Australian Institute of Architects
Queensland Chapter
2/270 Montague Road
WEST END QLD 4101
T: +61 7 3828 4100
qld@architecture.com.au
www.architecture.com.au

Wednesday, 28 February 2024

Committee Secretary Housing, Big Build and Manufacturing Committee
Parliament House George Street
Brisbane Qld 4000
Via email: SDRIC@parliament.qld.gov.au

BUILDING INDUSTRY FAIRNESS (SECURITY OF PAYMENT) AND OTHER LEGISLATION AMENDMENT BILL 2024

AMENDMENTS TO THE ARCHITECTS ACT 2002

Thank you for the opportunity to respond to the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024*. The Queensland Chapter of the Australian Institute of Architects (the Institute) represents more than 2,300 architects in this state with a commitment to a high quality and sustainable built environment, professional and ethical practice, and social justice. Nationally and internationally, the Institute is a single professional voice for 14,500 members and has been in existence Australia for more than ninety years.

Our purpose in writing to the Committee today is to seek an amendment to the Bill's proposed amendments to the Architects Act 2002. The Institute has been voicing concerns since consultation on the Building Industry Fairness (Security of Payment) Bill 2020 both by written submission (deadline 26 Feb 2020) and by appearance before the Transport and Public Works Committee – Public Hearing on the matter (March 4, 2020). We note that despite both the comprehensive written representation and the appearance at the public hearing, no changes were made.

The Institute was then and is still highly supportive of professional licensing and registration for all practitioners and trades as a means to protect consumers. However, we have significant concern regarding the new subsection 130(3)(d) and the new Section 139A amendments being made to the *Architects Act 2002*.

We are concerned that the new subsection 130(3)(d), permits the tribunal (Queensland Civil and Administrative Tribunal) to require architects to

> *pay an amount to the board as compensation for all or part of the reasonable costs of an investigation by the board about the matter the subject of the proceeding, including the costs of preparing for the proceeding*.

This is in addition to existing subsection 130(2) which already permits the tribunal to order the architect to pay a stated amount of not more than the equivalent of 200 penalty units (at $154.80 per penalty as at 1 July 2023) or currently $30,960.

Similarly, under the provisions of the new Section 139A and its new subsection (2) provides that

> *The court may make an order requiring the person to pay an amount to the board as compensation for all or part of the reasonable costs of an investigation by the board about the offence, including the costs of preparing for the prosecution.*

The following subsection (3) also provides that,

> *This section does not limit the orders for costs the court may make on the finding of guilt.*

While we support investigations to protect consumers and address misconduct, we caution against excessive cost recovery that could disproportionately penalise individuals, notwithstanding the role of human errors or mitigating circumstances, which may give rise to disciplinary grounds versus demonstrable incompetence or deliberate breaches of the Board of Architects of Queensland Code of Practice as approved under Regulation 18A of the Architects Regulation 2003.

Moreover, we find the rationale provided in the explanatory notes regarding the Board's limited resources as a small regulator to be inadequate to justify payment of costs of investigation and costs incurred by the Board in taking a proceeding/action against an architect. This suggests by implication, that large regulators do not need to recover investigation costs. Taken from the perspective of all regulated professions and practitioners across all registration and licensing bodies and authorities, there would be a significant variation in the cost recovered from an architect as compared to a practitioner who has been delivered an adverse finding in similar circumstances. This creates a disparity in the application of legislation (and an unfair and unjust penalty) where equivalent harm or disbenefit to a consumer has occurred.

The Queensland *Legislative Standards Act 1992* sets out fundamental legislative principles, that include the requirement that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament. Subsection (3) sets out a range of examples. In terms of costs – this is defined as including burdens and disadvantages; and direct and indirect economic, environmental and social costs. We believe that the recovery of costs set out in the amendment does not take sufficient regard to the rights and liberties of individuals.

We believe that the power given to the tribunal is not only unfair, but is insufficiently defined, and, as such has the potential to impose a greater penalty on an architect than was envisaged for a regulatory regime for professionals.

The method of determining costs against an architect under the proposed amendment is not sufficiently clear. It would allow all costs of actions to be borne by the architect, leaving no responsibility on the state to pay for its own legislation. The legislation imposes responsibilities on architects in the interests of the public (consumers), and therefore should be funded appropriately to undertake its functions, not at an individual's expense.

Costs must also be appropriate and reasonable. The amendment provides no guidance on how these costs of investigation and preparing for a proceeding should be determined.

The rules governing costs orders in Queensland courts is the *Uniform Civil Procedure Rules 1999* (UCPR). These rules relate to party-to-party costs, meaning that standard costs only compensate the successful party for part of the fees (around 60-75%) they pay to their solicitor. There is no mention of what fairly constitutes the cost of investigation and preparing for a proceeding. If government retains this amendment to the Architects Act, there needs to be

specific guidance to include only those costs actually incurred by the party which were necessary or proper for the attainment of justice or for enforcement or defence of rights.

Also, if these amendments are retained, we strongly recommend implementing a cap on costs of investigation. This would be more in line with other jurisdictions. We have analysed the settings in all jurisdictions and found them to be as follows:

State/ Territory	***Fine/Penalty***	***Compensation/ fee to Board for costs***	***Who Makes determination***
ACT	• $5,000 for an individual and $25,000 for a corporation. • Subsection 66 (i) provides that if the person gained financial advantage from the action that is the ground for occupational discipline—require the person to pay to the Territory an amount assessed as the amount of financial advantage gained by the person.	***No***	ACT Civil and Administrative Tribunal (ACAT) The Architects Act 2004 refers this to s 66 of the ACAT Act 2008, by which a tribunal may make an order for occupational discipline. Subsection 66 (h) requires the person to pay to the Territory or someone else a stated amount (not more than any amount prescribed by regulation); The maximum amounts currently set by Regulation 4 of the ACAT Regulation 2009 are prescribed as the maximum amounts payable under occupational discipline order
NSW	• pay a fine of an amount not exceeding 15 penalty units. ($1,650) • Up to 200 penalty units for unsatisfactory conduct ($22,000)	***No***	New South Wales Civil and Administrative Tribunal
NT	• fine the registered architect an amount not exceeding the prescribed amount (prescribed amount not currently defined in act or regs)	***No***	Architects Board
Qld (current)	• Tribunal ordering the architect to pay a stated amount up to 200 penalty units ($30,960)	***No***	the Queensland Civil and Administrative Tribunal
SA	• Pay the Board a fine not exceeding $10,000	***No***	South Australian Civil and Administrative Tribunal

TAS	-	***Yes.*** An order requiring the architect to pay the reasonable costs of the Board related to carrying out the investigation of the complaint	The Architects Board
Vic	• Tribunal to impose a penalty not exceeding 50 penalty units • ($9,615.50)	***No***	Three-person Tribunal constituted under the Act, of the Architects Board
WA	• pay a penalty not exceeding $5 000	***No***	State Administrative Tribunal

Only Tasmania has similar cost recovery provisions under subsection 20E(1)(f) whereby the Board may make,

> *an order requiring the architect to pay the reasonable costs of the Board related to carrying out the investigation of the complaint;*

We note these costs to be "*reasonable costs*". As well, these costs do not include the costs of taking an action against an architect. We would strongly recommend removing the phrase "*including the costs of preparing for the proceeding.*" from the amendment.

Furthermore, we urge careful consideration of the rationale provided in the explanatory notes regarding the Board's limited resources. While we understand the challenges faced by smaller regulators, legislation should provide clear controls and rules rather than simply "guidance" as stated in the explanatory notes. Additionally, we must remain vigilant to ensure that regulatory consequences designed to protect the public interest are proportionate.

It is crucial to strike a balance between strong regulation to protect the public interest and proportionate responses.

Thank-you for the opportunity to make a submission on this important bill. We are available to provide further information or clarification as needed.

Sincerely,

Russell Hall
Queensland Chapter President
Australian Institute of Architects

Amy Degenhart
Immediate Past Queensland Chapter President
Australian Institute of Architects

Australian Institute of Architects

****

Mandatory information for submission: - The author's name: Drafted for Russell Hall and Amy Degenhart by Paul Zanatta, National Policy and Advocacy Manager, and Dr Anna Svensdotter, State Manager Queensland, Australian Institute of Architects. - If the submission is made on behalf of an organisation, the level of approval: Queensland Chapter President, Russell Hall FRAIA, Queensland Chapter President, Australian Institute of Architects - Email address: qld@architecture.com.au - Daytime telephone number: 07 3828 4100

****

Appendix - Key points as presented to the committee in 2020.

Thank you to the committee for the opportunity to make a submission and act as a witness today. We have several points of note.

(1) The changes to the Architects Act are very significant and we are of the view that as a matter of courtesy, a consultation document should have been prepared by the government to enable architects in Queensland (via the peak body) to be given the opportunity to submit comments (Noting that these changes to the act were not foreshadowed in the first draft of this bill)

(2) Confirm that the AIA supports the amendments to the Architects Act in principle

(3) Some of the amendment powers given to the Board need to be moderated namely

- Immediate suspension of registration which should only be used in the most exceptional and urgent cases.

- In an investigation, the investigator is given the power to seize or copy of any item in the architect's office which means that the investigator has the power to copy any material not related to the investigation. Material in an architect's office that is not related to the investigation should remain confidential. We have suggested wording to section 62K General Powers to overcome our concern. Examples here would include the protection of a client's commercial in confidence material and sensitive intellectual property issues.

- Section 62P Power to secure seized thing in an investigation, gives the investigator power to make any equipment inoperable. It should be made clear that the investigator cannot damage the equipment as it may have to be returned to the owner. We have suggested wording to overcome this problem.

(4) There is the possibility that an audit and/or investigation of an architect could be based on incorrect information and as a result the architect's reputation could be seriously damaged. In such a case the architect should be entitled to compensation. A small change to section 64 Compensation is required.

(5) Regarding the amendments to the Building Industry Fairness (Security of Payment) legislation, the AIA is concerned with the anticipated additional costs that will be imposed on private owners when the system is extended to private projects.

(6) The Building Industry Fairness (Security of Payment) legislation is silent on the responsibilities of an architect or engineer acting as a superintendent in a project requiring a project trust account. We are of the view that the legal responsibilities of an architect or engineer acting as a superintendent should be stated in the Act and not leave it to the contract between the architect or engineer with the principal which could result in some difficult legal grey areas for the architect or engineer regarding responsibilities listed in the Act.