

# Building (Professional Indemnity Insurance) Amendment Regulation 2020

## 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*, I, the Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport provide this human rights certificate with respect to the Building (Professional Indemnity Insurance) Amendment Regulation 2020 (Amendment Regulation) made under the *Building Act 1975*.

In my opinion, the Amendment Regulation as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

### Overview of the Subordinate Legislation

Under section 163(1) of the *Building Act 1975* (the Act) and section 52 of the Building Regulation 2006 (the Regulation) private certifiers are required to hold professional indemnity (PI) insurance as a condition of their licence. Until August 2019, this PI insurance was required to be exclusion free. However, to address a contracting PI insurance market, partially caused by the use of combustible cladding, the Regulation was amended in August 2019 to temporarily permit private building certifiers to be licensed if they hold PI insurance with certain cladding-related exclusions. The current exclusion period under the Regulation ends on 30 June 2021.

The Amendment Regulation seeks to extend the current exemption period for a further 12 months to 30 June 2022 to allow building certifiers to continue to be licensed where they have exclusions relating to external cladding work in their PI insurance policies. The provisions of the Amendment Regulation permit certifiers to be licensed or continue to be licensed by the Queensland Building and Construction Commission (QBCC), while the Government considers other avenues to address the provision of fair and appropriate PI insurances within the building and construction industry.

### Human Rights Issues

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

In my opinion, the human rights under the Human Rights Act that are affected or engaged in the Amendment Regulation are:

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

For the reasons outlined below, I am of the view that the Amendment Regulation promotes (and does not limit) the following human right.

### **Freedom of expression**

Section 21 of the Human Rights Act protects an individual's right to hold an opinion without interference and to seek, receive and express or impart information and ideas orally, in writing or print, by the way of art or other means to another person. Any act which may be perceived by reasonable members of the public as trying to convey some meaning can be defined as imparting information and ideas, whether or not it is conveyed to a specific person.

Clause 4 of the Amendment Regulation extends the current exemption period, allowing the QBCC to continue to renew or issue a new licence to a private certifier holding a PI insurance policy with an exclusion for external cladding for another 12 months.

It is unlikely the private certifier will find affordable and exclusion-free PI insurance cover due to ongoing concerns amongst the insurance industry about the high-risk status of ACPs for inducing costly insurance claims. Therefore, the certifier would not meet the requirement for mandatory PI insurance for a licence to permit the private certifier to perform certification functions.

This amendment ensures eligible private certifiers can still obtain a licence to perform certification functions where they hold PI insurance that has an exemption for external cladding work. This supports qualified and experienced private certifiers to continue performing certification work and allows eligible individuals to enter the industry during the extended period (i.e. until 30 June 2022).

In my view, the Amendment Regulation promotes the right where it enables building certifiers, including those who have been licensed and working in the sector, to continue to seek out and express information through lawfully performing certification work.

### **Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

#### **Property Rights**

##### (a) the nature of the right

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

Clause 4 and Clause 5 of the Amendment Regulation extends the current exemption period for a further twelve months, to 30 June 2022, to allow building certifiers to hold an exclusion in their PI insurance policies. The amendment allows building certifiers to renew a license or

apply for a licence with an exclusion relating to external cladding work. Without the exclusion, building certifiers would have difficulty obtaining PI insurance and they would not be able to hold a licence to perform certification functions. The lack of licenced building certifiers could cause delays in inspecting and issuing certificates to progress the stages of building work (including a final inspection certificate) which if not received, may deprive people from accessing their property, especially on completion. While the amendment limits some certification functions, relating to external cladding, the exemption allows most certification functions to be performed ensuring building certifiers can inspect stages of building work to keep the building project progressing. The amendment regulation will ensure people are not deprived of their property.

(b) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The limitation achieves the purpose by allowing building certifiers to continue to hold PI insurance with an exclusion relating to external cladding. Building certifiers who hold the prescribed PI insurance can renew or apply for a licence during the extended exemption period to allow all certification functions to continue. The limitation on a private building certifiers PI insurance policy, only limits certification functions relating to external cladding. All certification functions can be performed by the building certifier. Without a licence the building certifier could not inspect building work and could not issue certificates at relevant stages to progress the building work. In particular, inspection certificates and final inspection certificates could not be issued which would delay the completion of building work. The limitation achieves the purpose by allowing certifiers to remain licenced and to continue to perform certification functions, thereby helping to protect people from being deprived of their property.

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

There are no less restrictive and reasonably available ways to achieve the purpose of licencing a building certifier who is required to hold mandatory PI insurance. The uncertainty that building certifiers may be unable to obtain exclusion free PI insurance continues to be an issue for the building and construction industry. To provide certainty to this sector, an extension of the exemption period is required to allow building certifiers to focus on their certification functions, especially during the COVID-19 pandemic. Without the exclusion there is also the risk that building certifiers may exit the market due to the lack of suitable PI insurance available, which would have a significant impact on the Queensland building and construction industry. This in turn could deprive people from having their building work completed in a timely manner and may deprive them of their property for a period of time.

(d) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The extension of the exemption period, while continuing to limit building certifiers' certification functions relating to external cladding, allows building certifiers to continue performing most certification functions. This ensures people are not deprived of having their properties and or building work inspected and certified. Without mandatory PI insurance with an exclusion for external cladding works, a building certifier will have difficulty obtaining PI

insurance. The certifier would not be eligible to be licenced, and would be unable to perform any certification functions. The amendment regulation while limiting building certification functions, ensures certifiers can still perform most certification work. The limitation may prevent delays and ensure building certifiers can conduct inspections to progress stages of building work as detailed in a building development approval. The limitation assists in preserving the human right, of people not being arbitrarily deprived of their property.

(e) any other relevant factors

Not applicable

### **Privacy and reputation**

(a) the nature of the right

Section 25 of the Human Rights Act provides that an individual has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with, and not to have their reputation unlawfully attacked. 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 arbitrariness in the context of the right to privacy carries a particular human right meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.

Clause 4 and Clause 5 of the Amendment Regulation while allowing the QBCC to licence an individual for a further 12 months or issue a licence with an exemption to their PI insurance policy relating to external cladding, directs the QBCC to collect information about a building certifier's PI insurance cover. This includes whether their insurance policy does or does not cover the performance of private certifying functions related to external cladding. This allows the QBCC to determine whether or not to issue a licence or renew a licence for a building certifier within the extended exemption period.

Clause 4 may limit a person's right to privacy to the extent that it extends the length of time applications for a licence (eligible under the exemption) can be made, and therefore information that may be collected.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to ensure that the QBCC can accurately assess an application for renewal or a new licence where the building certifier may have the prescribed PI insurance cover, but that cover has an exclusion for external cladding. Information regarding their insurance policy and coverage is therefore needed so the QBCC may assess their eligibility for a licence as permitted by the exemption during the exemption period.

This purpose is consistent with the right to freedom of expression (protected under section 21 of the Human Rights Act), where individuals have the right to freely seek, receive and impart information and ideas. Building certifiers will be able to express information through performing work, or continuing to perform work, where the exemption permits them to be licensed until 30 June 2022 when they hold PI insurance with cladding-related exclusions. This

purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to privacy achieves the purpose of the Amendment Regulation by allowing the QBCC to assess applicants for a licence to perform building certification work. The extension of the exemption period under clause 4 of the Amendment Regulation ensures building certifiers who hold the prescribed PI insurance can renew or apply for a licence for an extended period.

The collection of information is necessary for the QBCC to verify the applicant has PI insurance which may be subject to exclusions for external cladding. It is conducted lawfully under section 163 of the Act to determine whether the building certifier meets the licensing eligibility requirements under the Act and Regulation. The information collected will allow qualified and experienced certifiers, including certifiers who are currently licensed, to perform or continue to perform building certification functions, which ensure the safety and sustainability of buildings.

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

There are no less restrictive and reasonably available ways to achieve the purpose of assessing a person's eligibility for a licence under the extended exemption period other than by collecting personal information relating to their PI insurance coverage and exclusions.

There are protections and safeguards in place to ensure that the collection of personal information is not conducted arbitrarily nor is it unreasonable where it is used by the QBCC to make an assessment of an individual's eligibility to hold a licence. Any information collected by the QBCC for licence applications is lawfully protected under section 110 of the *Queensland Building and Construction Commission Act 1991*, where unauthorised disclosure of the information incurs a maximum penalty of 100 penalty units. Additional safeguards are provided under section 27 of the *Information Privacy Act 2009*, which places information privacy obligations on the QBCC. Further, the exemption period is time-limited in nature as it will only be available until 30 June 2022.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The collection of an applicant's personal information, relating to their PI insurance coverage, under the Amendment Regulation is necessary to demonstrate that an individual holds the prescribed insurance under the Regulation to be licenced as a building certifier.

On balance, I consider the importance of ensuring building certifiers hold the prescribed PI insurance with exclusions for external cladding work ensures they may continue to perform certification functions during the extended exemption period, which outweighs the limitation on the right to privacy and reputation.

(f) any other relevant factors

Not applicable.

## **Conclusion**

I consider that the Building (Professional Indemnity Insurance) Amendment Regulation 2020 is compatible with the *Human Rights Act 2019* because while it does limit, restrict or interfere with a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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