

Building (Private Certification Endorsement) 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* (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 for the *Building (Private Certification Endorsement) Amendment Regulation 2023* (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 Regulation 2006* (BR 2006) expired on 31 August 2021 and the *Building Regulation 2021* (BR 2021) commenced on 1 September 2021. The new regulation replicated and updated the obligations and requirements under the BR 2006 in a contemporary form.

Professional indemnity insurance

The Building Act establishes a licensing framework for building certifiers, including building certifiers who become private certifiers. Under the Building Act, an individual licensed as a building certifier may perform building certifying functions and particular additional certifying functions as a private certifier only if the Queensland Building and Construction Commission (QBCC) makes a private certification endorsement (PC endorsement) on the certifier's licence.

Under the Building Act, a PC endorsement may be made on a building certifier's licence only if the certifier has the insurance for private certification prescribed under a regulation. Further, under the Building Act, a PC endorsement may be continued for a building certifier's licence that is renewed only if the certifier has the insurance for private certification prescribed under a regulation.

Until August 2019, the professional indemnity insurance (PII) prescribed for private certification under the BR 2006 was required to be free of exclusions. However, in recent years, the certification profession globally has experienced difficulties in obtaining affordable exclusion-free PII. The use of combustible external cladding has contributed to these issues.

To address these issues and support industry, in August 2019, the BR 2006 was amended to allow the QBCC to make a PC endorsement on a building certifier's licence even if the certifier held PII with exclusions for private certifying functions related to external cladding that does not comply with relevant laws and standards (non-compliant cladding). The exemption for the PII (PII exemption) applied for a limited time (the exemption period) which was to end on 30

June 2021. The amendments allowed private certifiers to perform all private certifying functions during the exemption period while the PII exemption applied to them.

The issues relating to the availability and affordability of exclusion-free PII persisted in 2020, so the BR 2006 was again amended to extend the exemption period until 30 June 2022. The regulation amendments not only extended the exemption period; they also established provisions that provided that if a PC endorsement was made on a certifier's licence during the extended exemption period and the licence was still in force at the end of that period (on 30 June 2022), the certifier could continue to rely on PII with cladding-related exclusions after that date until their licence expired.

The BR 2021 effectively replaced the BR 2006 on 1 September 2021.

In 2022, the challenges faced by building certifiers in acquiring affordable exclusion-free PII continued to persist, so the BR 2021 was amended to extend the exemption period until 30 June 2023.

A report prepared for the Department of Energy and Public Works (DEPW) by PriceWaterhouseCoopers Australia (PwC report) on PII arrangements for building certifiers in Queensland, dated 15 December 2022, indicates that after a significant drop in building certifier licence applications identified in 2019, there has been a stabilisation in the number of licences. The report asserts that this stabilisation may have been assisted by the introduction of the temporary legislative reforms allowing private certifiers to perform private certifying functions while holding PII with cladding-related exclusions.

It was believed that raising standards in the construction industry through the introduction of the Australian Institute of Building Surveyors Professional Standards Scheme (PSS) in 2021 might reduce further increases in PII costs. However, the PwC report asserts that despite efforts to increase these standards, PII costs continue to rise.

Further, the PwC report asserts that exclusion-free policies are unlikely to be readily attainable and affordable after the current extended exemption period expires on 30 June 2023.

Given it is likely that the PII market will not improve in the short term, the exemption period has been extended by the Amendment Regulation for a further 2 years, to 30 June 2025. Building certifiers continue to work in an uncertain market partly due to the ongoing impacts of the COVID-19 pandemic. If the exemption period had not been extended, the risk of certifiers leaving the industry would have increased.

The Queensland Government is continuing to work with industry and other jurisdictions, including the Australian Government, to consider market constraints impacting building industry professionals. The extension will provide certainty and stability for industry while governments investigate other options to respond to the PII market challenges.

The extension of the exemption period for another 2 years until 30 June 2025 will ensure a private certifier can continue to perform all private certifying functions, while holding PII with cladding-related exclusions, until at least 30 June 2025.

Whether a private certifier chooses to perform private certifying functions directly related to non-compliant cladding, while holding PII with cladding-related exclusions, is a business decision. Currently, only a small number of private certifiers perform private certifying functions directly related to non-compliant cladding. Most, if not all, of those certifiers hold PII that does not include cladding-related exclusions. The PII they hold has been obtained in challenging circumstances at significant expense.

The Amendment Regulation will ensure that if the PII exemption for cladding applies for a private certifier and their licence is in force when the exemption period ends (30 June 2025), the exemption will continue to apply for the certifier after that date until the end of the 1-year period after the licence was granted or last renewed, unless the licence is earlier cancelled, suspended, amended or surrendered. So, for example, if the licence was renewed on 8 September 2024, the exemption will apply for the certifier until 8 September 2025, unless the licence is earlier cancelled, suspended, amended or surrendered, even though the exemption period will end on 30 June 2025.

New course on issuing building development approvals

Under the Building Act, the QBCC may make a development approval endorsement (DA endorsement) on a private certifier's licence, allowing the certifier to issue a building development approval (BDA) as a private certifier, only if the certifier has, among other things, satisfactorily completed a course about issuing BDAs prescribed under a regulation. The BR 2021 currently prescribes a course on issuing BDAs.

However, the provider of the course currently prescribed has deregistered as a registered training organisation and has not delivered the course since February 2022. Since then, there has been no pathway for a private certifier to obtain a DA endorsement for their licence. A new course on issuing BDAs offered by a new course provider has been selected following a tender process.

Amendments of the BR 2021 prescribe the details of the new course and its provider to ensure a private certifier will have the option to enrol in the course. If the certifier satisfactorily completes the course, they will be eligible to apply for a DA endorsement allowing them to issue BDAs.

The amendments ensure that even though the course on issuing BDAs that was prescribed under the BR 2021 (the old course) is no longer offered and no longer prescribed, the QBCC will be allowed to make a DA endorsement on a private certifier's licence if, among other things, the certifier satisfactorily completed the old course when it was offered and prescribed, rather than the new course.

Human Rights Issues

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

The Regulation Amendment does not limit or otherwise affect human rights protected under Part 2, Division 2, HR Act.

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

The Regulation Amendment is consistent with the provisions set down in section 13, HR Act, that human rights may be subject under law only to reasonable limits.

Conclusion

I consider that the *Building (Private Certification Endorsement) Amendment Regulation 2023* is compatible with the *Human Rights Act 2019* because it does not limit human rights.

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

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