

Proclamation - 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 model and is being gradually phased in for eligible Queensland building and construction contracts between 2021 and 2023.

A Proclamation was made on 24 March 2022 (SL No. 31 of 2022) to fix the commencement dates of the remaining phases as follows:

- **Chapter 9, part 1, division 3** commences on 1 April 2023 [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 October 2023 [expansion to all eligible contracts valued at \$1 million or more (full implementation) (Phase 4)].

An assessment was undertaken of industry readiness and capability before the framework expands to the smaller eligible contracts valued at \$3 million or more and \$1 million or more. The assessment found current trustees had broad understanding of the trust account requirements including when trusts are required and how to establish and operate the trust accounts. However, it also found that some challenges exist for subsequent phases including differing levels of awareness and understanding of the framework, and lack of software packages that can fully support and facilitate compliance with the trust record keeping requirements of the framework.

Additionally, industry capacity to adapt to the framework also continues to be impacted by market-wide factors. A December 2022 Infrastructure Market Capacity report released by Infrastructure Australia indicates an overheated construction market that is working to capacity. Escalating supply costs, labour shortages and worsening productivity continues to place pressure on construction companies, suppliers and projects, and this is impacting on workforce mental health and wellbeing. These pressures are not expected to ease until 2026.

In recognition of these factors and to support successful implementation of the framework, the commencement dates for the remaining two phases are being extended by approximately two years respectively:

- Phase 3 currently scheduled to commence on 1 April 2023, **will now commence on 1 March 2025**
- Phase 4 currently scheduled to commence on 1 October 2023, **will now commence on 1 October 2025**.

This approach will provide certainty to industry regarding the ongoing commitment to security of payment and allow industry to continue planning for the remaining phases. It will also support software providers to develop accounting software to ensure software solutions are available in the market and facilitate trustee compliance.

The objective of the Proclamation is to replace the existing commencement dates for Phases 3 and 4 specified in the Proclamation made on 24 March 2022 (SL No. 31 of 2022), with new dates that provide an additional two years respectively. Another Proclamation will repeal the Proclamation made on 24 March 2022.

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 assessment of industry readiness for implementation 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 previous phases 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 made under the *Building Industry Fairness (Security of Payment) Act 2017* 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.

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

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