

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

Statement of Compatibility

FOR

Amendments during consideration in detail moved by the Honourable Michael de Brenni MP

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (Human Rights Act), I, The Honourable Michael de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport make this statement of compatibility with respect to the amendments to be moved during consideration in detail (the amendments) for the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (the Bill).

In my opinion, the amendments to the Bill are compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the amendments

The amendments to the Bill will:

1. implement the recommendations of the Transport and Public Works Committee (the Committee) Report No. 36 in relation to the Bill;
2. provide flexibility in the commencement of the Bill, including through a new implementation phase of the trust account framework;
3. make amendments to:
 - the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) amendments in the Bill to clarify the operation of some provisions;
 - the *Queensland Building and Construction Commission Act 1991* (QBCC Act) to facilitate the introduction of a proposed new fire protection licensing framework; clarify key fire protection definitions; and extend the temporary exemption period for carrying out particular building work following the introduction of a new licence.

Committee Report

Following its examination of the Bill, including 23 public submissions, the Committee tabled its report on 20 March 2020. It made 12 recommendations in relation to the Bill, as follows:

1. The Bill be passed;
2. That the Minister for Housing and Public Works review all definitions identified by stakeholders as having ambiguities and amend the legislation as appropriate;
3. That the Bill be amended to include measures to prevent the use of multiple contracts on the same or adjacent land in relation to contracts for small scale residential construction work;
4. That the Bill be amended to make it clear which parties are intended to be excluded by the exemption allowed in proposed new section 15E;
5. That the terms used in proposed new section 15F be reviewed to ensure the intent is clearly articulated and amended as considered appropriate;
6. That clause 63 of the Bill (proposed new section 20) be amended to ensure that the account nominated by the subcontractor must be under the control of the subcontractor;
7. That the Bill be amended to ensure that all relevant contractors are protected by the trust regime;
8. That both the need for and location of proposed new section 55B (6) of the Bill be reconsidered and that the Bill be amended accordingly;
9. That section 42 and schedule 1A(8) of the QBCC Act be amended to omit the exemption allowing an unlicensed person who enters into a contract to carry out building work, does not contravene section 42(1) merely because the person entered into the contract, if the building work is to be carried out by a person (an appropriately licensed contractor) who is licensed to carry out building work of the relevant class;
10. That the QBCC Act be amended to include 'passive fire work' in the definition of 'fire protection' during consideration of the Bill;
11. That the Minister for Housing and Public Works considers undertaking a review of the role of property developers in the building and construction industry including consideration of the impact of their financial and operational capacity, ethical behaviour, and work practices.
12. That the review detailed in Recommendation 11 be conducted that it be conducted in consultation with industry stakeholders, and the Minister for Housing and Public Works should report the findings of the review by 1 July 2021.

The government response to the Committee's report accepts recommendations 1 to 11 in full and recommendation 12 in principle. Industry consultation will be critical to the review of property developers and the timing must be sensitive to the ongoing impacts of COVID-19 on industry. Therefore, it is intended that the outcome of the review be tabled in the Legislative Assembly as soon as practicable after the review is completed.

The amendments to the Bill give effect to the government's response to the Committee report.

Commencement of the Bill

In response to the COVID-19 crisis and to support industry readiness, the amendments to the Bill provide for most provisions to commence by proclamation. Additionally, the amendments limit the initial application of the new trust account framework to align with the application of project bank accounts now i.e. to government building contracts valued between \$1 million to \$10 million only.

Amendment of the BIF Act

The amendments to the BIF Act provisions of the Bill are largely of a minor or technical nature to address drafting issues and ensure drafting consistency, support implementation of the trust account framework, and respond to stakeholder feedback. For example:

- references to ‘financial institution’ and ‘approved financial institution’ have been amended to provide greater consistency and clarity;
- the requirement under new section 51 of the BIF Act for trustees to notify the Queensland Building Construction Commission (QBCC) when making a ‘top-up’ payment into a trust account has been removed. This provision sought to ensure the QBCC was alerted to instances where there are insufficient amounts in a trust account, because this may be an early indicator of financial distress. However, based on stakeholder feedback, it is considered that other notification requirements in the Bill achieve this intent; and
- the provision of an account review report to the QBCC has been streamlined. The amendments require an auditor to provide the report directly to the QBCC, rather than to the trustee who must then provide a copy to the QBCC.

Amendment of the QBCC Act

The Committee recommended amendments to address the licensing requirements for passive fire protection work. This issue was also been raised through work of a Ministerial Construction Council (MCC) subcommittee tasked with making recommendations to modernise and simplify existing QBCC fire protection licences. To support implementation of the MCC’s proposed new licensing framework, further amendments to the Bill—in addition to those recommended by the Committee—will ensure the necessary work is regulated and that key fire protection definitions under the QBCC Act operate as intended.

The amendments to the Bill also extend the period, following the introduction of a new licence class, during which persons who previously performed the work unlicensed may continue to do so. If a person has applied for the new licence within six months after it being introduced, they may continue to operate for up to 12 months pending the QBCC’s decision on the licence application. This will support future changes to the licensing framework and minimise disruption for industry.

A further amendment will clarify that a condition imposed on a licence under section 35 of the QBCC Act may include a condition limiting the scope of work the applicant may perform, if the licence is a new class of licence and the applicant is unable to demonstrate competence in all of the scope of work for the licence.

Human Rights Issues

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

In my opinion, the human rights that are relevant to the amendments are:

Amendment of the QBCC Act

- Right to life (section 16 of the Human Rights Act) (amendments 50, 57 and 58)

- Right to liberty and security of person (section 29 of the Human Rights Act) (amendment 50, 57 and 58).

Amendment of the BIF Act

- Privacy and reputation (section 25 of the Human Rights Act) (amendment 27).

The **right to life** protects the right not to be arbitrarily deprived of life. This right includes an obligation on the State to take steps to protect the lives of individuals. The right to life imposes both positive and negative duties on public entities. This means public entities need to refrain from taking someone's life (a negative duty). They also need to act to protect people from real and immediate risks to life (a positive duty).

The **right to liberty and security of the person** protects the personal physical liberty of all persons, including the right not to be arrested or detained except in accordance with the law. The fundamental value which the right to liberty and security expresses is freedom, which is acknowledged to be a prerequisite for equal and effective participation in society. The right to security requires the State to take reasonable measures to protect a person's security (both physical and mental).

The **right to privacy and reputation** protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. It protects privacy in the personal sense (and in the sense of personal information, data collection and correspondence) but also extends to an individual's private life more generally.

For the reasons outlined below, I am of the view that the amendments are compatible with each of these human rights.

If human rights may be subject to limitation if the amendments are passed – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 Human Rights Act 2019)

Amendment of the QBCC Act

Right to life and right to liberty and security of person (sections 16 and 29 of the Human Rights Act)

(a) The nature of the right

The right to life and the right to liberty and security of person place a positive obligation on the State to ensure that measures are in place to protect life and ensure the physical safety of those who are in danger of harm. For example, effective criminal law and law enforcement provisions. This protective obligation extends to requiring authorities to put in place measures that would protect an individual whose life is being put at risk by another's criminal activity. The QBCC Act addresses this right by regulating the building industry to ensure the maintenance of proper standards in the industry. This protects the right to life and the right to liberty and security of persons who live and work in Queensland's buildings.

Amendments 50, 57 and 58 will facilitate the introduction of a proposed new fire protection licensing framework and address legislative ambiguity around key fire protection definitions. In some respects, the amendments support the right to life. For example, the new definition of ‘fire protection equipment’ clarifies that a licence is always required regardless of the extent of the work being carried out. Also, including a broader range of passive fire protection work (such as the installation of fire or smoke wall) under this definition means that work of any value must be performed by a suitably qualified fire protection occupational licensee. This will help ensure the maintenance of proper standards in the industry to protect public health and safety.

However, there may be a view that amendments 50, 57 and 58 limit the right to life and right to liberty and security by deregulating certain aspects of fire protection work, namely the: installation, restoration, repair or maintenance of fire blankets; development, approval or certification of emergency evacuation procedures for a controlled evacuation during a fire emergency; and formulation or provision of alternative solutions relating to fire safety. This is because the work will no longer be carried out by a QBCC licensee.

The amendments also make clear that fire protection work does not include installation of a battery-operated smoke alarm in a domestic dwelling. While this amendment is intended to clarify the licensing requirements in line with current industry practice, it could be seen as deregulation.

- (b) The nature of the purpose of the limitation to be imposed by the amendments if passed, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Providing high quality fire protection standards is crucial to ensuring the safety of occupants within buildings. This is achieved, in part, through a rigorous and fit for purpose licensing framework that ensures that work meets best practice building and construction standards.

Queensland’s existing fire protection licensing framework is complex, with 25 classes of fire protection licence and 57 subclasses, and many licensees required to hold multiple licences to undertake similar scopes of work. The purpose of the amendments is to address those complexities by introducing a new and more streamlined framework which simplifies the licensing process, while maintaining and enhancing public health and safety standards by ensuring that work is carried out by suitably qualified and experienced individuals. The amendments to the Bill will also remove barriers to compliance with the fire protection laws and standards through reduced costs for consumers who would otherwise be required to engage a licensed contractor to carry out low-risk work, reduced licensing costs for industry participants, and eliminating overlap between different legislative schemes.

Protecting the health and safety of its citizens is a fundamental responsibility of the State and is consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) The relationship between the limitation to be imposed by the Bill amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The purpose of the amendments is to simplify the fire protection licensing framework, while maintaining and enhancing public health and safety standards. The national ‘Building Confidence’ report highlighted the need for a strong regulatory framework for fire safety,

including mandatory registration of fire safety practitioners and greater oversight of the installation and certification of fire safety systems.

Through the Queensland Building Plan 2017, the government committed to investigate rationalising the fire protection licensing framework established by the QBCC Act and supporting regulations. A subcommittee of the MCC, comprising key representatives from the fire protection, building, plumbing, engineering and electrical sectors, was established to work with government to deliver on this commitment. The MCC subcommittee identified opportunities to remove duplicate and redundant licence classes and these are reflected in the proposed new fire protection licensing framework.

Therefore, the amendments to deregulate certain aspects of fire protection work are rationally connected to the purpose of simplifying the fire protection licensing framework. Any limit to the right to life or right to liberty and security by deregulation allows for the framework to operate more effectively and removes barriers to noncompliance.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

The amendments are the least restrictive and most reasonable way of achieving the purpose as stated above. The MCC supported only deregulating work that is either very low risk or is regulated by another legislative scheme. Public health and safety are still safeguarded through the continued regulation of critical, high-risk fire protection work, for example, the installation and certification of fire sprinkler systems, fire hydrants and hose reels, and emergency warning and communication systems.

Other alternatives were considered, but they would not achieve the purpose of these amendments as effectively. For example, waiving the fees associated with the duplicate licences would not achieve the same result as removing the work from the QBCC's ambit through deregulation (i.e. addressing the complexities of the licensing framework), as it would continue to be regulated under different legislative schemes, causing confusion for industry and the community about which rules apply and duplicating regulator resources and effort.

(e) The balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The amendments will help streamline the fire protection licensing framework, reducing the costs for industry and consumers, and reducing complexity that may otherwise contribute to noncompliance. The deregulation of very low risk work or work that is regulated by another legislative scheme will also create efficiencies that allow both the regulator and industry devote more time and resources to higher risk or more productive activities.

On balance, taking into account the nature and extent of the limitation and having regard to the information and analysis detailed above, I consider that the importance of simplifying the fire protection licensing framework through reduced costs and complexity outweighs any potential limitations on the right to life and the right to liberty and security of person.

Amendment of the BIF Act

Right to privacy and reputation (section 25 of the Human Rights Act)

(a) The nature of the right

Section 25 of the of the Human Rights Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Relevantly, the right protects privacy in the sense of personal information, data collection and correspondence (as well as also extending to an individual's private life more generally). The notion of arbitrary interference extends to those interferences which may be lawful, but capricious, unpredictable, unjust or unreasonable (in the sense of not being proportionate to the legitimate aim).

The amendments to the Bill amend clause 63, new sections 57A and 57D, which provide that a trustee may be required to engage an independent auditor to review the trust accounts for compliance with the BIF Act. Presently, the Bill requires the auditor to give the trustee the original signed account review report. The trustee must then provide a copy of the report to the QBCC within 10 business days.

The amendments streamline the requirements so that the auditor must provide the account review report to the trustee and the QBCC at the same time. The amendments do not change the original intent of provisions, or the outcome i.e. that both the trustee and the QBCC are informed about the trustee's compliance with the BIF Act. However, as amendment 27 facilitates the disclosure of the trustee's information to the QBCC by another party, there may be a view that it limits the trustee's right to privacy and reputation.

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to support the QBCC's enhanced compliance and enforcement functions, as it assumes the monitoring and oversight role previously performed by principals in relation to trust accounts. Requiring an auditor to provide an account review report directly to the QBCC will reduce the obligations on the trustee. It will also reduce the risk of information being amended or withheld before it is provided to the QBCC, or not being provided at all.

The purpose of the trust account framework is also to ensure subcontractors are being paid and to avoid the significant financial and social impacts associated with insolvency, corporate collapse, and late and non-payment. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation assists in the collection of information and evidence about compliance with the trust account framework and will therefore help achieve the purpose of providing QBCC oversight of trust accounts.

- (d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

No less restrictive and reasonably available ways to achieve the purpose of the limitations have been identified. The oversight mechanisms implemented by the amendments will ensure that the QBCC can effectively perform its role as regulator and ensure compliance with the security of payment reforms. Reliance on the trustee to provide the account review report to the QBCC may not achieve the same result. Whether deliberately or not, the trustee could fail to provide some or all of the information contained in the report which would not achieve the purpose of ensuring the QBCC receives independent advice about a trustee's compliance with the BIF Act.

- (e) The balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation and having regard to the information and analysis above, I consider that the purpose of streamlining the process and improving the QBCC's oversight of trustees outweighs any potential limitations on the right to privacy.

Conclusion

In my opinion, the amendments during consideration in detail of the Bill are compatible with human rights under the *Human Rights Act 2019* because they limit human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

THE HONOURABLE MICHAEL DE BRENNI MP
MINISTER FOR HOUSING AND PUBLIC WORKS
MINISTER FOR DIGITAL TECHNOLOGY
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