



26 February 2020

Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
BRISBANE QLD 4000

Email: tpwc@parliament.qld.gov.au

Dear Sir/Madam

**LGAQ Submission – Building Industry Fairness (Security of Payment) and Other
Legislation Amendment Bill 2020**

The LGAQ welcomes the opportunity to provide a submission on the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020* (the Bill), which was introduced to Parliament on 5 February 2020 by the Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport.

Overall, local government supports the objectives of the Bill including to strengthen Queensland's building laws in relation to building certification and inspection processes and enhance Queensland's security of payment legislation to extend protections for the building and construction industry.

The LGAQ has prepared detailed comments regarding the reforms contained in Parts 3 and 4 of the Bill, relating to amendments of the *Building Act 1975* and the *Building Industry Fairness (Security of Payment) Act 2017*, and has made 10 recommendations outlined in the attached submission.

I trust this will assist the Committee with its consideration of the Bill.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Sarah Buckler', is written over a light blue horizontal line.

Sarah Buckler PSM
GENERAL MANAGER - ADVOCACY



February 2020

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

LGAQ Submission to the Transport and Public Works
Committee



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The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association setup solely to serve councils and their individual needs. The LGAQ has been advising, supporting and representing local councils since 1896, allowing them to improve their operations and strengthen relationships with their communities. The LGAQ does this by connecting councils to people and places that count; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional and political excellence.

1.0 Executive summary

The LGAQ welcomes the opportunity to provide a submission on the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020* (the Bill), which was introduced to Parliament on 5 February 2020 by the Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport.

Overall, local government supports the objectives of the Bill including to strengthen Queensland's building laws in relation to building certification and inspection processes and enhance Queensland's security of payment legislation to extend protections for the building and construction industry.

The reforms contained in the Bill that are of most relevance to local government include amendments to the:

- *Building Act 1975* (Part 3 of the Bill)
- *Building Industry Fairness (Security of Payment) Act 2017* (Part 4 of the Bill).

The LGAQ has prepared detailed comments on Parts 3 and 4 of the Bill (included in section 4.0 below) and has made 10 recommendations which are summarised as follows:

Recommendation 1: The LGAQ seeks a working partnership with the Department of Housing and Public Works (the Department) and the Queensland Building and Construction Commission (QBCC) to ensure local government input and expertise can inform further phases of the building certification reforms, as these are progressed (including any amendments to the *Building Regulation 2006* and Queensland Development Code).

Recommendation 2: The LGAQ recommends that 'impact assessment', relating to proposed amendments to section 37(6) of the *Building Act 1975*, be defined and/or further guidance developed to provide more certainty for industry as to the process the Minister will conduct before making a regulation to allow the immediate application of new building assessment provisions.

Recommendation 3: The LGAQ recommends the Department prepare guidance material for building owners and develop a comprehensive education program, in consultation with local governments, to increase community awareness and understanding of the proposed changes to the building certification and inspection processes.

Recommendation 4: The LGAQ recommends the timeframes for a private certifier to notify a local government of engagement should seek to align if possible, regardless of whether the certifier is engaged by an owner client or a non-owner client.

Recommendation 5: If the alternative recognition pathway for a person seeking to obtain (or renew) a building certifiers licence is retained as 'qualifications and experience prescribed by regulation', the LGAQ requests the opportunity for local government to review and provide feedback on the draft regulation before it is made.

Recommendation 6: The LGAQ seeks enhanced training, education and continuing professional development opportunities for building certifiers to be developed by the State Government and the QBCC, in consultation with local government.

Recommendation 7: The LGAQ requests the Department and the QBCC work with local government to streamline and improve the process for local governments to lodge complaints with the QBCC against building certifiers who are not acting in accordance with the building legislation.

Recommendation 8: The LGAQ requests that draft templates for a 'certificate of occupancy' are distributed to stakeholders, including local government, for feedback prior to releasing as final and to ensure that these can be uploaded into council systems in a timely manner.

Recommendation 9: The LGAQ does not support the expanded application of project and retention trust requirements to local government building and construction contracts, given the negligible risks of a delayed payment or non-payment by local government to a contractor or subcontractor. If a threshold contract value is to be applied to local government, the LGAQ suggests that ultimate threshold of \$1 million for local government building and construction projects is not commensurate with the risk and should be increased.

Recommendation 10: If recommendation 9 above is not supported, consideration should be given to allowing a council to utilise a Trust Account that will already be established pursuant to section 200 of the *Local Government Regulation 2012*, in order to satisfy the requirements of the security of payment legislation.

The LGAQ has not received any specific feedback or concerns from member councils on the proposed reforms to the:

- *Architects Act 2002* (Part 2 of the Bill)
- *Professional Engineers Act 2002* (Part 5 of the Bill)
- *Queensland Building and Construction Commission Act 1991* (Part 6 of the Bill)
- *Retirement Villages Act 1999* (Part 7 of the Bill).

Should you wish to discuss any aspect of this submission, please do not hesitate to contact Crystal Baker, Lead – Planning and Development on [REDACTED] [REDACTED] [REDACTED] or [REDACTED] Mark Leyland, Principal Advisor – Finance & Governance on [REDACTED]

2.0 LGAQ Policy Statement

The LGAQ Policy Statement is a definitive statement of the collective voice of local government in Queensland. This statement identifies the agreed position of local government in relation to a number of key issues.

The relevant policy positions of local government in the context of the Bill are as follows:

Building Certification

- *6.2.1.1 Local government supports the state government implementing an improved regulatory system through the Queensland Building and Construction Commission to provide greater incentive for building certifiers to operate professionally. The reviewed system will address minor and major offences and ensure the compliance system is efficient and appropriate penalties are applied.*
- *6.2.1.2 Local government supports the state government in providing the Queensland Building and Construction Commission with adequate resources to carry out a more extensive and comprehensive role in auditing and disciplining building certifiers in a timely manner. Local government acknowledges the important role of Building Codes Queensland in monitoring and facilitating the performance of the building certification system.*
- *6.2.1.3 The state government should provide a comprehensive education program to increase community awareness of how the building certification system works and where responsibility/liability resides. The state government should also create a system of consumer protection.*

3.0 Relevant LGAQ Annual Conference Resolutions

In addition to the agreed policy positions of local government outlined above, a resolution was also passed at the 2019 LGAQ Annual Conference in relation to building certifier training and complaint processes:

Resolution #35 Building Certifier Training and Complaint Process

That the LGAQ lobby the State Government and the Queensland Building and Construction Commission (QBCC) to:

- *Provide more training and advice for building certifiers to reduce instances of non-compliance with Queensland's building legislation,*
- *Streamline and make more effective the process for local governments to lodge complaints against certifiers who are not acting in accordance with the legislation.*

4.0 Response to specific provisions of the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020

The proposed amendments to the *Building Act 1975* and the *Building Industry Fairness (Security of Payment) Act 2017* are of most relevance to local government and detailed comments are provided below.

4.1 Amendments to the Building Act 1975

Overall, the LGAQ supports in principle amendments that implement an improved regulatory system for building certification to reduce instances of non-compliance with Queensland's building laws.

The proposed amendments to the *Building Act 1975* are outlined in Part 3 of the Bill (clauses 32-59). The LGAQ understands these amendments seek to deliver the first phase of reforms under the Queensland Building Plan 2017 to strengthen the building certification and inspection process and improve professional standards and compliance in the building sector.

The LGAQ notes the administrative amendments outlined in clauses 34, 35 and 36 of the Bill, are intended to support adoption of a future Queensland Housing Code by:

- changing how the parts of the Queensland Development Code (QDC) are prescribed (i.e. under regulation rather than the *Building Act 1975*, schedule 1), and
- amending the definition of 'relevant provisions', as it relates to 'building work that is accepted development for the *Planning Act 2016*' and 'alternative provisions to QDC'.

The LGAQ understands there is no policy change intended by these amendments but given the relationship with the planning framework and local government planning schemes, it is critical that local governments are consulted on any changes to the *Building Regulation 2006* and the QDC.

Recommendation 1: The LGAQ seeks a working partnership with the Department of Housing and Public Works (the Department) and the QBCC to ensure local government input and expertise can inform further phases of the building certification reforms, as these are progressed (including any amendments to the *Building Regulation 2006* and Queensland Development Code).

In relation to Part 3 of the current Bill, specific feedback is provided below regarding:

- Changes to building assessment provisions
- Owner's rights to inspection documentation and additional inspections
- Notices of engagement to local government
- Licensing, accreditation and registration of building certifiers
- Making a complaint against a building certifier
- Change in terminology – 'certificate of classification' to 'certificate of occupancy'

Changes to building assessment provisions

Clause 37 of Bill seeks to amend section 37 of the *Building Act 1975* to include new subsections (5) and (6) that provide for a regulation to be made to allow the immediate application of new building assessment provisions where the Minister has conducted an 'impact assessment' and is satisfied the regulation is necessary to reduce or remove a risk of serious injury or illness to an individual. Clause 40 of the Bill, which amends section 61 of the *Building Act 1975*, also provides that amendments to building assessment provisions can apply immediately to alterations.

The LGAQ supports in principle the intent of this amendment to enable a more responsive regulatory system and protect against significant risks to public health and safety (such as instances of fire safety risk associated with non-conforming building products).

However, to provide more certainty for industry as to the process the Minister will conduct before making the regulation it is suggested that 'impact assessment' in section 37(6), should be defined and/or further guidance developed to support this.

Recommendation 2: The LGAQ recommends that 'impact assessment', relating to proposed amendments to section 37(6) of the *Building Act 1975*, be defined and/or further guidance developed to provide more certainty for industry as to the process the Minister will conduct before making a regulation to allow the immediate application of new building assessment provisions.

Owner's rights – inspection documentation and additional inspections

Clause 41 of Bill relates to insertion of new section 124A – Obligation to give owner inspection documentation for particular inspections. The LGAQ supports the intent of this proposed amendment to give a building owner the right to request and receive all relevant inspection documentation from the building certifier for a stage of work for which the certifier has issued a certificate of inspection. Owners should be entitled to all documents associated with their property to increase transparency of process.

It is noted that section 17(2), Schedule 1B of the *Queensland Building and Construction Commission Act 1991* already requires a building contractor to directly give the building owner, a copy of each certificate of inspection issued by the building certifier as soon as practicable after receiving the certificate. However, the additional changes to the *Building Act 1975* support increased transparency and are beneficial to ensure records are accessible for example, in instances where a building contractor becomes insolvent.

In relation to owner's rights to request additional inspections (as provided for in clause 44 of Bill and the insertion of new section 143B in the *Building Act 1975*), there should be clear guidance developed to support the proposed reforms.

Recommendation 3: The LGAQ recommends the Department prepare guidance material for building owners and develop a comprehensive education program, in consultation with local governments, to increase community awareness and understanding of the proposed changes to the building certification and inspection processes.

Notice of engagement to local government

As outlined in clause 44 of the Bill, the timeframes for notifying a local government of engagement differs for a private certifier depending on whether or not the certifier is engaged by a client that is the building owner.

In instances where there is an owner client, section 143(2) of the *Building Act 1975* requires that a "private certifier must, within 5 business days after the engagement starts, give notice of the engagement to the local government, unless the certifier has a reasonable excuse". For non-owner clients, this timeframe extends to 15 business days (under new section 143A(4) of the *Building Act 1975*).

It is unclear why there is such a discrepancy and feedback from local government officers has suggested 5 business days should be reasonable for both instances.

Recommendation 4: The LGAQ recommends the timeframes for a private certifier to notify a local government of engagement should seek to align if possible, regardless of whether the certifier is engaged by an owner client or a non-owner client.

Licensing, accreditation and registration of building certifiers

Currently in Queensland, accreditation standards bodies such as the Australian Institute of Building Surveyors (AIBS) and the Royal Institution of Chartered Surveyors (RICS) issue accreditation to individuals proposing to apply to be building certifiers.

The LGAQ supports the proposed 5-yearly review of the educational and experiential standards and professional development scheme of accreditation standards bodies such as AIBS and RICS (as envisaged by clause 53 of the Bill).

However, concerns have been expressed by some local government officers in relation to the proposed changes to licensing requirements for building certifiers and the criteria to be applied by the QBCC for deciding the suitability of applicants for a building certifier licence.

Proposed changes in clauses 46-48 of the Bill (relating to sections 155, 156 and 167 of the *Building Act 1975*), mean that a person may apply for, obtain and renew a building certifier licence without necessarily holding accreditation from an accreditation standards body.

In addition, clause 54 of Bill amends section 186 of the *Building Act 1975* and the criteria for deciding suitability of applicants. Whilst the proposed changes that enable the QBCC to consider whether an applicant/licensee is a 'disqualified individual' (and that a disqualified individual is not suitable to hold a licence) are supported, concerns have been raised that the broadened criteria means a person who is not currently accredited with an accreditation body, may be suitable to hold a building certifiers licence.

Under the Bill, the alternative recognition pathway for a person seeking to obtain a building certifiers licence is 'qualifications and experience prescribed by regulation' (section 155), however no detail has been provided in relation to what this might entail.

Depending on the precise form the regulations take, this alternative approach to accreditation could create bias, argument and debate and impact confidence regarding the professional standards of the building certification industry.

Local government seeks improved training of building certifiers and the LGAQ is concerned with any proposal that could be perceived as weakening the professional development standards and continuing professional development of the building certification industry.

Recommendation 5: If the alternative recognition pathway for a person seeking to obtain (or renew) a building certifiers licence is retained as 'qualifications and experience prescribed by regulation', the LGAQ requests the opportunity for local government to review and provide feedback on the draft regulation before it is made.

Recommendation 6: The LGAQ seeks enhanced training, education and continuing professional development opportunities for building certifiers to be developed by the State Government and the QBCC, in consultation with local government.

Making a complaint against a building certifier

Clause 55 of Bill amends section 190 of the *Building Act 1975* to give QBCC discretionary power to dismiss a complaint against a building certifier, in certain circumstances, and also limit the period for making a complaint about the conduct of a building certifier for breaches unlikely to cause serious financial loss or harm.

Although the restrictions on complaint timeframes are limited, it is important that changes do not reduce consumer protections.

Local governments also currently experience difficulties in the operational and administrative processes associated with lodging complaints to the QBCC about building certifiers. To complement the proposed legislative changes under clause 55 of the Bill, the process for local governments to lodge complaints with the QBCC against a building certifier, should be streamlined and improved.

Recommendation 7: The LGAQ requests the Department and the QBCC work with local government to streamline and improve the process for local governments to lodge complaints with the QBCC, against building certifiers who are not acting in accordance with the building legislation.

Change in terminology – ‘certificate of classification’ to ‘certificate of occupancy’

The LGAQ notes the proposed change in terminology from ‘certificate of classification’ to ‘certificate of occupancy’ foreshadowed by the Bill. Local government feedback supports this change as being consistent with terminology used in other jurisdictions.

Recommendation 8: The LGAQ requests that draft templates for a ‘certificate of occupancy’ are distributed to stakeholders, including local government, for feedback prior to releasing as final and to ensure that these can be uploaded into council systems in a timely manner.

4.2 Amendments to the Building Industry Fairness (Security of Payment) Act 2017

The LGAQ supports in principle the intent of the reforms to enhance Queensland’s security of payment legislation and further extend the protections for industry, through amendments to the *Building Industry Fairness (Security of Payment) Act 2017*, as outlined in Part 4 of the Bill (clauses 60-84).

Notwithstanding, concerns have been raised regarding the additional administrative burden and costs associated with the extended application of project trusts to local government building and development contracts, particularly in relation to the contract value threshold of \$1 million by 2022.

Project trusts and retention trusts

As stated in the Explanatory Notes (page 6) to the Bill, the application of project trust and retention trust requirements is to be extended to eligible contracts as follows:

- from 1 July 2020, project and retention trusts will apply to State government and Hospital and Health Services’ building contracts valued at \$1 million or more (excluding GST) – refer clause 63 of the Bill, new section 14.
- from 1 July 2021, project and retention trusts will also apply to private sector and local government building contracts valued at \$10 million or more (excluding GST) – refer clause 83 of the Bill, section 215.
- from 1 January 2022, project and retention trusts will also apply to private sector and local government building and construction contracts valued at \$3 million or more (excluding GST) – refer clause 83 of the Bill, section 216.
- from 1 July 2022, project and retention trusts will apply to all building and construction contracts valued at \$1 million or more (excluding GST) – refer clause 83 of the Bill, section 217.

- retention trust accounts for cash retentions will apply for all phases where a project trust is also required, and in the final phase, will apply to all parties holding cash retentions down the contractual chain where the head contract requires a project trust.

As such, local government building and construction contracts will be subjected to the new requirements from 1 July 2021 (for contracts valued at \$10 million or more) and progressively extended to lower value contracts of \$3 million or more by 1 January 2022, and \$1 million or more by 1 July 2022.

The LGAQ notes there are some exceptions to this including:

- new section 15B which states that “*a project trust is not required for a contract if the only parties to the contract are the State and a state authority*”. The LGAQ understands a ‘state authority’ includes a local government.
- new section 32(4) which states “*a retention trust account is not required when the contracting party is the State, the Commonwealth, a state authority, local government or another entity prescribed by regulation*”.

The LGAQ understands examples of local governments functioning as a head contractor for contracts requiring a project trust, are likely limited. Rather, councils will likely tender out building and construction contracts to be delivered by an independent contractor. In these instances, where the local government is the contracting party and a project trust is required, the LGAQ understands that the ‘contracted party’ is responsible for opening a project trust account, in accordance with clause 63 of the Bill and section 18.

The LGAQ believes there is negligible risk of a delayed payment or non-payment by local government to a contractor or subcontractor. Local governments are audited by the Queensland Audit Office or its contract auditors, obliged to comply with Australian accounting standards and operate in accordance with current legislation (*Local Government Act 2009* and *Local Government Regulation 2012*, plus the *Statutory Bodies Financial Arrangements Act 1982*). Ultimately, local government debts are guaranteed by the Queensland Treasury. The LGAQ is not aware of any council defaulting on payments for sub-contractors.

In instances where local government is required to establish a project trust account, legislative amendments could be considered to allow a council to utilise the Trust Account that will already be established pursuant to section 200 of the *Local Government Regulation 2012*.

Recommendation 9: The LGAQ does not support the expanded application of project and retention trust requirements to local government building and construction contracts, given the negligible risks of a delayed payment or non-payment by local government to a contractor or subcontractor. If a threshold contract value is to be applied to local government, the LGAQ suggests that the ultimate threshold of \$1 million for local government building and construction projects, is not commensurate with the risk and should be increased.

Recommendation 10: If recommendation 9 above is not supported, the LGAQ recommends consideration should be given to allow a council to utilise a Trust Account that will already be established pursuant to section 200 of the *Local Government Regulation 2012*, in order to satisfy the requirements of the security of payment legislation.