection certificates for all aspects of the stage. Section 52(5) is intended to require the certifier to personally inspect the final stage of work, by preventing them from solely relying on aspect inspection certificate for all aspects of this stage of work.

Representatives of the building industry have identified that the current drafting is ambiguous, and it is arguable that a certifier may be required to personally inspect the excavation, footing and/or slab stages as well as the final stage of work. The Amendment Regulation aims to clarify the policy intent by amending section 52 subsections (4) and (5) to clarify that multiple aspect certificates can be relied upon for all stages of assessable building work, other than the final stage of work, for a detached class 1a building and relevant class 10 buildings and structures. It should be noted, the building certifier's obligation to sign the certificate of inspection for the excavation, footings, slab stages as well as the final stage of work under section 46(2) will be retained.

Under section 163(1) of the *Building Act 1975* and section 84 of the *Building Regulation 2021* private certifiers are required to hold Professional Indemnity Insurance (PII) as a condition of their licence. Until August 2019, this PII was required to be exclusion free. In response to a contracting PII market, caused in part by the use of combustible cladding, the now expired *Building Regulation 2006* was amended in August 2019 to temporarily permit private building certifiers to be licensed if they hold PII with certain cladding-related exclusions. On 17 September 2020, the now expired *Building Regulation 2006* was amended to extend the exemption period in which PII could be obtained with cladding exclusions by an additional 12 months. The current exclusion period ends on 30 June 2022.

In 2021, measures, such as the accreditation of professional standard schemes or PII with cladding exclusions in certain circumstances, were implemented to address the PII issues. However, there has been insufficient time to assess the effectiveness of these measures and

until this occurs industry faces uncertainty about being able to acquire compliant and affordable PII.

The Amendment Regulation seeks to extend the exemption period by an additional 12 months, from 30 June 2022 to 30 June 2023. This will allow building certifiers to continue to be licensed where they have exclusions for external cladding work in their PII policies.

Amendments will clarify that the proposed exemption will apply to licences with the exemption until the licence expires, providing the licence is current when the exemption period ends. For example, where an exempt and current licence was due to expire on 8 September 2023, the PII cladding exemption would apply beyond the 30 June 2023 deadline until the licence expires on 8 September 2023.

Human Rights Issues

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

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

- Freedom of expression (section 21)
- Property Rights (section 24)
- Privacy and reputation (section 25).

I am of the view that the Amendment Regulation promotes (and does not limit) these human rights for the following reasons:

- The Amendment Regulation enhances the right to life through requirements that will clarify when and how building inspections must take place. Providing clarity regarding roles and responsibilities during the inspection process will help to ensure that inspections are undertaken and certified by appropriately qualified individuals. This will assist in assuring the safety and quality of building work. Clarifying that building certifiers may rely on aspect inspection certificates without a certifier present does not limit this right because an individual must be assessed as a competent person to provide an aspect inspection certificate. Competent persons are required to meet particular competency benchmarks under the *Building Regulation 2021*. These benchmarks include being a Registered Professional Engineer of Queensland for inspecting the reinforcement of footings, formwork and reinforcement of a slab, or a cadastral surveyor to assess boundary clearances. Other competent persons involved in the inspection of other aspects must meet the assessment requirements for competent persons under the *Building Regulation 2021* and be appointed in line with requirements under the guideline for the assessment of competent persons. The amendments will reflect the policy intent of the *Building Regulation 2006* and *Building Regulation 2021* which was to clarify inspection requirements and only require the building certifier on-site at the final stage of inspection, providing competent persons are appropriately relied on.
- The Amendment Regulation also enhances the right to freedom of expression by ensuring eligible private certifiers can still obtain a licence to perform private certifying functions where they hold PII that has an exemption for external cladding work. If the exemption period is not extended, it is unlikely that private certifiers will find affordable and exclusion-free insurance cover due to ongoing concerns about safety

risks associated with combustible cladding. The Amendment Regulation enables private certifiers to continue to seek out and express information through lawfully performing certification work.

- The Amendment Regulation enhances the property rights of private certifiers by enabling them to retain their licence and remain employed while applying reasonable limitations on their ability to be insured for work on external cladding.

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

(a) The nature of the right

Property Rights (section 24 of the HR Act)

Section 24 of the HR Act provides the right of all persons to own property (alone or with others) and that people have a right to not be arbitrarily deprived of their property. Property may include all real and personal property interests recognised under general law such as (e.g. interest in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). Public entities may be obliged to take measures to prevent the unlawful deprivation of property occurring.

Clause 5(1) and (2) of the Amendment Regulation extends the period in which private building certifiers may have an exclusion in their PII policy for a further twelve months, to 30 June 2023. The amendment enables private building certifiers to renew a license or apply for a new licence with an exclusion relating to external cladding work.

If the exclusion didn't apply, private building certifiers would have difficulty obtaining PII and they could not meet the legislative requirements to obtain a licence with endorsement to perform private certifying functions. As a result, property owners may be impacted by delays and be unable to access their property where building work cannot be inspected and approved.

The Amendment Regulation limits some certifying functions allowed under a licence solely related to the use of external cladding. However, the exemption permits all other certifying functions to be performed to keep building projects progressing which ensures that people are not deprived of their property.

Right to Privacy and Reputation (section 25 of the HR Act)

Section 25 of the HR Act protects a person's right to not have their privacy and reputation unlawfully or arbitrarily interfered with. The right protects privacy relating to personal information, data collection and correspondence. The notion of arbitrariness in the context of the right carries a particular human right meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.

By extending the exemption period, Clause 5(1) and (2) and Clause 6 of the Amendment Regulation permit the Queensland Building and Construction Commission (QBCC) to collect information about a building certifier's PII cover for an additional 12 months. This includes the collection of information regarding whether their insurance policy covers the performance

of certifying functions related to external cladding. Access to this information is necessary for the QBCC to assess whether an individual may acquire a new private certifier licence or have an existing licence renewed within the extended exemption period.

Clause 5(1) and (2) may limit a person's right to privacy by extending the period in which a licence application can be made with a PI cladding exemption which will extend the length of time that information can be collected.

- (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

Property Rights (section 24 of the HR Act)

The purpose of the limitation to exclude PII coverage for work on external cladding is to ensure private building certifiers can remain licenced and continue to work. While the Amendment Regulation limits some certifying functions, it will protect the property rights of private building certifiers by enabling them to remain licenced and continue to work which will in turn preserve their dignity, equality and freedom. It will also preserve the dignity, equality and freedom of consumers such as building owners who are reliant upon building certifiers to complete inspections and approve building work.

Right to Privacy and Reputation (section 25 of the HR Act)

The purpose of the limitation is to enable the QBCC to assess an application for renewal or a new licence where a building certifier has the required PII cover with an exclusion for external cladding. The QBCC requires access to information regarding an applicant's insurance policy and coverage to assess their eligibility for a licence as permitted by the exemption during the exemption period.

This purpose is consistent with the right to freedom of expression (protected under section 21 of the HR Act), where individuals have the right to freely seek, receive and impart information and ideas. The purpose of the limitation enables private building certifiers to express information by performing work where the exemption permits them to remain licenced with cladding-related exclusions. This purpose is consistent with a free and 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

Property Rights (section 24 of the HR Act)

The limitation on property rights helps to achieve the purpose by allowing private building certifiers to continue to hold PII with an exclusion for work related to external cladding. The exclusion enables individuals with prescribed PII to renew or apply for a licence during the extended exemption period and perform private certifying functions. All other private certifying functions can be performed by the building certifier and the limitation on their insurance policy only applies to work on external cladding. The limitation achieves the purpose

by allowing certifiers to hold a licence and to continue to perform private certifying functions which will protect consumers from being deprived of their property.

Right to Privacy and Reputation (section 25 of the HR Act)

The limitation on the right to privacy is necessary to allow the QBCC to adequately assess licence applications by considering whether an applicant's PII coverage is subject to exclusions for external cladding.

In accordance with section 163 of the *Building Act 1975*, the QBCC must determine whether the building certifier meets the insurance requirements for private certification endorsement. Under section 84 of the *Building Regulation 2021*, the QBCC is required to collect information regarding applicant's PII to ensure they are eligible for a licence.

The information is collected by the QBCC to ensure that appropriately qualified and experienced building certifiers perform certifying functions. This in turn enhances the safety of buildings and the quality of building work.

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

Property Rights (section 24 of the HR Act)

There are no less restrictive and reasonably available ways to achieve the purpose of licencing a building certifier who is required to hold mandatory PII.

The Amendment Regulation provides an outcome for private building certifiers that prevents much more significant restrictions on their ability to perform their job.

Uncertainty faced by building certifiers regarding their ability to obtain exclusion free PII and be endorsed to perform certifying functions remains an issue for the building and construction industry.

An extension of the exemption period will help to alleviate this uncertainty and enable building certifiers to focus on their certifying functions. The extension is especially important during the COVID-19 pandemic as certifiers face additional challenges and uncertainties. If the exclusion period is not extended, there is a risk that building certifiers may leave the profession which would have negative repercussions for the industry and impact owner's access to property.

Privacy and Reputation (section 25 of the HR Act)

There are no less restrictive and reasonably available ways to assess a person's eligibility for a licence under an extended exemption period other than by acquiring applicant's personal information relating to their PII coverage and exclusions.

Legal protections are in place to ensure that the QBCC may not collect personal information in an arbitrary or unreasonably way, when assessing an application. Information collected by the QBCC for licence applications is protected under section 110 of the *Queensland Building and Construction Commission Act 1991*. A maximum penalty of 100 penalty units applies where such information is unlawfully disclosed. Additional information privacy obligations are placed on the QBCC under section 27 of the *Information Privacy Act 2009*.

- (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

Property Rights (section 24 of the HR Act)

The extension of the exemption period allows building certifiers to continue performing most private certifying functions and ensures that people are not deprived of their property.

PII will be difficult for building certifiers to obtain without an exclusion for external cladding works. If PII could not be obtained, private building certifiers could not be licensed which would prevent them from legally performing their job. The Amendment Regulation only limits private certifying functions related to external cladding and ensures private building certifiers can still perform all other certifying functions. The limitation is expected to prevent delays and ensure that private building certifiers can continue to carry out inspections to progress building work. On balance, I consider that the limitation assists in preserving the human right of people not being arbitrarily deprived of their property.

Privacy and Reputation (section 25 of the HR Act)

The Amendment Regulation includes necessary provisions that direct the QBCC to collect personal information relating to applicant's PII coverage. This is necessary to establish that an individual holds the prescribed insurance to be licenced as a building certifier and perform private certifying functions.

I consider that ensuring building certifiers can continue to perform private certifying functions, with reasonable PII exclusions for external cladding work during the extended exemption period, outweighs the limitation on the right to privacy and reputation.

- (f) any other relevant factors

Not applicable.

Conclusion

I consider that the *Building Amendment Regulation 2022* is compatible with the *Human Rights Act 2019* because while it does limit, restrict or interfere with a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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

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