

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

Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, 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 Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020.

In my opinion, the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 is compatible with the human rights protected by the *Human Rights Act 2019* (Human Rights Act). I base my opinion on the reasons outlined in this statement.

Overview of the Bill

This Bill seeks to amend a range of Acts, including to:

- amend the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) to implement the government response to the Building Industry Fairness Reforms Implementation and Evaluation report, by simplifying the trust account framework, introducing new protections for monies in dispute, and strengthening the Queensland Building and Construction Commission's (QBCC) regulatory oversight of trust accounts;
- amend the *Queensland Building and Construction Commission Act 1991* (QBCC Act) to implement the government response to the Special Joint Taskforce report and to improve licensing provisions;
- confer a range of entry and inspection powers on the respective boards governing registered architects and engineers under the *Architects Act 2002* (Architects Act) and *Professional Engineers Act 2002* (PE Act);
- amend the *Building Act 1975* (Building Act) to support owners in the building development approval process and to introduce mechanisms to improve building certifier standards, such as a demerit points system; and
- preserve external review rights made by the *Retirement Villages (Transitional) Regulation 2019* for decisions by the chief executive about a transition plan (where a retirement village scheme is to be transferred from one operator to another) under the *Retirement Villages Act 1999*.

Human Rights Issues

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

In my opinion, the human rights under the Human Rights Act that are relevant to the Bill are:

- Right to life (section 16);

- Freedom from forced work (section 18);
- Freedom of expression (section 21);
- Property rights (section 24);
- Privacy and reputation (section 25);
- Right to liberty and security of person (section 29);
- Right to a fair hearing (section 31); and
- Rights in criminal proceedings (section 32).

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

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

Freedom of expression

(a) The nature of the right

Section 21 of the Human Rights Act provides that every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information of all kinds. It protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication).

Several provisions in the Bill provide that it is an offence for a person to give another party information that the person knows is false or misleading, and therefore may interfere with the person's freedom of expression. For example, clause 138 amends the QBCC Act to create a new offence if a licensee knowingly gives a third party, such as an accountant, false or misleading information about the licensee's satisfaction of the minimum financial requirements and the information is given to the QBCC in purported compliance with the Act.

Offences also apply for providing false or misleading information to parties in the contractual chain. Clause 80 creates an offence for giving particular documents required under the BIF Act that contain false or misleading information, including a supporting statement given to a principal about subcontractor payment and a notice given to a subcontractor about a withdrawal from a trust account.

(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 limitation on the freedom of expression is to protect the public interest. Insolvency, corporate collapse and late or non-payment in the building and construction industry can have significant adverse impacts for subcontractors, business owners, employees, suppliers and the wider community. In addition to the financial effects, social impacts can include relationship breakdowns, loss of reputation and stress-related illnesses, as reported by the Special Joint Taskforce.

The Senate Economics References Committee's 2015 inquiry into insolvency in the industry (Senate Inquiry) noted that nationally the industry is burdened every year by nearly \$3 billion in unpaid debts, including subcontractor payments, employee entitlements and tax debts averaging around \$630 million a year for the past three years. Further, the industry's rate of insolvencies is out of proportion to its share of national output. Australian Securities and Investments Commission data shows that, in 2017–18, the industry had 1,642 external administrations—the second highest of any industry in the country.

The QBCC regulates Queensland's building and construction industry, including licensing conditions, building product safety, minimum financial requirements, and proper standards of building work. To ensure compliance with these requirements, and thereby protect public health and safety, the QBCC requires accurate information from licensees.

Parties in the contractual chain, particularly subcontractors, also require accurate information to ensure that contractual requirements are being met and that they will be paid for the work they perform.

Limiting the right to freedom of expression in order to protect the public interest by minimising the risk of insolvency, corporate collapse and late or non-payment, and their associated impacts discussed above, 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 helps to protect the public interest by ensuring that the QBCC can effectively target licensees that attempt to misrepresent their financial situation.

It is not uncommon for a person other than the licensee, such as an accountant, to furnish the QBCC with financial information on the licensee's behalf. In cases where the accountant unwittingly passes on false or misleading information originating from a licensee, the QBCC has limited ability to hold the licensee to account. The offence at clause 138 relating to the provision of false and misleading information (and thus limiting the freedom of expression) will help ensure the QBCC receives accurate information about a licensee's financial situation by providing a deterrent to licensee misrepresentation to a third party. This achieves the identified purpose of protecting the public interest by minimising the risk of insolvency, corporate collapse and late or non-payment.

Further, the creation of the offence relating to false or misleading information provided to parties in the contractual chain will protect these parties from being misled and safeguard subcontractor payments, thus achieving the identified purpose of protecting the public interest by minimising the risk of insolvency, corporate collapse and late or non-payment.

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

Provisions in the Bill provide safeguards to restrict the impact of the limitation. For clause 138, the application of the offence is restricted to licensees rather than any person, which is the case for when false or misleading information about the minimum financial requirements is provided directly to the QBCC.

Further, for all relevant provisions, the right to freedom of expression is only limited in restricted, specific circumstances, namely where a person knowingly gives false or misleading information. It is not intended to penalise those who are unaware the information contains genuine errors or omissions.

No less restrictive reasonably available ways to achieve the purpose have been identified.

- (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, it is considered that the importance of protecting the public interest by enabling the QBCC to detect and mitigate the impacts of potential insolvencies and corporate collapses, and to help subcontractors to ensure they are taking the necessary steps to protect their interests, outweighs the negative impact on the freedom of expression. Importantly, the provisions provide appropriate safeguards and the circumstances in which they operate are objectively ascertainable and limited only to discrete circumstances.

Freedom from forced work

- (a) The nature of the right

Section 18 of the Human Rights Act provides for the right to freedom from forced work. A person must not be held in slavery or servitude and must not be made to perform forced or compulsory labour. The term forced or compulsory labour means all work or service which is exacted from any person under the menace of any penalty and for which the person has not offered himself or herself voluntarily.

There may be a view that new section 143B(5) of the Building Act (clause 44 of the Bill), when read literally, limits the freedom from forced work, in that an owner may require a building certifier to perform additional certifying functions.

- (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 requiring the performance of additional certifying functions is to promote transparency and accountability of the builder and building certifier. Private certifiers perform a regulatory role and must act in the public interest. Strengthening the rights of consumers in the building certification process supports this requirement and encourages consumer confidence in the industry. These additional certification inspections will also increase the likelihood of defects or safety issues being detected to ensure that homes are fit and safe for living.

In Queensland, there are no rules about who may engage a private certifier. Generally, this is done by the builder, rather than the property owner, because of the need for close engagement between the builder and building certifier throughout the building development application process and the technical complexities involved. However, it means that owners have limited ability to request a building certifier to undertake inspections of the building work where are compliance concerns as this ability is currently restricted to the engaging party (i.e. the builder). Noting that the construction or renovation of a home is a significant investment and it is

important that consumers have confidence that their home complies with the relevant codes and standards, the new section 143B(5) will alleviate this restriction.

(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

Amendments in the Bill would require building certifiers to undertake additional certifying functions at an owner's request, with penalties attached for noncompliance where the building certifier does not have a reasonable excuse. Additional inspections will increase the likelihood of defects or safety issues being detected. Therefore, the limitation helps achieve the purpose.

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

A less restrictive way to achieve the purpose may be to remove the penalties associated with the provision. However, this would limit deterrence for a building certifier to not perform the additional certifying functions. The consequences of potential inaction by the building certifier, such as unsafe or defective building work, would be unfairly borne by the owner, potentially limiting their right to property. It is considered that this alternative would not achieve the purpose to the same extent as the proposed new section 143B(5).

Consideration was also given to giving owners the option of requesting a different building certifier to perform the additional certifying functions, however, industry has suggested this could result in significant time delays in construction. There would also be licensing implications for the other building certifier, as providing independent advice (i.e. on a building development approval for which they are not engaged) typically does not fall within the scope of building certifying functions.

Therefore, no less restrictive reasonably available ways to achieve the purpose have been identified.

(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, the importance of promoting transparency and accountability of builders and building certifiers, strengthening the rights of consumers, and creating a regulatory environment to support an increased likelihood of defects or safety issues being detected outweighs the negative impact on the freedom from forced work. Importantly, the extent of the limitation on the freedom from forced work is ameliorated by allowing building certifiers to recover reasonable costs of the performance of the certifying function.

Property rights

Clauses of the Bill relating to money held in trust

(a) The nature of the right

Section 24 of the Human Rights Act provides that a person must not be arbitrarily deprived of their property. Case authority suggests that 'arbitrary' in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

Deprivation of property is not limited to situations of forced transfer or extinguishment of title of ownership, for example, but would include any “de facto expropriation” by means of a substantial restriction in fact on a person’s use or enjoyment of their property.

The Bill establishes a simplified trust account framework that, as with the current BIF Act, removes the full legal interest in project money from the contracting party and reduces them to a beneficial interest only, among other beneficiaries. Amendments in the Bill also limit the circumstances in which a trustee is entitled to be paid or restricts the purposes for which a trustee may use project money. For example, clause 63, section 34A of the Bill provides that a trustee may not pay itself from the retention trust account until the end of the defects liability period, while clause 63, section 51B prevents a trustee from investing funds held in trust.

Section 11 of the Human Rights Act provides that only natural persons have human rights—corporations do not. Given the minimum contract value associated with establishing a project trust, it is unlikely that a trustee would be a sole trader and therefore have their human rights limited by these provisions. However, if the right is limited, it is reasonable and demonstrably justified and further detail supporting this conclusion is set out below:

- (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 trust account framework is 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, as outlined in this statement. 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 clauses relating to the trust account framework achieve the purpose by ensuring that progress payments and retention monies are safely held in trust and that contractors higher up the chain cannot delay payments to those lower down to supplement their own cash flow and working capital. Further, the framework provides greater security in events such as insolvency, where money within the account is effectively quarantined for subcontractors who are beneficiaries to the trust.

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

Reforming the culture and payment practices of the building and construction industry, which have been documented in multiple reviews by individual states and territories and at a national level over more than a decade, requires systemic change. Through its evaluation of the implementation of the BIF Act, including the trust account framework, the BIF Panel found that it meets its objective of security of payment for subcontractors.

No less restrictive and reasonably available ways to achieve the purpose of the limitation have been identified.

- (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

In the unlikely case that the limitation impedes the right to property for persons protected by the Human Rights Act, the importance of protecting the rights of many subcontractors to be paid for the work they perform, and also avoiding the significant financial and social impacts associated with insolvency, corporate collapse, and late and non-payment, outweighs the potential negative impact on the right.

Clauses of the Bill which provide for search and seizure powers

- (a) The nature of the right

Section 24 of the Human Rights Act provides that a person must not be arbitrarily deprived of their property. Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

The Bill provides that investigators for the Board of Architects Queensland (BOAQ) and the Board of Professional Engineers Queensland (BPEQ) may, for the purpose of monitoring compliance, enter any premises with consent or warrant and examine and seize anything found on the premises believed to be evidence of an offence against a relevant Act. The Bill also provides for an investigator to secure a seized thing against interference.

In each provision that permits investigators to seize or take items or documents, the powers of investigators are strictly confined. For example, where an investigator has entered a premises on consent, seizure of a thing must be consistent with the purpose of entry as explained to the occupier at the time the consent was obtained.

- (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

Architects and engineers play a crucial role in the design and construction of safe buildings. In Queensland, architects and engineers are regulated by the Boards under the Architects Act and the PE Act, respectively.

The Architects Act and PE Act are similar in operation and seek to promote public safety by ensuring that architectural and engineering services are only provided by qualified, registered practitioners and that these services are of a high standard.

Allowing appropriate search and investigatory powers in respect of these professions is in the public interest as it ensures the public safety of occupants in the built environment. A safe built environment is also linked to the right to liberty and security of person, which goes to protecting against injury and harm to individuals.

- (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

Presently, the BOAQ and BPEQ have limited compliance, enforcement and disciplinary powers, particularly when compared to other regulators. For example, the Boards’

investigatory powers are restricted to requiring information or documents from persons under investigation, which creates a risk of crucial evidence being withheld or destroyed which may hinder investigations.

The limitation facilitates in the collection of evidence relating to alleged offences of the Architects Act and PE Act, which will achieve the purpose of ensuring that architectural and engineering services are only provided by qualified, registered practitioners and that these services are of a high standard.

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

No less restrictive reasonably available ways to achieve the purpose have been identified.

Importantly, the general powers of the BOAQ and BPEQ and investigators to enter premises is by consent or via execution of a warrant. These are consistent with those used in other regulators and contain protection for individuals by requiring a warrant or consent for entry.

(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

While the exercise of these compliance and enforcement powers may interfere with the privacy of an individual in some cases, any such interference will be lawful and not arbitrary. The purpose of the investigator powers is to enforce compliance with the relevant Acts and relevant registration conditions, to ensure architectural and professional engineering services are provided in a competent manner. Architects and engineers engaged in providing professional services have a diminished expectation of privacy in a regulatory context and it is reasonable that they can be required to produce information and permit entry to premises for compliance purposes.

Without search and seizure powers, the Boards are not able to effectively regulate their respective professions, which means there is limited ability for the Boards to ensure that architectural and engineering services are only provided by qualified, registered practitioners and that these services are of a high standard. On balance, the importance of ensuring this high standard and appropriately regulating the industry outweighs the negative impact that the search and seizure powers may have on property rights.

Clauses of the Bill which relate to a payment withholding request

(a) The nature of the right

Section 24 of the Human Rights Act provides that a person must not be arbitrarily deprived of their property. Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

To protect monies in dispute, the Bill provides that a claimant who is successful in an adjudication may give a higher party in the contractual chain, for example, the principal or financier, a payment withholding request. The higher party must then retain, out of money that is or becomes payable to the respondent, the adjudicated amount. If the higher party fails to

retain the amount, then the higher party will become jointly and severally liable with the respondent to pay to the claimant the amount that the higher party failed to retain.

The payment withholding request provisions may limit property rights by imposing limits on what the higher party can do with the money or limit a respondent's right to own money that may otherwise be payable to them by the higher party.

- (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 payment withholding request provisions is to try to ensure that a claimant receives payment if it is successful in an adjudication application. The importance of protecting subcontractor payments has been discussed above and 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 Special Joint Taskforce reported that many subcontractors that made submissions lacked the ability or will to litigate disputes. Subcontractors cited the cost and time involved in doing so, especially given that payment is not a guaranteed outcome. In more than one case, the submitter won a favourable decision in adjudication, but the respondent refused to pay the adjudicated amount and the submitter could not afford to pursue the matter.

The possibility of funds being withheld from a respondent until it pays an adjudicated amount is an outcome the respondent would want to avoid. The deterrent posed by the payment withholding provisions will improve the likelihood of a claimant receiving disputed amounts in a timely manner. Therefore, the limitation helps achieve the purpose.

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

No less restrictive reasonably available way to achieve the purpose has been identified.

Reliance upon voluntary compliance with an adjudication decision will not achieve the same result, as demonstrated by the Special Joint Taskforce's findings. It is not reasonable to expect subcontractors to further pursue an adjudicated amount as a matter of course—this undermines the intent of the adjudication process, which is designed to be a quicker, more cost-effective alternative to court proceedings.

- (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, the importance of protecting subcontractor payments outweighs the negative impact on the right. The amendments do not give rise to an arbitrary deprivation of a person's property, and importantly, the limitations on property rights imposed by the payment withholding request provisions are temporary and are intended to increase the likelihood of claimants being paid for the work they have carried out.

Clauses of the Bill which allow for a charge over land

(a) The nature of the right

Section 24 of the Human Rights Act provides that a person must not be arbitrarily deprived of their property. Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought. Deprivation of property is not limited to situations of forced transfer or extinguishment of title of ownership, for example, but would include any “de facto expropriation” by means of a substantial restriction in fact on a person’s use or enjoyment of their property.

The Bill provides that a claimant who is a head contractor may register a charge on the property on which the building work the subject of the adjudication application is being carried out if the adjudicated amount is not paid by the due date.

The effect charge of the charge is to create a right for the claimant to apply to the court to sell the property to recover the debt. An owner may apply to a court of competent jurisdiction to have the charge set aside, otherwise it lasts for 24 months with the ability for extension. The charge on land will expire when the claimant is no longer owed payment—for example, the respondent pays the claimant, or the adjudication decision is set aside—or when the unpaid amount is paid into court.

Clause 75 provides that a charge may only be registered if the property is owned by a respondent or a related entity of the respondent—if the property is owned by an unrelated third party, the charge cannot be registered. The right for a person to not to have their home arbitrarily interfered with under section 25(a) is unlikely to be limited as a resident owner cannot be a respondent in an adjudication. However, if the right is limited, it is reasonable and demonstrably justified and further detail supporting this conclusion is set out below:

(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 charge over property is one of several improved mechanisms recommended by the BIF Panel to increase the likelihood of claimants receiving disputed amounts following adjudication. By ensuring that head contractors are paid for the work they have carried out, the provisions also protect subcontractor payments as the system of cascading payments in the industry means that subcontractors are usually reliant on the contractors above them for 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

Failing to pay an adjudicated amount means that respondent is at risk of having their property sold to satisfy the debt to the claimant. As with the payment withholding provisions, the deterrent posed by charge on land will improve the likelihood of a claimant receiving disputed amounts in a timely manner. Therefore, the limitation helps achieve the purpose.

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

The charge on land provisions incorporate safeguards to restrict the impact of the limitation, including that a charge cannot be registered on property owned by an unrelated third party. This restriction recognises that there is a risk that the deprivation of property would be arbitrary where the owner has no control over a person entering into a contract to build on the owner's land, or over the engagement of the claimant by the respondent.

No less restrictive reasonably available way to achieve the purpose has been identified.

(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

The importance of the purpose of the limitation is considered to outweigh the negative impact on the right to property. The security of payment reforms, including this provision, protect the public interest. To reduce the risk that deprivation of property is arbitrary, the provisions are appropriately confined and structured. The provisions clearly set out the effect of the charge and how it may be enforced so it is a known consequence of failing to pay an adjudicated amount.

Right to privacy and reputation

Clauses of the Bill which relate to the publication of information

(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 are unreasonable, unnecessary and disproportionate.

The Bill enables the QBCC to publish details about individuals who become bankrupt or are involved in a construction company collapse—known as excluded and permanently excluded individuals. Information about excluded and permanently excluded individuals is not always readily accessible if the individual has not previously held a licence, for example, a company's director or chief financial officer. Clauses 140 and 143 set out when the QBCC may publish the information and provides that all periods for review or appeal have ended. Further, the information may not be published for longer than 10 years.

Other provisions that allow the QBCC to publish individuals' details are:

- clause 63, section 54F allows the QBCC to publish the names of persons who have been excluded from providing account review reports for a trust account
- clause 51 of the Bill amends section 179 of the Building Act, which provides that the published register of building certifiers may including information about demerit points allocated to a building certifier and whether a building has been a disqualified individual.

- (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 amendments serve the important purpose of promoting transparency about a person's previous commercial dealings and professional conduct, which will in turn assist consumers and contractors to make informed decisions about whether to conduct business with certain individuals or to engage a building certifier to provide certifying functions.

In relation to the publication of excluded and permanently excluded individuals that are not licensees, the Special Joint Taskforce suggested that improving accessibility of this information may also help to expose phoenix activity, as it would alert subcontractors to the presence of such an individual improperly acting as a 'shadow director' for a company. Phoenix activity is the practice of one company taking over the business of another company that is wound up or abandoned where the controllers of both companies are the same people or their associates, and it is illegal if it involves a fraud upon creditors.

In 2018, the Australian Tax Office, Fair Work Ombudsman, Australian Securities and Investments Commission and PricewaterhouseCoopers estimated the cost of phoenixing to the Australian economy to be between \$2.85 billion to \$5.13 billion annually. The Special Joint Taskforce observed a common view among stakeholders is that this activity was widespread in the building industry and that it was having a significant and lasting detrimental effect on their businesses.

- (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 helps to achieve the purpose as it ensures the QBCC can make necessary information available to public which will in turn assist consumers and contractors to make informed decisions about whether to conduct business with certain individuals or to engage a building certifier to provide certifying functions.

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

No less restrictive reasonably available way to achieve the purpose has been identified.

Reliance upon voluntary disclosure by a person carrying out building work about their exclusion status, or a building certifier about their licensing status, would not achieve the same result (and therefore not achieve the purpose), as there would be limited incentive for unscrupulous operators to disclose information that may disadvantage them commercially.

- (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

In respect of the extent of the limitation on the right to privacy, not all of the information to be published will be of a private nature. For excluded and permanently excluded individuals, the particulars which are to be published are clearly set out in clauses 140 and 143, and their listing is therefore a known condition of any person seeking to be involved in the running of a construction company. The collection and publication of information on the website is

necessary for ensuring the integrity of industry participants and promoting transparency and accordingly does not constitute an arbitrary interference with privacy.

For similar reasons, the provision allowing the QBCC to publish the names of persons who have been excluded from providing account review reports for a trust account is also considered reasonable. The circumstances in which the provision applies require the QBCC to first establish that grounds for exclusion exist, that is, the person has provided incorrect information about the compliance of a trust account with the BIF Act or has failed to comply with the requirements of the BIF Act for providing a review. The QBCC must provide a show cause notice and consider any representations made by the person. The circumstances of the operation of the provision are therefore not arbitrary, being objectively ascertainable, confined, just and proportionate to the purpose of the section. Nor does the provision purport to permit an attack upon a person's reputation in the sense of sanctioning an action which is otherwise expressly contrary to law.

Notification provisions also apply before a building certifier can be considered a disqualified individual.

On balance, the importance of promoting transparency about a person's previous commercial dealings or professional conduct outweighs the negative impact on the right to privacy and reputation.

Clauses of the Bill which relate to compliance and enforcement powers of Boards

(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 are unreasonable, unnecessary and disproportionate.

Amendments in the Bill provide for the entry, search and seizure powers of Board investigators. Investigators may exercise powers of entry to any premises with the consent of the occupier, by warrant, or where entry to the premises is open to the public.

(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 Architects Act and PE Act seek to promote public safety by ensuring that architectural and professional engineering services are only provided by qualified, registered professionals and that these services are of a high standard.

Allowing appropriate search and investigatory powers in respect of these professions is in the public interest as it ensures the public safety of occupants in the built environment. A safe built environment is also linked to the right to liberty and security of person, which goes to protecting against injury and harm to individuals. The limitation is considered necessary to protect the rights and safety of the public and to deter any ongoing alleged offending behaviour through a more effective regulatory framework.

- (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

Under the current framework, the Boards' investigatory powers are restricted to requiring information or documents from persons under investigation, which creates a risk of crucial evidence being withheld or destroyed and may hinder investigations.

The limitation assists in the collection of evidence relating to alleged offences of the Architects Act and PE Act and is considered proportionate to achieving the objectives of both Acts.

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

No less restrictive reasonably available ways to achieve the purpose have been identified.

Entry to premises is by consent or via execution of a warrant. The proposed amendment allows for the least restrictive method to be exercised first (that is, entry with consent) prior to applying for warrant.

Additionally, the proposed powers will improve the Boards' alignment with other Queensland regulators, such as the QBCC, the Queensland College of Teachers and the Valuers Registration Board of Queensland. Each of these bodies seek to promote public safety by ensuring high standards in their respective industries.

- (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

While the exercise of the compliance and enforcement powers may interfere with the privacy of an individual in some cases, any such interference will be lawful and not arbitrary. The purpose of the investigator powers is to enforce compliance with the relevant Acts and relevant registration conditions, to ensure architectural and professional engineering services are provided in a competent manner. Architects and engineers engaged in providing professional services have a diminished expectation of privacy in a regulatory context and it is reasonable that they can be required to produce information and permit entry to premises for compliance purposes.

On balance, the importance of ensuring compliance with relevant Acts and registration conditions and ensuring architectural and professional engineering services are provided in a competent manner outweighs the negative impact that the powers may have on the right to privacy and reputation.

Clauses of the Bill which relate to the oversight of trust accounts

- (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 are unreasonable, unnecessary and disproportionate.

Clause 63 inserts new chapter 2, part 4, division 8 of the BIF Act which establishes a framework for independent auditing of retention trust accounts. A trustee must give an auditor trust records to enable the auditor to prepare a report about the trustee's compliance with the BIF Act. A copy of the report must be given to the QBCC. An auditor must also notify the QBCC immediately if they become aware of serious breaches of the Act.

This and other oversight mechanisms, such as the requirement for a trustee to inform the QBCC and the contracting party when it has established a trust account and the details of that trust, may inevitably require private information to be disclosed to the QBCC or another party.

As noted previously, it is unlikely that a trustee would be a sole trader and therefore have their human rights engaged by these provisions. However, if the right is limited, it is reasonable and demonstrably justified and further detail supporting this conclusion is set out below:

- (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 BIF Panel's recommendations included several enhancements to the QBCC's compliance and enforcement functions. For example, it recommended that trust accounts be supported by detailed trust accounting records, and that these records be subject to mandatory external auditing and be made available to the QBCC. The BIF Panel also recommended that the QBCC replace the current role of the principal to monitor compliance and oversee trust accounts, as principals having viewing access to the commercial transactions of the contractor was not considered practicable for private sector implementation.

The purpose of the oversight mechanisms is to deliver on the BIF Panel's recommendations to ensure that QBCC can effectively perform its role as regulator and ensure compliance with the security of payment reforms.

- (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 and reasonably available ways to achieve the purpose of the Bill

The limitations have been developed by the BIF Panel through its evaluation of the implementation of the BIF Act. No less restrictive and reasonably available ways to achieve the purpose of the limitations has been identified.

- (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

The limitation is considered reasonable and is demonstrably justified. Without the oversight mechanisms provide for in the Bill, the QBCC would have limited ability to effectively regulate contractors who hold trust accounts. The limitation imposed upon registered contractors is balanced by the public interest objectives of the security of payment reforms.

While the exercise of these powers may interfere with the privacy of an individual in some cases, any such interference will be lawful and not arbitrary. Contractors participating in a regulated industry have a diminished expectation of privacy and it is reasonable that they can be required to produce information for compliance purposes.

Right to liberty and security of person

(a) The nature of the right

Section 29 of the Human Rights Act provides for the right to liberty and security of person. This right protects against arbitrary arrest or detention. The concept of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law. If a person is arrested or detained, they are entitled to certain minimum rights, including the right to be brought to be promptly brought before the court.

The Bill includes offences in relation to the trust account framework that limit the right to liberty as they provide the option of imprisonment for non-compliance. A person who fails to exercise due diligence relating to minimum financial requirements under the QBCC Act may also face imprisonment.

(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 the maximum penalty of imprisonment is to provide strong deterrence from non-compliance with the trust account requirements, including the requirements to hold money for the beneficial interest of subcontractors and to only use project money for prescribed purposes. The importance of protecting subcontractor payments has been discussed above and this purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

Similarly, strong deterrence from noncompliance with the minimum financial requirements is needed to in order to minimise the risk of insolvency, corporate collapse and late or non-payment, and their associated impacts.

(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 helps achieve the purposes as the possibility of imprisonment is expected to motivate trustees and executive officers of companies to ensure that the trust account requirements are met and that companies continue to meet the minimum financial requirements. This will improve the likelihood of subcontractors being paid for the work they have performed and of companies being financially sustainable.

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

There is no alternative way, with less impacts to human rights, to effectively achieve the policy intent of the measures to which the offences relate. Relying solely on monetary penalties may result in large companies simply factoring potential fines into the cost of doing business, which would not achieve the purpose of providing strong deterrence from non-compliance with the trust account requirements and protecting subcontractor payments.

- (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

The introduction of these penalties is considered appropriate and justified, given the seriousness of the matter and its impact on subcontractors. The possibility of imprisonment is assigned to those provisions that underpin the trust account framework, such as the requirement to pay all project money into the project trust and restrictions on when money can be withdrawn from a trust.

Similarly, the penalty for the minimum financial requirements will enable the QBCC to take prosecutorial action against those who make decisions that impact on the actions of a licensed entity, rather than only the licensee or entity itself. The QBCC Act already has similar provisions regarding executive officer liability in relation to non-conforming building products.

On balance, the importance of providing strong deterrence from non-compliance with the trust account requirements and protecting subcontractor payments outweighs the negative impact the offence and penalty may have on the right to liberty and security of the person.

Right to a fair hearing

- (a) The nature of the right

Section 31 of the Human Rights Act provides for the right to a fair hearing. It applies to criminal trials but also civil proceedings. The right reflects the common law tradition of the due process of the law.

While the Bill creates several new offences, these do not inherently affect the fairness or public natures of proceedings. It is not intended to deny a person charged with a criminal offence or a party to a civil proceeding the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Further, all decisions made by regulators in accordance with the provisions of the Bill may be subject to external review by the tribunal and, in the case of QBCC, internal review as well.

However, clause 147 of the Bill, which increases the timeframe in which the QBCC may commence prosecutions, may limit the right to a fair hearing as it is possible that evidence and recollections will be harder to obtain or recall after a longer period of time has lapsed.

- (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 QBCC regulates Queensland's building and construction industry, including complex matters such as building product safety and minimum financial requirements for contractors. The purpose of the limitation is to provide the QBCC sufficient time to recognise and consider alleged breaches and further the public interest by providing a consequence for legally wrong conduct that has potential safety, financial or social impacts.

- (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

An important factor in time limitations for actions following a breach of the minimum financial requirements, for example, is the need for sufficient time to gather evidence relating to intricate and interrelated corporate structures, which often requires forensic financial analysis. Increasing the timeframes for starting a prosecution will enable the QBCC to undertake these activities effectively and, therefore, the limitation helps to achieve the purpose.

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

No less restrictive reasonably available ways to achieve the purpose have been identified.

This same approach is recognised in other Australian state and territories where, Tasmania aside, all interjurisdiction building regulators have a longer time than the QBCC within which to start a prosecution. As the provision involves an adjustment of existing rights at law, it is most effectively achieved through legislative provision, to ensure clear and equitable application of the provision.

- (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

The degree of restriction of the right is reasonable in the circumstances. The QBCC regulates complex matters of public health and safety and it is important its ability to target offending behaviour is not unduly constrained. The three-year limitation period provides an end date at a reasonable point for the liability to be prosecuted, given the potential seriousness of the conduct.

On balance, the importance of allowing sufficient time for the QBCC recognise and consider alleged breaches for prosecution outweighs the negative impact the provision may have on the right to a fair hearing.

Rights in criminal proceedings

- (a) The nature of the right

Section 32 of the Human Rights Act provides for certain minimal procedural guarantees in criminal trials. As with section 31, the right reflects the common law tradition of the due process of the law. Section 32(2)(k) provides that a person charged with a criminal offence is entitled not to be compelled to testify against themselves or to confess to guilt. It applies to protect a charged person against the admission in subsequent criminal proceedings of incriminatory material obtained under compulsion, regardless of whether the information was obtained prior to or subsequent to the charge being laid.

There may be a view that clauses 63 and 78 of the Bill limits this right, in that it provides that it is not a reasonable excuse for a person to fail to comply with a request to provide certain information on the grounds that complying with the request might tend to incriminate the person or expose the person to a penalty.

- (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

Clause 63 inserts new sections 23B of the BIF Act. Section 23B allows a subcontractor beneficiary to request particular information from the trustee about the project trust account. The provision implements the BIF Panel's recommendation that beneficiaries for a trust account have reasonable access to trust accounting information. The purpose of the limitation is to improve transparency for subcontractors about their cashflow and how money held on their behalf is being used. The BIF Panel also suggested that mandatory reporting by trustees would support the QBCC's new oversight role, in that subcontractors can confirm that trust accounting information aligns with contractual requirements.

Clause 78 inserts new section 189A, which provides that the QBCC may require a person the subject of an approved audit program to give the QBCC documents it reasonably requires to decide whether a person is, or has been, complying with the BIF Act. Privilege against self-incrimination is clearly capable of limiting the information that may be available to the QBCC, which may compromise its ability to ensure ongoing compliance and payment protections. Further, the information sought through an audit program would be peculiarly within the knowledge of the person subject to the audit and would be difficult for the QBCC to establish through an alternative evidential means. The purpose of the limitation is to ensure persons cannot deliberately withhold information that would otherwise assist the QBCC in detecting, and mitigating the effects of, noncompliance with the BIF Act.

- (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 abrogation of the privilege provided for under the Bill assists in the collection of information and evidence to substantiate compliance with the BIF Act. Further, it will ensure that subcontractor beneficiaries receive accurate information to ensure that contractual requirements are being met at and that they will be paid for the work they perform.

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

No less restrictive reasonably available ways to achieve the purpose have been identified.

The Bill provides safeguards to restrict the impact of the limitation, in that the provisions generally relate to information that is required to be kept under the legislation. The application of the privilege to pre-existing documents is less limiting than that accorded to oral testimony or documents that are required to be brought into existence to comply with a request for information. Further, the requirement to produce a document does not extend to having to explain or account for the information contained in that document.

New section 189B states that a document or other evidence provided under clause 78 is not admissible as evidence against that person in civil or criminal proceedings, other than proceedings arising if the information is misleading or false. It also provides 'derivative' use immunity in that it includes any other evidence directly or indirectly derived from the document is not admissible. This means that the person is protected against the evidence being used against them in subsequent legal proceedings.

- (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

The degree of restriction of the right is reasonable in the circumstances. A duty to provide information or assistance is consistent with the reasonable expectations of persons who participate in a regulated industry. Furthermore, it is necessary for regulators that oversee matters of public interest to have strong powers to compel the provision of information. This same approach is recognised in the QBCC Act as well as the governing Acts for Queensland's Electrical Safety Office and Workplace Health and Safety. To excuse the provision of information and assistance would significantly impede QBCC's ability to investigate and enforce compliance with the BIF Act.

On balance, the importance of providing QBCC oversight to ensure compliance with the BIF Act and protect subcontractor payments outweighs the negative impact the limitation may have on rights in criminal proceedings.

Conclusion

In my opinion, the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 is compatible with human rights under the *Human Rights Act 2019* because it limits 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
MINISTER FOR SPORT

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