

Building Industry Fairness (Security of Payment) Bill 2017

Explanatory Notes

Short title

The short title of the Bill is Building Industry Fairness (Security of Payment) Bill 2017 (the Bill).

Policy objectives and the reasons for them

The objectives of the Building Industry Fairness (Security of Payment) Bill 2017 are to:

- improve security of payment for subcontractors in the building and construction industry by providing for effective, efficient, and fair processes for securing payment, including the establishment of a framework to establish Project Bank Accounts;
- modernise and simplify the provisions for making a subcontractors charge;
- increase ease of access to security of payment legislation;
- improve legislation to provide increased ability of the Queensland Building and Construction Commission (QBCC) to provide regulatory oversight to the building and construction industry.

The building and construction industry is the third largest employer in Queensland, employing around 220,000 Queenslanders and contributing approximately \$44 billion to the State economy in 2015-16.

Following a series of high profile collapses in the industry, the Government made an election commitment to review the issue of security of payment for subcontractors and to consult widely.

Consultation outcomes reinforced previous analysis of systemic problems within the building and construction industry, including non-compliance with existing State regulations and non-compliance with existing contractual requirements.

What was once considered poor business practice has become a standard operating model for some licensees in the industry – higher contractors often do not make, or delay payments to subcontractors in order to supplement cash flow, offset the costs of other projects or to receive interest, and avoid additional financing costs for accessing further funding.

The results of consultation were supported by the Senate Economics References Committee's 2015 inquiry into insolvency in the Australian construction industry, which found that security of payment in the building and construction industry is a problem across all jurisdictions.

The Australian Securities and Investments Commission's submission to the Senate Committee noted that from 2009 to 2014, the construction industry experienced the highest number of external administrator appointments of all industry sectors, except for the business and personal services sectors. The Senate Committee's report also found that the Australian building and construction industry's rate of insolvencies is out of proportion to its share of national output.

Delaying payments to subcontractors, or non-payment, can have a significant impact on the cash flow of the subcontractor and can contribute to subcontractor insolvency. Subcontractors also typically have more lending risk than their higher contractor counterparts due to reliance on payments, and they subsequently incur higher costs associated with accessing short term finance to meet cash flow commitments.

Evidence from subcontractors suggests it is common practice to embed additional costs in all contracts to offset the loss of funds from bad debts and to counteract the effects of delayed cash flow from other projects.

Insolvency has an adverse impact on business owners and their families, employees and their families, suppliers and the wider community. In addition to financial impacts, harmful social impacts include relationship breakdowns, loss of reputation and stress-related mental illnesses, including suicide. Moreover, it can include families losing their homes, livelihoods and marriage breakdown due to a lack of security of payment. It is not acceptable for subcontractors to not get paid, or to routinely be left waiting for payment.

Achievement of policy objectives

The policy objectives of the Bill will be achieved through:

- implementing Project Bank Accounts (PBA) in the building and construction industry;
- improving the relevant provisions in the progress payment claim legislation to further protect the interests of subcontractors;
- to modernise and simplify the legislation relating to making a subcontractor's charge and improve its operation;
- improve legislation to provide increased ability of the Queensland Building and Construction Commission (QBCC) to provide regulatory oversight to the building and construction industry;
- combining security of payment legislation into one Act, to provide ease of access to the security of payment legislation.

The Bill provides for implementation of PBAs in two phases. Phase 1 will apply to government building and construction projects between \$1-10 million, excluding engineering projects. Engineering projects include infrastructure such as bridges, roads and ports. Phase 2 will implement PBAs in all building and construction projects valued over \$1 million, again excluding engineering projects.

PBAs are trust accounts where progress payments and retention monies are safely held in trust, independent of the head contractor and principal. PBAs are intended to provide greater security in events such as insolvency, where money within the account is effectively quarantined for subcontractors who are beneficiaries to the trust.

It is also expected to lead to faster progress payments, as the head contractor and subcontractors are paid out of the PBA simultaneously. Phases 1 and 2 will apply to first tier subcontractors, that is, subcontractors who contract directly with the head contractor. The Bill also enables application of PBA to lower tier contractors and suppliers at a later date.

The Bill provides for a more level playing field for subcontractors through improvements to the progress payment claims. The *Building and Construction Industry Payments Act 2004* (BCIPA) will be repealed and its provisions placed into the new Act. New progress payment claims provisions will reduce opportunities for head contractors to delay payment and allow subcontractors to take action to resolve payment issues faster. Amendments also enhance the independence and operation of the Adjudication Registry within the QBCC, and streamline the adjudication process for greater ease of use.

The Bill also repeals the *Subcontractors' Charges Act 1974* (SCA) and places its provisions within the new Act. While it is intended that the legal effect of the provisions that are currently in the SCA will remain unchanged, the Bill seeks to improve usability of the SCA provisions.

The amendments to the *Queensland Building and Construction Commission Act 1991* (QBCC Act) will improve regulatory compliance and enhance the QBCC's enforcement capability. The QBCC administers the building and construction licensing system and the Bill introduces licensing reforms in relation to influential and excluded persons. The current definition of 'influential person' is expanded to ensure that not only is the role of the person captured but also the function of the person is captured. For example, a person may appoint their spouse as the director of a company and effectively run the company through their spouse, but without officially being an officer of the company.

The Bill also increases the rigour around the 'excluded individual' provisions, so that a person who was involved in a company failure in other jurisdictions, or who was the director of a company up to two years prior to a failure, will be excluded from obtaining a QBCC licence. Amendments in the Bill are aimed at preventing illegal phoenixing activity, when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts. The Bill will allow the QBCC to more effectively target defaulting contractors who restructure their corporate affairs in order to keep operating after their licence has been cancelled.

Amendments in the Bill will also provide the QBCC with greater insight into a company's financial position so it can more effectively act on any potential problems, to reduce the harm to licensees and consumers.

The Bill also increases penalties for breaches related to unlicensed building work. Further, the Bill increases the number of persons on the Queensland Building and Construction Board to make the Board more representative of the building and construction industry.

To streamline and improve accessibility to the security of payment legislation generally, the Bill creates a single Act containing the requirements for PBAs and the provisions of the BCIPA and SCA.

These measures work together towards the overarching objective to make systemic changes designed to effect cultural change in the industry and protect subcontractor payments. This will lead to reduced family breakdown, greater business confidence and more fairness in the industry.

Alternative ways of achieving policy objectives

The policy objectives can only be achieved through legislative amendment.

Estimated cost for government implementation

The Bill is expected to have some impact on government agencies undertaking capital works, primarily relating to operational activities supporting the implementation of PBAs. Any costs arising from implementation of these legislative amendments will be met from existing agency and departmental resources.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

Legislation should have sufficient regard to the rights and liberties of individuals - *Legislative Standards Act 1992, section 4(2)(a)*

Offences and penalties

The Bill creates new offences for contravening requirements under chapter 2 of the Bill, which provides for the establishment and use of PBAs for particular building and construction projects.

The building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations to pay. The reforms set out in chapter 2 seek to address these issues and it is considered that the introduction of new offences is justified for the following reasons:

- offences will encourage compliance and help bring about cultural change;

- other mechanisms such as an education program and guidance material will assist in meeting the requirements;
- the offences are clearly defined under the Bill;
- the associated penalties are proportionate and have been benchmarked against other jurisdictions wherever possible.

Penalties in the Bill that relate to PBAs are largely consistent with offences relating to trust matters in other legislation. The penalty of 500 penalty units for the head contractor failing to establish a PBA and unauthorised ending of the PBA (500 penalty units and 1 year's imprisonment) are the highest penalties under Chapter 2. This is because this requirement underpins the entire PBA regime and it is critical that the offences reflect the seriousness of the requirement.

The Bill also increases the penalties for existing offences under the QBCC Act relating to unlicensed building work. Currently sections 42, 42B, 42C and 42D attract a maximum penalty of 250 penalty units. However, consultation has shown that unlicensed building work is considered a serious offence due to the significant financial and safety risks for consumers. Introducing higher penalties is considered proportionate and appropriate in order to provide a greater deterrent to unlicensed persons entering the market. This, in turn, is expected to improve the rate of compliance with standards and protect consumers and licensees from loss.

The Bill provides for the new penalties for unlicensed work to operate as follows:

- First offence – maximum 250 penalty units
- Second offence – maximum 300 penalty units
- Third and subsequent offences, or where the work results in tier 1 defective building work – maximum 350 penalty units or 1 year imprisonment.

The proposed new penalties will align Queensland more closely with other states and territories, which generally have higher penalties for unlicensed building work. For example, the maximum penalty in both Victoria and New South Wales is 500 penalty units, with the possibility of 12 months' imprisonment in New South Wales for second and subsequent offences. South Australia also applies escalating penalties including imprisonment. The possibility of imprisonment is particularly targeted at repeat, high-level offenders.

In recognition of the fact that subcontractors may be unaware of when their defects liability period ends (and therefore their entitlement to payment of retention monies), the Bill imposes penalties for failure of a head contractor to give a notice about the defects liability period. The introduction of these penalties is considered appropriate and relevant, given the seriousness of the matter and its impact on subcontractors.

The Bill also provides an offence for failure to comply with an adjudication decision, in order to encourage compliance by respondents with decisions of adjudicators. The Bill also provides offences for adjudicators who fail to provide the registrar a copy of their decision or inform the registrar of a change in circumstances, such as where the adjudicator's professional association has been cancelled. These offences are considered to be justified because these matters are critical to the effectiveness of the

operation of the legislative framework and ensuring that adjudicators are appropriately qualified and suitable to be registered. The offences are clearly defined in the Bill.

Reversal of onus of proof

Clause 23 of the Bill may potentially be considered a reversal of onus of proof as it requires the head contract to establish a PBA unless they can prove that there is less than 90 days between the days the PBA is required and the day of practical completion. A number of clauses, highlighted in the relevant notes on provisions, also provide for compliance unless a person has a 'reasonable excuse'.

In these cases, the provisions are considered justified because they provide clear grounds for liability but also provide for specific exceptions. It is therefore reasonable that the person seeking an exception from the requirement should bear the onus of proof. For example, section 76 of the *Justices Act 1886* outlines that it is considered appropriate in such cases that the onus of proving the exception on the balance of probabilities lies with the person seeking to rely on the exception.

Principles of natural justice

The provision under clause 283 regarding an extension of time for a direction to rectify is a non-reviewable decision. This is considered to be justified on the basis of the need for consumers to have defective work remedied in the shortest amount of time. This is because there could potentially be safety concerns or a severe impost on the consumer (for example, not being able to occupy a building through no fault of their own).

Common law rights

The imposition of the PBA could be considered as providing for the compulsory acquisition of property as it removes the full legal interest in contract money from the head contractor, and reduces them to only a beneficial interest among other beneficiaries. This provision is justified in order to provide payment that is due to subcontractors.

Certain clauses of the Bill could also be considered as overriding the provisions of contracts between parties, such as clause 276 which provides that particular conditions in building contracts are void. These provisions are justified to correct an imbalance that can occur in subcontracts that provide unfair conditions on subcontractors. Also, clause 264 creates an offence where a person deliberately avoids complying with a building contract and as a result, causes another person significant financial loss. This provision is necessary to address a problematic trend in the building and construction industry of poor payment practices and contractual deficiencies which can have a detrimental impact for both licensees and consumers.

**Legislation should have sufficient regard to the institution of Parliament –
*Legislative Standards Act 1992, section 4(2)(b)***

Regulation-making powers

The Bill contains provisions that have regulation-making powers that may be considered to not have sufficient regard to the institution of Parliament

For example, clause 276 inserts new sections 67GA and 67GB of the QBCC Act which provide that a contracting party must not enter a building contract that does not include particular mandatory or prohibited conditions that are prescribed by regulation. This clause has been drafted in this manner to enable the government to respond to the dynamic nature of the building and construction industry.

The type of mandatory conditions that are intended to be imposed include 'best practice' conditions contained in relevant Australian Standards for contracts. However, these standards are subject to regular review. Placing the conditions in a regulation will provide greater flexibility for the government to amend conditions following such reviews. Further, it is expected that the suite of security of payment reforms, including PBAs, will necessitate changes to standard industry contracts and the way that industry does business generally. The department will be monitoring these changes and again, the regulation-making power will allow the government to respond to these changes in industry practice.

Other regulation-making powers under the Bill include:

- Clause 8 – the definition of 'building work' does not include work prescribed by regulation;
- Clause 28 – a head contractor may only deposit money into the PBA for particular purposes outlined in the Act and prescribed by regulation;
- Clause 31 – a head contractor may only withdraw money from the PBA for particular purposes outlined in the Act and prescribed by regulation;
- Clause 32 – where there are insufficient funds in the PBA, the head contractor is prohibited from paying itself or making another payment prescribed by regulation before paying the subcontractor;
- Clauses 79 and 82 – a regulation may limit the number and length of submissions that may accompany an adjudication application or an adjudication response;
- Clause 165 – requires adjudicators to comply with the continuing professional development requirements prescribed by regulation as a condition of registration;
- Clause 258 – amends the QBCC Act to require licensees to comply with minimum financial requirements prescribed by regulation.

While a regulation made under these provisions could potentially affect some aspects of the operation of the Act, they are limited to strict circumstances and many are administrative in nature. Some flexibility for the government to be able to consider

these matters in an expedient manner is considered appropriate due to the need to respond to changing practices

It is also considered that, due to the limited aspects that could be covered by a regulation made under these provisions, there is little scope for a regulation to be made that would be considered to be outside the scope of the power in the authorising law. It would need to be consistent with the policy objectives and purpose of the authorising law.

Consultation

The Government made an election commitment to undertake a wide-ranging review of security of payment for subcontractors, and that it would consult widely. To deliver on this commitment, the Minister for Housing and Public Works released the Security of Payment discussion paper (SoP discussion paper) on 17 December 2015, which was followed by extensive consultation between December 2015 and March 2016.

Following consideration of this feedback, the Premier and the Ministers for the Arts, and the Minister for Housing and Public Works and Minister for Sport released the Queensland Building Plan discussion paper in November 2016. Comprehensive consultation was undertaken across Queensland until 31 March 2017. The government held 15 public consultation sessions throughout Queensland which were attended by over 1100 key industry associations, industry representatives, local government representatives and consumers.

The feedback from these extensive consultation processes refined the policy objectives in the Bill.

Consistency with legislation of other jurisdictions

PBAs have been used on government projects in multiple Australian jurisdictions, including Western Australia, New South Wales and the Northern Territory. PBAs have also been used in England and Scotland. However, these arrangements have generally been implemented administratively. Accordingly, the Bill is state-specific as Queensland is leading the way with legislative reforms of this nature.

Notes on provisions

Chapter 1 – Preliminary

Part 1

1 Short title

Clause 1 provides that the short title will be cited as the *Building Industry Fairness (Security of Payment) Act 2017*.

2 Commencement

Clause 2 provides for the commencement of the Bill on a day fixed by proclamation, except for certain provisions which will commence on assent. The clause also provides that section 15DA of the *Acts Interpretation Act 1954* does not apply to chapter 9, part 1, division 2 or 3. Section 15DA provides for the automatic commencement of certain Acts 1 year after they are assented to.

3 The main purpose of Act

Clause 3 provides that the main purpose of this Act is to assist people working in the building and construction industry in being paid for the work they do. This purpose is to be achieved primarily by:

- requiring the use of PBAs for particular building contracts;
- granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments;
- establish a procedure for making of payment claims, responding to payment claims, the adjudication of disputed payment claims and the recovery of amounts claimed; and
- enabling the use of a statutory charge in favour of subcontractors for payment of work done by the subcontractor.

Part 2 – Application and operation of Act

4 Act binds all persons

Clause 4 provides that this Act binds all persons, including the State, and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States.

Part 3 – Interpretation

5 Definitions

Clause 5 provides that the dictionary in schedule 2 defines particular words used in this Act.

6 Subcontracts, subcontractors and subcontracted work

Clause 6 identifies the subcontracts to which this Act applies. Subsection (1) provides that a subcontract is a subcontract for another contract if the performance of the contract contributes to the performance of the other contract because the work required to be carried out under the contract, will form all or part of the work required to be carried out under the other contract and this contribution is not merely incidental (for example, the purchase of tools from a retail store).

Subsection (2) provides that to remove any doubt, the contribution mentioned in subsection (1)(a) may be indirect because the contract contributes to the performance of 1 or more of the subcontracts in order to contribute to the other contract; and a contract may be a subcontract for another contract regardless of whether any party to the contract is also a party to the other contract.

Subsection (3) provides that if the party to a contract who is required to carry out work under the contract subcontracts all or part of the work – (a) the resulting subcontract is a subcontract for the contract; and (b) the person required to carry out the work under the subcontract is a subcontractor for the contract; and (c) the work required to be carried out under the subcontract is the subcontracted work for the contract.

Subsection (4) provides that the categories of subcontracts are first tier subcontracts, second tier subcontracts, third tier subcontracts and so on.

Subsection (5) provides that a subcontract will be a first tier subcontract if the performance of the subcontract contributes directly to the performance of a head contract.

Subsection (6) provides that a subcontract is a second tier subcontract for a contract if— (a) performance of the subcontract contributes to the performance of the contract only by also contributing to the performance of another subcontract for the contract; and (b) no party to the subcontract is also a party to the contract; and (c) 1 person is both a party to the subcontract and a party to the other subcontract.

Subsection (7) provides that a subcontract is a higher subcontract for another subcontract if (a) performance of the other subcontract contributes to the performance of the subcontract because the work required to be carried out under the other subcontract will form all or part of the work required to be carried out under the subcontract; and (b) both subcontracts are for the same contract.

Chapter 2 – Project bank accounts

Part 1 – Preliminary

7 Purpose of chapter

Clause 7 advises that the main purpose of the PBA chapter is to ensure that money to be paid to particular subcontractors is held in a way that protects the interests of subcontractors.

8 Definitions for chapter

Clause 8 details the definitions for chapter 2.

9 What is a *project bank account*

Clause 9 (1) provides that a PBA is a trust over the following amounts – (a) an amount paid by the principal to the head contractor under a building contract; (b) an amount a subcontractor is entitled to be paid by the head contractor under a first tier subcontract; (c) a retention amount withheld from a subcontractor under a first tier subcontract; (d) an amount that is subject of a payment dispute.

Subsection (2) provides that the head contractor is the trustee of the PBA.

Subsection (3) provides that the head contractor and each subcontractor are the beneficiaries of the PBA and have a beneficial interest in the amounts held in trust under the PBA to the extent of (a) for a subcontractor, an amount that the subcontractor is entitled to be paid under its subcontract, including a retention amount and an amount that is the subject of a payment dispute; or (b) for the head contractor, the remainder of the monies in the PBA.

Subsection (4) provides that a subcontractor (a) becomes a beneficiary when its subcontract is entered into; and (b) ceases to be a beneficiary when paid all amounts, including any retention amount that it is entitled to be paid under its subcontract. Subsection (4)(a) means that a subcontractor will be automatically joined to the trust arrangement when the subcontract is entered into.

Subsection (5) provides what is the “remainder” for a PBA. It is the amount held in trust under the PBA after subtracting all of the following amounts- (a) an amount that the subcontractor is entitled to be paid by the head contractor under a first tier subcontract; (b) a retention amount withheld from to subcontractor under a first tier subcontract; (c) an amount that is the subject of a payment dispute.

Subcontractor for a building contract means a subcontractor, other than the supplier, for a first tier subcontract for the building contract.

10 Contract price

Clause 10 subsection (1) defines ‘contract price’ for a building contract as the amount the head contractor is entitled to be paid under the contract or, if the amount cannot be accurately calculated, the reasonable estimate of the amount the building contractor is entitled to be paid under the contract. Subsection (2) provides that an amount mentioned in subsection (1) must be inclusive of GST.

11 Who is a supplier

Clause 11 subsection (1) defines who is a supplier. A subcontractor is a supplier if under their subcontract they are only required to provide goods and services, without also carrying out building work.

However subsection (2) provides that a subcontractor is not a ‘supplier’ if the goods supplied are- (a) materials or components that were specifically manufactured, or significantly modified, by the subcontractor for incorporation into the building work to be carried out under the head contract for the subcontract; or (b) plant or materials that were specifically manufactured or significantly modified by the subcontractor, to be used in connection to the building work to be carried out under the head contract for the subcontract.

Subsection (3) defines a ‘head contract’ for a subcontract as the building contract (a) that is not also a subcontract; and (b) for which the subcontracted work is to form all or part of the contracted building work.

12 References to particular terms in this chapter

Clause 12 provides clarity in relation to certain references used in this chapter. For example, it states that in this chapter, a reference to a building contract in association with a reference to a PBA is a reference to the building contract for which the PBA is required.

Part 2 – When project bank accounts required

Division 1 – Building contracts requiring project bank account

13 Building contracts requiring a project bank account

Clause 13, subsection (1) outlines what building contracts require a PBA. A building contract requires a PBA if the contract is a PBA contract under sections 14 or 15; and the head contractor enters into a subcontract for all or part of the building work.

Subsection (2) provides that a PBA is not required for a building contract if it is a building contract for which a PBA not required under division 2.

Subsection (3) provides that if a PBA is required for a building contract under subsection (1), the requirement to have a PBA will continue until the contract ends, regardless of- (a) a variation or other amendment to the contract; (b) a change in the contract price; or (c) a change in the work to be carried out under the contract.

14 Particular government building contracts

Clause 14 (1) provides that a building contract is a PBA contract if the (a) the principal for the contract is— (i) the State; or (2) a State authority that has decided a PBA is to be established for the contract; and (b) more than 50% of the contract price is for building work; and the contract price for the building contract is \$1 million or more, but not more than \$10 million; (c) and the building contract is not a subcontract for another building contract. Subsection (2) will allow State authorities to operate PBAs if they wish to do so.

Subsection (2) will allow a regulation to prescribe a building contract to be declared a PBA contract if the principal for the contract is the State or a State authority. This will

allow projects that would not otherwise fall within the requirements for PBA will nonetheless be brought within the legislative provisions.

15 Amendment of building contract

Clause 15 provides the means for determining whether a building contract becomes a contract to which the PBA applies if the nature of the contract changes. Subsection (1) provides that a building contract becomes a PBA contract if (a) before an amendment to the contract, the contract is not a building contract described in section 14; but (b) after an amendment of the contract, the contract is a building contract described in section 14.

Subsection (2) provides that if the only amendment of the building contract is an increase in the contract price, the contract is a PBA contract only if the amendment of the contract, together with any earlier amendments, increases the contract price by 30% or more.

Subsection (3) provides that “amendment” of a building contract, includes any variation of the contract or change to the contract price.

Division 2 – Building contracts not requiring project bank account

16 Building contracts for residential construction work

Clause 16 (1) provides that a PBA is not required for a building contract if the only building work for the contract is residential construction work. Subsection (2) provides however that subsection (1) does not apply if (a) the principal is the department; and (2) the residential construction work relates to 3 or more living units. Based on present administrative arrangements the department administering the new Act will be the Department of Housing and Public Works.

Subsection (3) provides that for subsection (2)(b) a single detached dwelling is taken to be 1 living unit, a residential unit is taken to be 1 living unit and a duplex is taken to be 2 living units. This provision aligns residential construction work for this chapter with the provisions in the QBCC Act, which provisions are used to determine coverage under the Queensland Home Warranty Insurance Scheme.

17 Building contracts for maintenance work

Clause 17 provides that a PBA is not required for a building contract if the only building work that the contract provides for is maintenance work. Maintenance work is defined in section 8 and means work required on an ongoing basis to (i) prevent deterioration or failure of a thing; (ii) restore a thing to its correct operating specifications; or (iii) replace a component at the end of its working life. Maintenance does not include (i) improving a building to increase its capabilities or functions; or (ii) improving a building to meet new statutory requirements applying to the thing; (iii) a refurbishment or replacement of a building that extends the life of a building.

18 Government contracts tendered before commencement

Clause 18 provides that a PBA is not required for a building contract if (a) the principal is the State or a State authority; and (b) the tender for the contract is tendered before the commencement of this section.

To remove doubt, the provision declares that a PBA continues to not be required for the building contract regardless of any of the following – (a) a variation or any other amendment of the contract; (b) a change in the contract price; (c) a change in the work to be carried out under the contract.

Division 3 – Related entities

19 Who is a related entity

Clause 19 defines who is a related entity for another person. The related entity provisions are intended to deter behaviour that would result in head contractors, who would otherwise be required to establish PBAs, from avoiding the PBA requirements.

20 Application of chapter if parties to a subcontract are related entities

Clause 20 sets out what is required if a PBA is required for a building contract and a subcontractor, for a first tier contract, is a related entity for the head contractor.

21 Notices about related entities

Clause 21 sets out the procedure if a PBA is established for a building contract. Under subsection (2) if the principal knows that a subcontractor beneficiary is a related entity for the head contractor, the principal must advise the QBCC commissioner (the commissioner) in the approved form within 5 days after the person first knows the subcontractor beneficiary is a related entity for the head contractor.

Subsection (3) provides that for subsection (2) the principal is taken to know a subcontractor beneficiary is a related entity for the head contractor if the principal ought reasonably to know.

Subsection (4) provides that if the head contractor enters into a subcontract with a related entity, the head contractor must advise the commissioner and the principal, in the approved form, within 5 business days after entering into the subcontract.

Part 3 – Project bank accounts

Division 1 – Application

22 Application of part

Clause 22 provides that this part applies where a PBA is required for a building contract.

Division 2 – Establishing project bank accounts

23 Head contractor must establish project bank account

Clause 23 requires the head contractor to establish a PBA within 20 business days of entering into the first subcontract for the building contract. There would be nothing to prevent a head contractor from establishing a PBA earlier than this time frame, if the head contractor is aware that they will be engaging subcontractors for the work. This could occur for example when the principal and the head contractor enter into a contract.

The head contractor is required to establish a PBA at the office or a branch of a financial institution within the State of Queensland. The provision requires that three accounts be set up, namely a general account, a retention account and a disputed funds account.

Subsection (4) provides that the head contractor is not required to establish a PBA does not arise if the head contractor can prove that there is less than 90 days between the day the PBA is required for the contract and practical completion for the contract.

Subsection (5) defines practical completion.

The clause provides for significant penalties of 500 penalty units for noncompliance. The building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations establish PBAs and so meet their obligations to pay. The requirements in this clause underpin the whole PBA regime and it is critical the levels of the offences reflect the seriousness of the requirement.

24 Particular requirements for trust accounts

Clause 24 requires the head contractor to make any deposits to, or withdrawals from the PBA to be by electronic transfers. Withdrawals from the trust accounts can only be made using a payment instruction given to the financial institution. Deposits and withdrawals of amounts from the trust accounts can only be made using an electronic transfer.

The head contractor must ensure that the principal can view matters such as deposits to the accounts, withdrawals from the accounts and payment instructions given to the financial institutions.

Requiring only electronic funds transfers into and out of PBAs will assist the QBCC in any audits and investigations and provide accountability by the principal and the head contractor. For the Government and the QBCC to effectively regulate the use of PBAs, it is critical that an audit trail is established supported by appropriate record-keeping. The penalty of 200 penalty units for this offence will help encourage proper business practices and bring about cultural change.

25 Name of trust account

Clause 25 requires the head contractor opening a PBA to ensure that the words ‘trust account’ are included in the account name so that it can be readily identified as a trust account.

This clause creates an offence of 200 penalty units. This requirement ensures that PBAs are properly established and it is critical that the offence reflects the seriousness of the requirement.

26 Notice of trust account’s opening, closing or name change

Clause 26 requires a head contractor to give written notice within 10 days to the principal if they open a PBA, change the name of, or close an established PBA.

Division 3 – Payments to project bank account

27 All payments from principal to be deposited into project bank account

Clause 27 (1) applies if the principal pays an amount to the head contractor under the building contract and that otherwise reduces the unpaid amount of the contract price for the building contract. The principal must pay the amount into the general trust account for the PBA unless the amount was due to be paid before the PBA was established or the principal has reasonable excuse.

Once deposited into the general trust account, the amount is taken to be a payment made by the principal to the head contractor and discharges the principal’s liability to the pay that amount to the head contractor under the building contract.

Subsection (4) provides that if an amount is paid to the head contractor or its agent in contravention of subsection (2) the head contractor must deposit the amount into the general trust account as soon as practicable after receiving the amount.

A penalty of 200 penalty units or 2 years’ imprisonment applies. This penalty reflects the seriousness of the requirements for principals to comply with the PBA requirements.

28 Limited purposes for which money may be deposited into project bank account

Clause 28 provides that the head contractor must not cause an amount to be deposited into a trust account for any purpose other than the reasons listed in this section.

Division 4 – Payments from project bank account

29 All payments to subcontract beneficiaries to be paid from project bank account

Clause 29 applies if a subcontractor is a beneficiary is entitled to be paid an amount under its subcontract. The head contractor may only pay the amount to the

subcontractor beneficiary from a trust account. This provision carries a penalty of 200 penalty units or 1 year's imprisonment. This penalty reflects that need for compliance with the PBA requirements to provide payment to subcontractors through the PBA.

30 Head contractor to cover shortfalls

Clause 30 applies if there is an insufficient amount available in a trust account to pay an amount to a subcontractor beneficiary. The head contractor must immediately deposit into the trust account an amount equal to the shortfall.

31 Limited purposes for which money may be withdrawn from project bank account

Clause 31 provides for the circumstances in which money may be withdrawn from the PBA. This includes paying a subcontractor beneficiary an amount that the head contractor is liable to pay the subcontractor under a subcontract for the building contract.

The head contractor must repay to the trust account all amounts that the head contractor withdraws in contravention of subsection (1) as soon as practicable after withdrawing the amount.

The penalties for this section are 300 penalty units or 2 years' imprisonment. The building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations to pay. This provision ensures that the PBA and the funds held in the account are not misused, and will help encourage proper business practices and bring about cultural change.

32 Order of priority

Clause 32 applies if there is an insufficient amount available in a trust account to pay the amounts listed in the clause in full. The clause provides that the head contractor must not withdraw an amount from the trust account or make a prescribed payment until the subcontractor's amount is paid in full to the subcontractor beneficiary. However, the head contractor may withdraw an amount before the subcontractor's amount is paid in full if the withdrawal is to make a payment ordered by the court or for an adjudication under this Act.

The penalty for subsection (2) is 300 penalty units or 2 years' imprisonment. The building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations to pay. This provision ensures that subcontractors are getting their entitlements to the greatest degree possible.

33 Insufficient amounts available for payments

This clause will apply if there are 2 or more subcontractor beneficiaries each of whom are a claimant due to be paid an amount from the trust account at the same time, the amount held in the trust account is insufficient to satisfy in full all of the amounts due to be paid to the subcontractor beneficiaries. The amount to be paid to each subcontractor beneficiary is to be reduced in proportion to the amounts due to be paid

to each. The clause also provides that the head contractor remains liable to pay each claimant in full.

This provision ensures that subcontractors are getting their entitlements to the greatest degree possible.

Division 5 – Retention amounts

34 Dealing with retention amounts

This clause provides that a head contractor must ensure that if an amount held in trust under a PBA is a retention amount, the amount is held in the retention account for the PBA. The penalty for this offence is 200 penalty units or 2 years' imprisonment.

The head contractor must not withdraw an amount held in the retention account unless the withdrawal is to make any of the following payments in accordance with the building contract – (a) payment to a subcontractor beneficiary of an amount withheld under the beneficiary's subcontract; or (b) payment to the head contractor for an amount to correct defects in the subcontracted building work; or (c) a payment ordered by the court. The penalty for this section is 300 penalty units or 2 years' imprisonment.

The penalties in this clause reflect the fact that the building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations to pay. This provision ensures that the PBA and the funds held in the account are not misused, and will help encourage proper business practices and bring about cultural change.

Division 6 – Payment disputes

35 When payment dispute occurs

This clause will apply when a head contractor provides a payment schedule under the Act to a subcontractor and the amount in the progress payment instruction that is provided to the principal is less than that provided for in the payment schedule.

36 Dealing with amount if a payment dispute occurs

Where *clause 36* applies, the head contractor must, to the extent that there is a discrepancy in the payment schedule and the instructed amount, place the difference in the disputed funds account.

The penalty for not complying with this requirement is 200 penalty units or 1 year's imprisonment. This penalty is designed to ensure that the head contractor does not mislead the principal in the progress payment instruction as to the amount owing to the subcontractor.

Subsection (3) provides that the head contractor must ensure that the amount transferred under subsection (2) is not paid to any person other than the subcontractor beneficiary or to another person in the circumstances prescribed by regulation. The

penalty for this subsection is 300 penalty units or 2 years' imprisonment. This penalty is to ensure that subcontractors get the money to which they are entitled.

Division 7 – Ending project bank account

37 Ending project bank account

Clause 37 provides that the head contractor may dissolve a PBA only if there are no longer any subcontractor beneficiaries for the PBA; or the only remaining building work to be carried out under the building contract is maintenance work. Subsection (2) provides that a head contractor dissolves a PBA by closing the trust accounts and giving written notice to the principal that the PBA. When dissolving the PBA the head contractor may pay itself (a) any amount that is interest that the head contractor is entitled to under section 44; or any remaining amount that is not otherwise owing to another person.

38 Unauthorised ending of project bank account

Clause 38 provides that while a PBA is not required for a building contract, the head contractor must not dissolve the PBA. The head contractor is taken to dissolve the PBA if it withdraws all amounts held in trust under the PBA or closes any of the trust accounts.

The penalty for this provision is 500 penalty units or 1 year's imprisonment. The requirements in this clause underpin the PBA regime and it is critical the levels of the offences reflect the seriousness of the requirement.

Division 8 – Other

39 Amounts in project bank account unavailable for head contractor's debts

Clause 39 subsection (1) provides that an amount paid, or required to be paid into a trust account for a PBA cannot be (a) used for payment of the debt of a creditor of the head contractor; or (b) attached or taken in execution under a court order or process for the benefit of a creditor of the head contractor. Subsection (1) ceases to apply to the amount if lawfully withdrawn from the trust account.

This provision is to ensure that the subcontractor beneficiary's money in the trust account cannot be used otherwise than for the benefit of the subcontractor beneficiary. In this way subcontractors should receive their entitlements.

40 No power of head contractor to invest

Clause 40, subsection (1) clarifies that the head contractor must not invest funds held in a trust account for the PBA in any form of investment. Subsection (1) does not apply to interest on an amount held in a trust account paid by the financial institution at which the account is held.

41 Power to employ agents

Clause 41 permits the trustee to employ agents to perform their functions, however, the trustee remains liable for the agent's acts and defaults.

42 Power to delegate

Clause 42 provides that the head contractor may, using the approved form, delegate to a person resident in the State any powers of the head contractor in relation to the PBA, other than the power to delegate.

43 Head contractor not entitled to payment for administration of project bank account or fees

Clause 43 provides that the head contractor is not entitled to payment from the PBA, or from the subcontractor beneficiary for any amount relating to the administration of the PBA by the head contractor or fees payable for the PBA.

44 Interest earned on amounts held in project bank account

Clause 44 provides that the head contractor is entitled to receive all interest earned on amounts held in a trust account for a PBA.

45 Account to be kept by head contractor

Clause 45 provides that the head contractor must keep written records of all transactions involving amounts held in trust for a PBA that will sufficiently explain the transactions, provide a true position in relation to the outcome of the transactions, enable accurate accounts to be prepared from time to time and enable convenient and proper audit of transactions. The head contractor must retain a copy of the records for a period of not less than 7 years. These requirements will assist the QBCC in any audits and investigations and provide accountability by the principal and the head contractor.

For the Government and the QBCC to effectively regulate the use of PBAs, it is critical that an audit trail is established supported by appropriate record-keeping. The penalty of 300 penalty units or 1 year's imprisonment for this offence will help encourage proper business practices and bring about cultural change.

46 Right of head contractor to apply to Supreme Court for directions

Clause 46 provides that the head contractor may apply to the Supreme Court for directions about (a) an amount held in trust under a PBA; or (b) the administration of the PBA; or (c) the exercise of a power by the head contractor. An application under this clause must be served on any subcontractor beneficiaries for the PBA unless otherwise directed by the Supreme Court.

47 No assignment of entitlement by head contractor

Clause 47 provides that an assignment by the head contractor of an entitlement of the head contractor to an amount held in trust under the PBA is of no effect.

48 Equity and court's jurisdiction preserved

Clause 48 provides a principle of equity relating to trusts applies for a PBA except to the extent that the principle is inconsistent with this Act. The clause also provides that nothing in this chapter affects a court's inherent jurisdiction to supervise a PBA as a trust.

Part 4 – Information sharing

49 Notice of project bank account before entering subcontracts

Clause 49 applies if a PBA is required for a building contract under section 13. Before entering into a subcontract for the building contract, the head contractor must give the subcontractor the information that is in the approved form- (a) that a PBA will be used for making payments to the subcontractor; (b) details of the financial institution at which the trust accounts for the PBA to be held. However, if the head contractor entered into the subcontract for the building contract before the day (the start date) a PBA is required for the contract, the head contractor must give the subcontractor the information within 10 business days after the start date.

50 Principal to be given information about subcontracts

Clause 50 applies if a PBA is required to be established for a building contract under section 13. The head contractor must, after establishing the PBA, give the principal the information prescribed by regulation. The head contractor must also advise the principal of a change in this information.

51 Principal and subcontractor to be given copy of payment instruction

Clause 51 applies if a head contractor gives a financial institution an instruction about a payment from a trust account for a PBA. The head contractor must as soon as practicable after giving the instruction give a copy of the instruction to the principal and if the payment is to a subcontractor beneficiary, the subcontractor beneficiary.

52 Principal to inform commissioner of discrepancies

Clause 52 applies if a head contractor gives a principal a copy of a payment instruction under clause 51. The principal must inform the commissioner of any discrepancies in the payment instruction as soon as practicable after becoming aware of discrepancies. This provision is to provide the principal and the Commission of oversight over the payment instruction process.

Part 5 – Effect of insolvency or termination of building contract

53 Definitions for part

This clause provides the definitions for this part.

54 Right of principal to step in as trustee

This clause applies if a PBA is established for a building contract and the contract is terminated by the principal for a default by the head contractor; or if the head contractor is an individual, he or she is insolvent under administration within the meaning of section 9 of the *Corporations Act 2001 (Cwlth)*, or if the head contractor is a company a provisional liquidator, liquidator, administrator or controller is appointed or the company is wound up or ordered to be wound up under the *Corporations Act 2001 (Cwlth)* or another circumstance prescribed by regulation.

The principal may serve a notice on the head contractor advising that the principal will replace the head contractor as trustee of the PBA. From the day the notice is served on the head contractor the head contractor is discharged as trustee for the PBA and the principal is appointed as trustee for the PBA. Amounts in the PBA are divested from the head contractor to the principal. However, the head contractor continues to be entitled to any interest by virtue of section 44.

55 Information to be given to principal as trustee

If the principal for a PBA is appointed as trustee for the PBA under clause 54, the head contractor must, as soon as practicable give the principal the information that the principal will require to act as trustee of the PBA. The head contractor must inform the relevant financial institution as soon as practicable that the principal will act as trustee of the PBA. The relevant financial institution is defined as the financial institution at which the trust accounts for the PBA are held.

56 Principal as trustee

Clause 56 also applies if the principal for a PBA is also appointed as trustee for the PBA under clause 54. As trustee of the PBA the principal may only make the payments to the subcontractor beneficiaries or the head contractor (as a beneficiary) that are required to be made under this chapter.

57 Protection from civil liability

Clause 57 provides that a principal appointed as trustee under clause 54 does not incur civil liability for performing a function or exercising a power of a trustee if the conduct is engaged in good faith and without negligence.

Part 6 – Other

58 Limited liability of principal

Clause 58 provides that nothing in this chapter creates or supports a right of action against the principal by a subcontractor beneficiary, or the head contractor, as a beneficiary of the PBA.

59 Application of Personal Property Securities Act 2009 (Cwlth)

Clause 59 provides that a PBA has priority over security interests under the *Personal Properties Securities Act 2009 (Cwlth)*. This is to avoid conflict with the PBA provisions.

60 Application of Trusts Accounts Act 1973 and Trusts Act 1973

Clause 60 provides that the *Trusts Accounts Act 1973* and the *Trusts Act 1973* do not apply to a PBA or to a trustee or beneficiary of a PBA. This is to avoid conflict with the PBA provisions.

Chapter 3 – Progress payments

Part 1 – Preliminary

Division 1 – Application and operation of chapter

61 Application of chapter

Clause 61 replicates section 3 of the repealed BCIPA, which provides for the application of this chapter to all construction contracts, whether written or oral, or partly written and partly oral. Certain classes of contract are excluded from the Bill, as are certain classes of contractual provision.

62 Effect of giving notice to claim for subcontractors' charges

Clause 62 essentially replicates section 4 of the repealed BCIPA. It provides that a person who gives a notice of claim of charge under chapter 4 of the Bill in relation to construction work or related goods and services the subject of a construction contract, may not under part 3 of this chapter, start or continue proceedings or another action in relation to all or part of the construction work or related goods and services.

However, a person may serve a payment claim under part 3 of this chapter in relation to the construction work or related goods and services the subject of a construction contract, if the notice of claim of charge under chapter 4 is withdrawn.

63 Act does not limit claimant's other rights

Clause 63 replicates section 5 of the repealed BCIPA, which preserves a claimant's other entitlements under a construction contract.

Division 2 – Interpretation

64 Definitions for chapter

Clause 64 sets out the key definitions used in this chapter.

65 Meaning of construction work

Clause 65 replicates section 10 of the repealed BCIPA, which defines the term 'construction work'. The definition of construction work includes building work within the meaning of QBCC Act.

66 Meaning of related goods and services

Clause 66 replicates section 11 of the repealed BCIPA. It defines the term 'related goods and services' for the purposes of this chapter.

67 Meaning of reference date

Clause 67 is a new provision defining the term 'reference date' for the purposes of this chapter. The definition of reference date also provides for when a construction contract is terminated and does not provide for a reference date surviving beyond termination. In such cases, the final reference date for when payment claim may be made is the day the contract is terminated.

68 Meaning of payment claim

Clause 68 is a new provision defining the term 'payment claim' for the purposes of this chapter. The claim must be a written document that (a) identifies the construction work or related goods and services to which the progress claim relates; (b) states the amount of the progress payment that the claimant claims is payable by the respondent; and (c) requests payment of the claimed amount; and (d) includes the other information prescribed by regulation. A request for payment may be, for example, in the form of an invoice that contains a due date.

69 Meaning of payment schedule

Clause 69 defines the term 'payment schedule' for the purposes of this chapter. A payment schedule is a written document that identify the payment claim to which it responds, and states the amount of the payment, if any, that the respondent proposes to make and if the amount is less than the claimed amount, any reason for withholding payment.

Part 2 – Right to progress payments

70 Right to progress payments

Clause 70 essentially replicates section 12 of the repealed BCIPA. It provides that for each reference date under a construction contract, a person who has carried out construction work or supplied related goods and services, becomes entitled to a progress payment.

71 Amount of progress payment

Clause 71 replicates section 13 of the repealed BCIPA. It provides for the amount of a progress payment that a person is entitled to under a construction contract to be ascertained in accordance with the terms of the contract. If the construction contract does not provide for the amount of a progress payment, the amount should be calculated on the basis of the value of the construction work carried out, or related goods and services supplied.

72 Valuation of construction work and related goods and services

Clause 72 incorporates and amends section 14 of the repealed BCIPA, which provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.

73 Due date for payment

Clause 73 provides that a progress payment becomes due and payable in accordance with the terms of the construction contract. If the contract does not provide for a due date for payment, or it contains a void payment provision, the progress payment becomes payable at the end of 10 business days after a progress claim is made under part 3 of the chapter.

A void payment provision includes:

- a construction contract that is the subject to clause 74 below
- for a construction management trade contract or subcontract under the QBCC Act—a provision that provides for payment more than 25 business days after making a payment claim
- for a commercial building contract under the QBCC Act—a provision that provides for payment more than 15 days after making a payment claim.

The clause is based on section 15 of the repealed BCIPA.

74 Effect of ‘pay when paid’ provisions

Clause 74 replicates section 16 of the repealed BCIPA. It states that a ‘pay when paid’ provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A ‘pay when paid’ provision is a provision that makes one person’s payment dependent on another person’s payment or dependent on the operation of another contract.

Part 3 – Claiming progress payments

75 Making payment claim

Clause 75 incorporates and amends section 17 of the repealed BCIPA, which enables a person who is entitled to a progress payment (the claimant) to serve a payment claim on the person who is liable to make the payment (the respondent). The clause also sets out the timeframes for making a payment claim.

76 Responding to payment claim

Clause 76 incorporates and varies section 18 of the repealed BCIPA. It provides that a respondent given with a payment claim must serve a payment schedule to the claimant, (whether or not the respondent intends to pay the amount stated in the payment claim), unless they have a reasonable excuse. The clause also sets out the timeframes for serving a payment schedule.

Failure to provide a payment schedule is an offence, with a maximum penalty of 100 penalty units. The offence reflects the importance of open communication and providing certainty to claimants about whether a respondent intends to pay. The opportunity to proceed to judgment or adjudication will also arise sooner.

77 Consequences of failing to serve payment schedule

Clause 77 applies if a respondent given a payment claim does not respond to the claim by serving the claimant with a payment schedule as required by clause 76. This provision incorporates provisions of section 19 of the repealed BCIPA. The clause provides that the respondent is liable to pay the amount claimed under the payment claim to the claimant on the due date for the progress payment to which the payment claim relates.

78 Consequences of failing to pay claimant

Clause 78 applies if a respondent given a payment claim does not pay the amount owed to the claimant in full on or before the due date for the progress payment. The clause entitles a claimant who is not paid in full on or before the due date for the progress payment to recover the unpaid portion set out in the respondent's payment schedule as debt in court, or make an adjudication application. A claimant may also suspend carrying out construction work, or supplying the related goods and services, in accordance with clause 98 of the Bill.

Part 4 – Adjudication of disputed progress payments

79 Application for adjudication

Clause 79 incorporates and varies section 21 of the repealed BCIPA. It enables a claimant to apply for adjudication in the event that the respondent fails to pay an amount to the claimant by the due date for the payment, or the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim.

The timeframes for making an adjudication application as follows:

- (i) for an application relating to failure to serve a payment schedule and pay the full amount stated in the payment claim, 30 business days after the due date for the progress payment to which the claim relates;
- (ii) 40 business days after the due date for payment where the respondent fails to pay the full amount stated in the payment schedule; or
- (iii) for an application relating to an amount stated in the payment schedule being less than the amount in the payment claim, 30 business days after the claimant receives the payment schedule.

An adjudication application is made to the adjudication registrar in the approved form. To minimise the complexity of the adjudication and ensure it remains a faster alternative to court proceedings, an application must not exceed the number and length of submissions that is prescribed by regulation.

Once received, the registrar must refer the adjudication application to an adjudicator within 4 business days after the application is received.

80 When adjudicator ineligible to adjudicate

Clause 80 incorporates and varies section 22 of the repealed BCIPA, which prevents an adjudicator from adjudicating a particular construction contract if they are a party to the contract or has a conflict of interest as prescribed by regulation.

81 Appointment of adjudicator

Clause 81 incorporates and varies section 23 of the repealed BCIPA. It provides that after receiving a referral, the adjudicator must accept or reject the referral within 4 business days after the referral, unless the adjudicator has a reasonable excuse. If the adjudicator accepts the referral, he or she must also provide a written notice of acceptance to the claimant, the respondent and the registrar.

If an adjudicator rejects a referral, by notice to the registrar, or fails to provide a response in the given time, the registrar must refer the application to another adjudicator. The referral to the second adjudicator is made at no cost to the claimant.

82 Adjudication response

Clause 82 essentially replicates section 24 of the repealed BCIPA. It only allows the respondent to give the adjudicator a response to the claimant's adjudication application if the respondent provided a payment schedule to the claimant within the required timeframe.

The adjudication response must be in writing, identify the adjudication application to which it relates and may contain submissions relevant to the response. Similar to an adjudication application, an adjudication response must not exceed the number or length of submissions that is prescribed by regulation. The respondent must also not include any new reasons for withholding payment that were not previously included in the payment schedule.

83 Time for making adjudication response

Clause 83 sets out the timeframes for making an adjudication response. These vary depending on whether the adjudication application relates to a standard payment claim (for an amount of \$750,000 or less) a complex payment claim (more than \$750,000). A respondent may seek an extension of time from the adjudicator for providing the adjudication response. This clause replicates section 24A of the repealed BCIPA.

84 Adjudication procedures

Clause 84 replicates section 25 of the repealed BCIPA. It sets out how a proceeding for an adjudication application may be conducted. The clause allows the adjudicator to seek further submissions from the parties, call a conference or carry out an inspection. Failure by the claimant or the respondent to comply with an adjudicator's request does not prevent the adjudicator from deciding the application.

An adjudicator must also decide whether he or she has jurisdiction to adjudicate the application and whether the application is frivolous or vexatious.

85 Time for deciding adjudication application

Clause 85 incorporates and varies section 25A of the repealed BCIPA, which provides the timeframe for the adjudicator to decide an adjudication application. The clause also provides that for a proceeding conducted to decide an adjudication application the adjudicator must decide whether he or she has jurisdiction to adjudicate the or the application and whether the application is frivolous or vexatious. The adjudicator may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions.

86 Extending time for deciding adjudication application

Clause 86 incorporates provisions of section 25A of the repealed BCIPA, and allows an adjudicator to decide an adjudication application within a longer period than that set out under clause 85 if:

- the claimant and respondent agree in writing to a longer decision period; or
- for a complex payment claim, and in the opinion of the adjudicator—the claimant and respondent have sought, but failed to reach, an agreement to extend the time. In latter case, an extension of 5 business days applies.

87 Valuation of work etc. in later adjudication application

Clause 87 incorporates and varies section 27 of the repealed BCIPA. It applies in the situation where an adjudicator has previously decided the value of any construction work under a construction contract or the value of any related goods and services supplied under a construction contract.

The clause provides that the adjudicator, or another adjudicator, must in any later adjudication application that involves the same work or the same goods and services, give the work or the goods and services the same value as that previously decided. The exception is where the parties satisfy the adjudicator concerned that the value of the work or of the goods and services has changed since the previous decision.

The clause further provides that if a decision or order of a court changes the value of the construction work or of the related goods and services, the adjudicator must apply the value as changed by the court.

88 Adjudicator's decision

Clause 88 incorporates and varies section 26 of the repealed BCIPA, which provides that an adjudicator's decision will determine the amount of the progress payment to be paid, the date on or before which it must be paid and the rate of interest payable on any such amount.

In determining an adjudication application, the adjudicator is only to consider certain matters, being:

- the provisions of this chapter
- to the extent they are relevant, provisions of the QBCC Act, part 4A, which provides the requirements for building contracts other than domestic building contracts
- the provisions of the relevant construction contract
- the payment claim together with all submissions properly made by the claimant
- the payment schedule together with all submissions properly made by the respondent
- the results of any inspection carried out under clause 84.

An adjudicator must not consider an adjudicator response that was not given with the allowable timeframes, exceeded the prescribed number and length of submissions, or attempted to introduce new reasons for withholding payment.

The adjudicator's decision must be in writing and include the reasons for the decision unless the claimant and the respondent have both requested the adjudicator not to include the reasons in the decision.

The clause also requires an adjudicator to provide a copy of their decision to the registrar at the same time it is provided to the claimant and respondent. This allows the registrar to proceed with issuing an adjudication certificate under clause 91 of the Bill, which can then be used by the claimant to seek payment in court should the respondent not comply with the adjudicator's decision. Failing to provide the registrar with a copy of the decision attracts a maximum penalty of 40 penalty units. The offence reflects the importance of this requirement in supporting the effective operation of the registry as well as a claimant's ability to get paid.

89 Adjudicator may correct clerical mistakes etc

Clause 89 allows an adjudicator to correct a decision if there is a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a material mistake in the description a person, thing or matter mentioned in the decision, or a defect of form.

The adjudicator may correct a decision on the adjudicator's own initiative or on the application of the claimant or the respondent. The clause further provides that an adjudicator must correct the decision if requested to do so by the registrar.

This clause incorporates and varies section 28 of the repealed BCIPA.

90 Respondent required to pay adjudicated amount

Clause 90 essentially replicates section 29 of the repealed BCIPA. It provides that if an adjudicator decides that the respondent must pay to the claimant an adjudicated amount, the respondent must pay the amount within 5 business days after being given the adjudicator's decision, or a later date determined by the adjudicator. A failure to pay an adjudicated amount is an offence and also grounds for disciplinary action if the

respondent is licensed under the QBCC Act. A strong deterrent is needed for respondents who would otherwise ignore an adjudicator's decision, forcing claimants to seek court judgement and further protracting payment.

91 Adjudication certificate

Clause 91 incorporates and varies section 30 of the repealed BCIPA. It provides that where an adjudicator decides a respondent must pay the claimant an adjudicated amount, the registrar must give the claimant an adjudication certificate no later than 5 days after the being given the decision. The clause also specifies the content requirements for an adjudication certificate.

An adjudication certificate is not required if there is no amount to be paid to the claimant, the adjudicator decided he or she did not have jurisdiction to decide the application, or if the application was considered frivolous or vexatious.

92 Consequences of not paying adjudicated amount

Clause 92 replicates provisions of section 20 of the repealed BCIPA. It provides that if a respondent fails to pay the whole or any part of an adjudicated amount, the claimant may notify the respondent of the claimant's intention to suspend carrying out construction work or supplying related goods and services.

93 Filing of adjudication certificate as judgment debt

Clause 93 replicates section 31 of the repealed BCIPA, which enables an adjudication certificate to be filed as a judgment debt that may be enforced in a court of competent jurisdiction. The adjudication certificate must be accompanied by an affidavit stating how much of the adjudicated amount, whether the whole or a part, has not been paid.

If the respondent commences proceedings to have the judgment debt set aside, the respondent is not entitled to bring any counter-claim against the claimant, raise any defence or challenge the adjudicator's determination and is required to pay to the court as security the unpaid portion of the adjudicated amount.

94 Claimant may make new application in certain circumstances

Clause 94 enables a claimant to make a new adjudication application in the event that an adjudicator fails to determine the application within the time allowed. The claimant may either:

- ask that the registrar refer the application to another adjudicator, at no cost
- make a new application within 5 days

Where the application is referred to another adjudicator, the claimant and respondent will not have the opportunity to make new submissions or introduce new information unless requested by the adjudicator under clause 84. Rather, the decision will be based on the original adjudication application and adjudication response. The claimant and respondent will have 5 days to provide the original submissions after the new adjudicator after he or she is appointed.

A new application made under this clause will ‘begin afresh’ and be subject to the usual requirements of this division, other than the timeframes for making the application.

This clause incorporates and amends section 32 of the repealed BCIPA.

95 Adjudicator’s fees

Clause 95 essentially replicates section 35 of the repealed BCIPA, which provides for the fees to be paid to an adjudicator who decides an adjudication application. An adjudicator may decide the proportion of the fees to be paid by the claimant and the respondent; otherwise, the parties are equally liable. The maximum amount of fees and expenses to be paid to an adjudicator may be prescribed by regulation.

The clause also provides that an adjudicator is not entitled to any fees if they fail to decide an application within the time allowed, except in particular circumstances such as where the adjudication application was withdrawn.

96 Deciding fees payable by claimant and respondent

Clause 96 incorporates and amends section 35A of the repealed BCIPA. It provides for matter to be considered by an adjudicator when determining the proportion of the adjudicator’s fees and expenses to be paid by the claimant and the respondent. While an adjudicator must consider the conduct of the parties, other matters may simply be taken into consideration.

97 Withdrawing from adjudication

Clause 97 allows a claimant to withdraw an adjudication application, including where the respondent pays the claimed amount. As the adjudicator may not otherwise be aware, the claimant is required to inform the adjudicator if the respondent has paid. This clause incorporates and amends section 35B of the repealed BCIPA.

Part 5 – Suspending work

98 Claimant’s right to suspend work

Clause 98 essentially replicates section 33 of the repealed BCIPA, which entitles a claimant to suspend carrying out of construction work, or the supply of related goods and services, if at least 2 business days have passed since notice of intention to do so has been given by the claimant. A claimant who suspends carrying out of construction work, or the supply of related goods and services, under this clause will be immune from civil liability as a consequence of doing so.

Part 6 – Court proceedings for debt recovery

99 Notice required before starting particular proceedings

Clause 99 incorporates and amends section 20A of the repealed BCIPA, and applies where a respondent fails to pay the whole or any part of the claimed amount. The claimant must notify the respondent within 20 business days following the due date for payment of their intention to commence proceedings to recover the unpaid amount as a debt. The claimant may then commence proceedings no sooner than 5 business days after serving the warning notice.

100 Proceedings to recover unpaid amount as debt

Clause 100 replicates provisions of section 20 of the repealed BCIPA, which provides that a respondent in proceedings to recover an unpaid amount as a debt is not entitled to bring any counterclaim against the claimant or raise any defence in relation to matters raised under the contract.

Part 7 – Miscellaneous

101 Effect of pt 3 on civil proceedings

Clause 101 replicates section 100 of the repealed BCIPA. It provides that nothing done under the Bill will affect any civil proceedings arising under a construction contract, except that a court will be required to allow for any amount paid to a party under part 2 in any orders it considers necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.

102 Service of notices

Clause 102 provides the procedure for the service of notices under this chapter and allows notices to be served by an agent. This clause essentially replicates section 103 of the repealed BCIPA.

Chapter 4 – Subcontractors' charges

Part 1 – Preliminary

Division 1 - Application and operation of chapter

103 Application to particular domestic building work

Clause 103 provides that this chapter does not apply to domestic building work, relating to a detached dwelling, that is carried out for an individual, unless the work is for a business conducted by the individual either alone or as a member of a partnership.

Division 2 – Interpretation

104 Definitions

Clause 104 provides definitions for various key terms used in this chapter to assist in the interpretation and implementation of the Bill.

105 Meaning of work

Clause 105 provides the definition of 'work' for a contract. The clause also defines 'manufacture' or 'fabrication', of project specific components used in this section to assist in the interpretation and implementation of the Bill.

106 References to amount payable under contract and to completion of work specified in subcontract

Clause 106 is a new provision which is derived from section 3A of the repealed SCA.

107 When work specified in contract or subcontract completed

Clause 107 is a new provision which is derived from section 3B of the repealed SCA.

Part 2 – Right to subcontractor's charge

108 Contracts to which this part applies

Clause 108 provides that this part applies if a person contracts with another person for the carrying out of work.

109 Charges in favour of subcontractors

Clause 109 is a new provision which is derived from section 5(1), (2) and (4) of the repealed SCA.

110 Limits on amount recoverable under subcontractor's charge

Clause 110 is a new provision which is derived from section 5(3) of the repealed SCA.

111 Subcontractor's charge valid although provision of the subcontract still to be complied with

Clause 111 is a new provision which is derived from section 5(6)(a) of the repealed SCA.

112 Damages etc. not covered by subcontractor's charge

Clause 112 is a new provision which is derived from section 5(6)(b) of the repealed SCA.

113 All money paid in reduction of contract price generally subject to subcontractor's charge

Clause 113 is a new provision which is derived from section 6 of the repealed SCA.

114 Assignments etc. of no effect against subcontractors' charge

Clause 114 is a new provision which is derived from section 7 of the repealed SCA.

115 Insufficient money available for claims

Clause 115 is a new provision which is derived from section 8 of the repealed SCA.

116 Assignment and transmission of subcontractor's charge

Clause 116 is a new provision which is derived from section 9 of the repealed SCA.

117 No subcontractor's charges over money held in trust under a project bank account

Clause 117 provides that no entitlement to a subcontractors' charge exists to the extent it is over money held in trust under a project bank account (see Chapter 2).

118 Limit of 1 claim for work

Clause 118 is a provision which is derived from sections 10(7) and 10(8) of the repealed SCA.

Part 3 – Information to be given to subcontractor

119 Request for information about building contract or security

Clause 119 is a new provision which is derived from sections 9A(1), 9A(1A) and 9A(1B) of the repealed SCA.

A maximum penalty of 20 penalty units applies to the contraventions in the section. It is considered the penalty units are justified as the contractor's non-compliance has the potential to delay the decision on a subcontractors' charge.

120 Damages payable for failure to give information

Clause 120 is a provision which is derived from existing sections 9A(2) and 9A(3) of the repealed SCA.

Part 4 – Claiming subcontractor's charge

Division 1 – Preliminary

121 Application of part

Clause 121 provides that this part applies if a subcontractor intends to claim a subcontractor's charge on money payable to the contractor for the contract or to another subcontractor for a higher subcontract.

Division 2 – Action by subcontractor

122 Notice of claim

Clause 122 is a new provision which is derived from section 10 of the repealed SCA. The clause introduces obligations on the subcontractor and establishes a process for claiming a charge.

123 Copy of notice of claim to contractor

Clause 123 is a new provision which is derived from section 10 of the repealed SCA. The clause requires the subcontractor to provide a copy of the notice of claim to the contractor.

124 Copy of notice of claim to the holder of a security

Clause 124 is a new provision which is derived from section 10 of the repealed SCA. The clause requires the subcontractor to provide a copy of the notice of claim to the holder of a security.

125 Withdrawing a notice of claim

Clause 125 is a new provision which is derived from section 11(8) of the repealed SCA.

Division 3 – Action by person given notice of claim

126 Person given notice of claim must retain money

Clause 126 is a new provision which is derived from section 11 of the repealed SCA.

127 Person given notice of claim must comply with request from security holder about s 11A or 11B

Clause 127 is a new provision which is derived from section 11E of the repealed SCA.

Division 4 – Action by contractor given copy of notice of claim

128 Contractor given copy of notice of claim must respond

Clause 128 is a new provision that requires a contractor to provide a response where a subcontractor has given them a notice of a claim of a charge. Subsection (2) provides that the contractor must respond in writing to the notice of the claim to both the subcontractor and the person who gave the notice of the claim. The response must be made within 5 business days of the contractor receiving the copy of the notice of the claim (previously the requirement was within 14 days under the repealed SCA). Penalties apply for contravening this requirement.

Subsection (3) outlines that the response must be made in the approved form. It also specifies that the contractor must advise about whether they accept liability to pay the full amount claimed; accept liability to pay part of the amount claimed but dispute the

remainder; or dispute the entire claim. This is essentially a reproduction of parts of section 11(3) of the repealed SCA.

Division 5 – Payment of claim

129 Payment of amount claimed

Clause 129 is a new provision which is derived from section 11 of the repealed SCA.

130 Use of security for benefit of subcontractor if contractor accepts liability for all claims

Clause 130 is a new provision which is derived from section 11B of the repealed SCA.

131 Use of security for benefit of subcontractor if contractor does not accept liability for all claims

Clause 131 is a new provision which is derived from section 11A of the repealed SCA.

132 Authority of court for security

Clause 132 is new provision which is derived from section 11C of the repealed SCA.

133 Particular subcontractor securities of no effect

Clause 133 is a new provision which is derived from section 11D of the repealed SCA.

Part 5 – Enforcing subcontractor’s charge

134 Recovering amount claimed

Clause 134 is a new provision which is derived from section 12(1) and 12(2) of the repealed SCA.

135 Enforcing subcontractor’s charge on behalf of other subcontractors

Clause 135 is a new provision which is derived from subsections 12(3), 12(3A) and 12(3B) of the repealed SCA.

136 Proceedings for subcontractor’s charges

Clause 136 is a reproduction of section 15 of the repealed SCA.

137 Claims of charge relating to retention amount not limited

Clause 137 is a new provision which is derived from section 5(5) of the repealed SCA.

Part 6 – Protection against subcontractor’s charge

138 When person prejudicially affected by a claim

Clause 138 is a new provision which is derived from section 21 of the repealed SCA.

139 Application to court by person prejudicially affected

Clause 139 is a new provision which is derived from section 21 of the repealed SCA.

140 Vexatious claims

Clause 140 is a new provision which is derived from section 22 of the repealed SCA.

Part 7 – Miscellaneous

141 Effect of payment made under order of the Court

Clause 141 is a new provision which is derived from section 20 of the repealed SCA.

142 Court jurisdiction

Clause 142 is a new provision which is derived from subsections 12(2) of the repealed SCA.

143 Consolidation of actions

Clause 143 is a new provision which is derived from section 13 of the repealed SCA.

144 Power to proceed in absence of person against whom proceedings brought

Clause 144 is a new provision which is derived from section 17 of the repealed SCA.

145 Costs

Clause 145 is a new provision which is derived from section 18 of the repealed SCA.

146 Appeal

Clause 146 is a new provision which is derived from section 19 of the repealed SCA.

147 Qualified persons

Clause 147 is predominantly a reproduction of section 10A of the repealed SCA.

Subsection (2) clarifies that a person must not give a certificate for a claim that relates to work they have performed themselves, nor if they have any direct or indirect financial interest in the work. Further, subsection (3) provides that if a certificate of claim is given in contravention of subsection (2), the claim is of no effect. Subsection (4) clarifies that a person is not considered to have a financial interest in the work for the sole reason that they are receiving payment for the certificate of claim.

148 Right to recover debt generally preserved

Clause 148 is a new provision which is derived from section 23 of the repealed SCA.

Chapter 5 – Administration

Part 1 – Registry and staff

Division 1 – Registry

149 Registry

Clause 149 provides for the Adjudication Registry established under the repealed BCIPA to be continued under this Act. The registry consists of the registrar and those employees of the employing office that are assigned to the registry. This clause also provides that the role of the registry staff is limited to assisting the registrar in performing their functions or exercise a power.

Division 2 – Registrar

150 Adjudication registrar

Clause 150 establishes the position of the Adjudication Registrar and that the appointment of the registrar must be made by the Governor in Council. The clause sets out the eligibility requirements a person must fulfil in order to be appointed as registrar. Under this clause, the commissioner may appoint a person to act as registrar for a temporary period of not more than six months in cases where there is a vacancy or the existing registrar is absent from duty.

It also outlines that the registrar is appointed under the Act and not under the *Public Service Act 2008*. It also clarifies that the registrar is an employee of the Queensland Building and Construction Employing Office established under the QBCC Act.

151 Disqualification from appointment

Clause 151 is a new provision that sets out the criteria that would disqualify a person from being appointed as registrar, including where the person is a member of the QBC Board or is contracted by the QBCC. A current QBCC staff member seeking to be appointed to the role would need to ensure their employment ended at the time of appointment.

152 Term of appointment

Clause 152 is a new provision which provides for a term stated in the person's appointment as registrar not exceeding 3 years. The registrar may also be reappointed.

153 Conditions of appointment

Clause 153 entitles the registrar to be paid the remuneration and allowances that are decided by the Governor in Council.

154 Registrar's functions and powers

Clause 154 incorporates and varies section 38 of the repealed BCIPA. It sets out the functions and powers of the registrar in administering and managing the registry. The clause sets out the functions and powers of the registrar. The registrar must also act impartially and transparently in the performance of their functions. The commissioner may not direct the registrar in performing certain functions such as referring adjudication applications to adjudicators, supplying a certificate as to the correctness of a matter in the adjudicator register and keeping a publishing records of adjudicator decisions.

155 Registrar's policies

Clause 155 provides that the registrar has the ability to make policies about the administration of chapter 3 or 5. A policy must be prescribed by regulation before it can take effect.

156 Delegation by registrar

Clause 156 replicates section 39 of the repealed BCIPA and allows the registrar to delegate powers under this Bill to an appropriately qualified member of the registry staff.

Division 3 – Other matters

157 Annual report on operation of chapter and registry

Clause 157 replicates section 41 of the repealed BCIPA. It provides that the commissioner must give to the Minister a report including a review of the operation of chapter 3 and the registry during the financial year and other matters relating to the registry as soon as practicable after each financial year but no later than 30 September. The clause provides for the contents of the report and allows it to be included as part of the QBCC's annual report.

The Minister is to table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report, unless it has been included in the QBCC's annual report.

Part 2 – Adjudicators

Division 1 – Preliminary

158 Definitions for chapter

Clause 158 provides for key definitions used in this chapter.

Division 2 – Registration of adjudicators

159 Application for registration as adjudicator

Clause 159 incorporates sections 56 and 57 of the repealed BCIPA. It enables a person to apply to the registrar for registration as an adjudicator and that the application must be in the approved form, signed by or for the applicant and accompanied by the prescribed fee for the application. It must also state the prescribed information, including the relevant experience and qualifications of the applicant.

160 Consideration of application

Clause 160 replicates section 58 of the repealed BCIPA and provides that the registrar must consider and either grant or refuse an application.

161 Suitability of person to be registered

Clause 161 replicates section 60 of the repealed BCIPA and provides the eligibility requirements for a person to be registered as an adjudicator. It also sets out the matters that the registrar may have regard to when deciding if a person is suitable to be registered as an adjudicator. These include whether the applicant has been convicted of a relevant offence, or has had their registration with a professional association (such as a legal profession) cancelled because of disciplinary action.

162 Request for further information

Clause 162 incorporates and varies section 61 of the repealed BCIPA. It provides that the registrar may seek further information from the applicant to assist the registrar in deciding the application. The registrar may make the request by written notice and provide the applicant at least 28 days to respond. The registrar will also have the ability to extend this time.

If the applicant fails to provide the requested information within the stated time, their application will be taken to have been withdrawn.

163 Decision on application for registration

Clause 163 replicates section 62 of the repealed BCIPA and provides the process for granting, with or without conditions, or refusing an application. Where an application is refused or there are conditions imposed on a registration, the registrar will provide to the applicant an information notice for the decision.

164 Term of registration

Clause 164 replicates section 64 of the repealed BCIPA and provides that adjudicators are registered for a 3 year term or a shorter period as determined by the registrar and stated in the certificate of registration.

165 Conditions of registration

Clause 165 replicates section 65 of the repealed BCIPA and sets out the conditions of registration that apply to all adjudicators, including complying with the requirements for continuing professional development prescribed by regulation. The clause also allows additional conditions to be imposed by the registrar at the time of registration, renewal or another time deemed necessary to ensure that an adjudicator can effectively perform their functions.

166 Form of certificate of registration

Clause 166 replicates section 68 of the BCIPA and provides that a certificate of registration must include specific particulars.

Division 3 – Renewals of registrations of adjudicators

167 Applications for renewal of registration

Clause 167 incorporates and amends section 70 of the repealed BCIPA. It sets out the requirements for a renewal of registration and what an application for renewal of registration must contain. The application must be made at least 1 month before the adjudicator's registration ends.

In deciding an application for renewal, the registrar may consider the suitability criteria set out in clause 161.

166 Request for further information

Clause 168 incorporates and varies section 71 of the repealed BCIPA. It provides that the registrar may seek further information from the applicant to assist the registrar in deciding the renewal application. The registrar may make the request by written notice and provide the adjudicator at least 28 days to respond. The registrar will also have the ability to extend this time.

If the adjudicator fails to provide the requested information within the stated time, their renewal application will be taken to have been withdrawn.

169 Registration taken to be in force while application for renewal is considered

Clause 169 replicates section 72 of the BCIPA and provides that where an adjudicator has made a renewal application, their registration will continue until the application is decided, regardless of whether it would have otherwise expired.

Division 4 – Suspension or cancellation of registrations of adjudicators

170 Grounds for suspension or cancellation

Clause 170 incorporates and amends section 77 of the repealed BCIPA. It provides the circumstances for the suspension or cancellation of an adjudicator's registration, including whether they meet the suitability criteria under clause 161.

171 Show cause notice

Clause 171 replicates section 78 of the repealed BCIPA and provides that the registrar must issue a show cause notice to the adjudicator if the registrar believes that grounds exist to suspend or cancel an adjudicator's registration. The clause also sets out the requirements to be contained in a show cause notice.

172 Representations about show cause notices

Clause 172 replicates section 79 of the repealed BCIPA. It provides that an adjudicator may make written representations about the show cause notice to the registrar who must consider all representations.

173 Ending show cause process without further action

Clause 173 replicates section 80 of the repealed BCIPA. which provides that the registrar must not take any further action about the show cause notice if, after considering the adjudicators representations, the registrar no longer believes a ground exists to suspend or cancel the registration. The registrar must give the adjudicator a notice that no further action is to be taken about the show cause notice.

174 Suspension or cancellation

Clause 174 replicates section 81 of the repealed BCIPA and provides the circumstances and process under which the registrar may suspend or cancel an adjudicator's registration.

175 Immediate suspension of registration

Clause 175 replicates section 82 of the BCIPA and provides the circumstances and process under which the registrar may immediately suspend or cancel an adjudicator's registration.

176 Effect of suspension or cancellation of registration of adjudicator

Clause 176 incorporates and varies section 84 of the repealed BCIPA. It provides for situations where the registration of an adjudicator is suspended or cancelled or otherwise ends, and an adjudication application has been made to the registrar or referred to the adjudicator and the adjudicator has not made a decision. In such cases, the clause provides that the registrar must refer the adjudication to another adjudicator within 4 business days.

The applicant will not be required to pay any fees for the referral. The adjudicator whose registration has ended will not be entitled to any fees or expenses in relation to the adjudication application.

Division 5 – Internal review of registration decisions

177 Applying to registrar for internal review

Clause 175 incorporates and varies sections 92 to 94 of the repealed BCIPA. It provides that an application for an internal review may be made to the registrar within 28 days after:

- (a) the person is given an information notice for the decision; or
- (b) if no information notice is given, the day the person otherwise becomes aware of the decision.

The application must be in writing and state fully the grounds for making the application. The registrar may extend the time for applying for the review at any time.

178 Internal review of original decision

Clause 178 incorporates section 95 of the repealed BCIPA. It relates to when the registrar receives an application to review an original decision. The registrar may review the original decision and either confirm, amend or substitute the original decision and give the applicant a notice of the review stating:

- (a) the reason for the review decision;
- (b) that the applicant can appeal the review decision;
- (c) how the applicant can appeal the review decision; and
- (d) that the applicant may apply to QCAT for a stay of the review decision.

If the registrar does not give the notice within 28 days after the application is made, the registrar is taken to have made a decision confirming the original decision on the 28th day after the application is made.

179 Stay of operation of original decision

Clause 179 replicates section 96 of the repealed BCIPA, which provides that if an application for a review of an original decision is made, the applicant may immediately apply for a state of the decision to QCAT.

Division 6 – External review of registration decisions

180 Applying to QCAT for external review

Clause 180 essentially replicates section 97 of the repealed BCIPA. It provides that a person who has applied for an internal review of an original decision and is dissatisfied with the review decision they may apply to QCAT for a review of the review decision.

Division 7 – Code of conduct

181 Code of conduct for adjudicators

Clause 181 provides that the registrar may make a code of conduct for adjudicators. The code of conduct, or an amendment or replacement does not take effect until it has been approved under a regulation.

The Minister must, within 14 sitting days after the code of conduct, or an amendment or replacement of the code takes effect, table a copy of the code in the Legislative Assembly.

This clause also provides that the code of conduct must be made available for inspection at the QBCC head office during the hours open for business or available from the QBCC's website, free of charge.

Division 8 – Other provisions about adjudicators

182 Adjudicator must comply with registration conditions

Clause 182 replicates section 67 of the repealed BCIPA, which provides that an adjudicator must not contravene a condition of their registration. The maximum penalty remains 200 penalty units.

183 Surrender of registration

Clause 183 replicates section 87 of the repealed BCIPA, which provides that an adjudicator may surrender their registration by giving the registrar written notice of the surrender. The surrender takes effect on the later of the day the notice is given or the day specified in the notice.

184 Replacement of certificate of registration

Clause 184 replicates sections 88 and 89 of the repealed BCIPA. It provides the requirements for the replacement of an adjudicator's certificate and what an application for a replacement of an adjudicator's certificate must contain.

185 Adjudicator must give information to registrar

Clause 185 is a variation of section 102 of the repealed BCIPA which requires an adjudicator to advise the registrar of certain matters. The Bill provides that an adjudicator must advise the registrar of the matters within 10 days. The matters include a change of address, a conviction of a relevant offence, or the cancellation of their registration with a professional body due to disciplinary action.

186 Protection from liability for adjudicators

Clause 186 replicates section 107 of the repealed BCIPA which provides that an adjudicator is not personally liable for anything done or omitted to be done in good

faith, in performing the functions of the adjudicator or, in the reasonable belief that the thing was done or omitted to be done in the performance of the adjudicator's functions under this chapter.

187 False or misleading statements

Clause 187 replicates section 90 of the repealed BCIPA which provides that a person must not state anything to the registrar that the person knows is false or misleading in a material particular for an application made under chapter 5. The maximum penalty has been increased from 50 units to 100 units.

There is a similar offence provision in section 108B (False or misleading statement) in the QBCC Act which also has a maximum penalty of 100 units.

The increased maximum penalty reflects the risk involved where a person provides false or misleading statements which lead to their registration as an adjudicator. This could result in an unqualified or inexperienced person deciding adjudication applications for payment claims to the detriment of the parties involved.

188 False or misleading documents

Clause 188 replicates section 91 of the repealed BCIPA which provides that a person must not give a document to the registrar containing information that the person knows is false or misleading in a material particular for an application made under chapter 5. The maximum penalty has been increased from 50 penalty units to 100 penalty units.

There is an identical offence provision in section 108C (False or misleading document) in the QBCC Act which has a maximum penalty of 100 units.

The increased maximum penalty reflects the risk involved where a person provides false or misleading documents which lead to their registration as an adjudicator. This could result in an unqualified or inexperienced person deciding adjudication applications for payment claims to the detriment of the parties involved.

Chapter 6 – Legal proceedings

Part 1 – Offences

189 Proceedings for offences

Clause 189 provides that proceedings for an offence against this Act are to be taken in a summary way under the *Justices Act 1886*, and provides the timeframes within which any proceeding is to be commenced.

189 Who may prosecute

Clause 190 provides that a prosecution may only be started by a person authorised in writing by the commissioner.

191 Enforcement action to comply with prescribed guidelines

Clause 191 provides that a regulation may be prescribed that sets out guidelines for taking enforcement action by the Commission. The regulation will inform Commission officers about when it is appropriate to take prosecution action and what form of prosecution action should occur. The Director of Public Prosecutions Guideline will be referenced in the regulation, however further guidance will be provided. This will include guidance on the circumstances in which a penalty infringement notice could be considered or whether the matter should be prosecuted in a court.

192 Payment for penalties and fines

Clause 192 provides that penalties and fines paid under this Act are to be paid to the commission.

Part 2 – Evidence

193 Application of division

Clause 193 applies this division to a proceeding under the Building Industry Fairness (Security of Payment) Act 2017.

194 Appointments and authority

Clause 194 provides that the registrar's appointment is presumed unless a party to a proceeding requests evidence of it.

195 Evidentiary aids

Clause 195 provides that the registrar may provide a certificate as evidence certifying the matters stated in the certificate.

196 Proof of signature unnecessary

Clause 196 provides that a signature purporting to be that of the registrar is evidence of the signature it purports to be.

Part 3 – Civil liability for officials

197 Protection from liability

Clause 197 protects the commissioner, the registrar and the registry staff from civil liability for an act done honestly and without negligence under this Act.

Chapter 7 – Miscellaneous

198 Approved forms

Clause 198 provides that the commissioner may approve forms for use under this Act.

The clause also provides that an approved must, if the approved form requires, be verified by statutory declaration. The approved form has no effect if the form is not so verified.

199 Delegations

Clause 199 provides that the commissioner may delegate their powers under the Act to an appropriately qualified relevant officer of the QBCC.

200 Contracting out prohibited

Clause 200 clarifies that the provisions in the Act have effect despite any provision to the contrary in any contract, agreement or arrangement. The provision is intended to prevent individuals attempting to contract out of their responsibilities under the Act.

201 Regulation-making power

Clause 201 provides that the Governor in Council may make regulations under this Act.

This clause also provides that a regulation may:

- provide for payment instructions for PBAs
- details about adjudication qualification requirements
- the grading of adjudicators; and
- continuing professional development that must be undertaken by adjudicators
- limits on fees payable to adjudicators
- procedures for the lodgement of adjudication applications with the registrar and the processing of adjudication applications by the registrar.
- fees payable under this Act.

Chapter 8 – Transitional and repeal

Part 1 – Repeal

202 Acts repealed

Clause 201 repeals the *Building and Construction Industry Payments Act 2004*, No. 6 and the *Subcontractors' Charges Act 1974*, No. 37.

Part 2 – Transitional provisions for the repealed Building and Construction Industry Payments Act 2004

203 Definitions for part

Clause 203 provides definitions for this part.

204 Continuation of appointments and employment

Clause 204 provides transitional provisions for existing registration of an adjudicator, the existing appointment of an adjudicator to decide an adjudication application under section 23 of the repealed Act and an existing appointment of the registrar under section 37 of the repealed BCIPA.

205 Unfinished matters for existing payment claims to be dealt with under the repealed Act

Clause 205 provides transitional provisions payment claims made, and matters unfinished under the repealed BCIPA.

206 References to repealed Act

Clause 206 is a transitional provision which provides that a reference in an Act or document to the repealed BCIPA, may if the context permits to be taken to be a reference to this Act.

Part 3 – Transitional provisions for the repealed Subcontractors’ Charges Act 1974

207 Definitions for part

Clause 207 is a new provision that provides definitions for this part.

208 Preservation of existing entitlement to subcontractors’ charges

Clause 208 is a transitional provision that relates to situations where a person was entitled to a claim of a subcontractors’ charge prior to the commencement of this Act, and the entitlement had not been extinguished. Subsection (2) provides that the entitlement to the subcontractors’ charge will continue under this Act until it is extinguished or otherwise ends.

209 Unfinished matters for existing subcontractors’ charges to be dealt with under the repealed Act

Clause 209 provides transitional provisions for existing subcontractors’ charges that were unfinished before the commencement of this Act.

210 References to repealed Act

Clause 210 provides that a reference in an Act or document to the repealed *Subcontractors’ Charges Act 1974*, may, if the context permits, be taken to be a reference to this Act.

Part 4 – Other transitional provision

211 Transitional regulation-making power

Clause 211 provides a transitional regulation-making power to make provision about a matter for which (a) it is necessary to make provision to allow or facilitate the doing of anything to achieve (i) the operation of this Act in relation to PBAs; (ii) the transition from the operation of a repealed Act to the operation of this Act; (b) this Act does not make provision or sufficient provision.

This clause provides that a transitional regulation may be retrospective in nature, up to the date of commencement of this Act. A transitional regulation must declare it is a transitional regulation. This section and any transitional regulation expire 1 year after the day of the commencement.

Chapter 9 – Amendment of this and other Acts

Part 1 Amendment of this Act

Division 1 – Amendments on assent

212 Act amended

Clause 212 provides that this part amends the *Building Industry and Fairness (Security of Payment) Act 2017*.

213 Amendment of long title

Clause 213 amends the long title of the *Building Industry and Fairness (Security of Payment) Act 2017*.

Division 2 – Extended application of project bank accounts for private and local government building contracts (phase 2)

This division deals with the extension of the PBA scheme in the future to the private sector.

The provisions in this division will commence on proclamation.

214 Replacement of s 14 (Particular government building contracts)

Clause 214 amends section 14 of the Act to expand the application of a PBAs to include the private sector. The clause also expands the application of PBA contracts to building contracts valued at \$1 million or more.

215 Replacement of s 16 (Building contracts for residential construction work)

Clause 215 amends section 16 of the Act. This clause provides for expansion of PBA to include residential construction work if the work relates to three or more living units.

This clause also provides definitions for use in the section:

‘Building envelope’

‘Related roofed building’

'Regulated amount'
'Residential construction work'
'Residential Unit'

216 Insertion of new s18A

Clause 216 inserts a new provision into the Act to clarify that if a private or local govt building contract is entered into prior to commencement of the provision a PBA is not required to be established, regardless of any change or variation to the contract.

217 Insertion of new chapter 2, part 2, division 4

Clause 217 inserts a new chapter 2, part 2, division 4 into the Act. The new division provides that if separate contracts are entered into in an attempt to avoid the requirement to establish a PBA, the separate contracts could be considered a single contract with the contract price being the sum of the separate contracts.

Division 3 – Extended application of project bank accounts all subcontractors and suppliers

This division enables the extension of the PBAs to second tier and lower subcontractors and also to suppliers, at a future time.

The provisions in this division will commence on proclamation.

218 Amendment of s8 (definitions for chapter)

Clause 218 replaces the definitions for 'building contract', 'first tier subcontract', 'head contractor', 'principal' and 'supplier' with definitions for 'contracted party', 'contracting party' and 'building contract'. The replacement of these definitions is needed to expand the application of the PBA scheme to second tier and lower subcontractors and also to suppliers.

219 Amendment of section 9 (What is a project bank account)

Clauses 219 to 220 of the Bill amend the definitions for 'principal', 'head contractor', 'first tier' and 'subcontractor' with 'contracting party', 'contracted party' and 'subcontractor' respectively. The new terms broaden the application of the PBA scheme to all tiers of subcontractors and suppliers in the contractual chain.

221 Amendment of s11 (Who is a supplier)

Clause 221 omits the meaning of what is and is what not a 'supplier'. This distinction will not be required when the PBA scheme applies to all tiers of subcontractors and suppliers in the contractual chain.

222 Amendment of s 14 (Particular private and government building contracts)

Clause 222 amends the Act to have PBA contracts apply to suppliers and all tiers of subcontractors in the contractual chain for building contracts valued at \$1 million or more.

223 Amendments to s18 (Government contracts tendered before commencement)

Clause 223 clarifies that if the tender for a building contract is issued or advertised prior to commencement of this provision a PBA is not required to be established for lower tier subcontractors or suppliers in the contractual chain.

224 Amendments to s18 (Government contracts tendered before commencement)

Clause 224 clarifies that a PBA is not required if the contracting party is a private entity or a local government and the contract was entered into before the commencement of this section.

Clauses 225 to 231

Clauses 225 to 231 amend definitions to expand the application of the PBA scheme to all tiers of subcontractors and suppliers in the contractual chain and provide consistency across provisions that apply to government and private sector entities.

Part 2 – Amendment of Building Act 1975

232 Act amended

Clause 232 provides that this part amends the *Building Act 1975* (BA).

233 Amendment of s 3 (Simplified outline of main provisions of Act)

Clause 233 removes an obsolete reference to the Pool Safety Council.

234 Amendment of ch 8, pt 7, hdg (Complaints, investigations and disciplinary proceedings relating to pool safety inspectors)

Clause 234 removes the word ‘investigations’ from the heading of chapter 8, part 7.

235 Omission of ch 8, pt 7, div 2, hdg (Investigations)

Clause 235 removes the heading, ‘investigations’, from chapter 8, part 7, division 2.

236 Omission of ss 246CP–246CX

Clause 236 removes sections 246CP to 246CX. These sections relate to the investigation of pool safety inspectors and provide for:

- the commissioner’s power to require documents to be produced;
- the issue of identity cards to investigators;

- the production or display of an identity card;
- the power to enter and inspect pool sites relating to a complaint or audit;
- procedures before entry;
- cooperating with investigations or audits;
- false or misleading statements; and
- false or misleading documents.

The Bill consolidates these investigator provisions into Chapter 9 of the QBCC Act to improve consistency and equity for QBCC licensees, and so these provisions are redundant. It also makes it easier for consumers and industry to understand their rights and responsibilities by providing a single point of reference in the legislation.

237 Amendment of sch 2 (Dictionary)

Clause 237 inserts a new definition of 'investigator' in schedule 2. An 'investigator' means a person appointed under section 104 of the QBCC Act as an investigator to investigate compliance with chapter 8. This new definition helps to consolidate all the investigator provisions into the QBCC Act.

The clause also amends the definition of 'ground for disciplinary action', against a pool safety inspector or former pool safety inspector, to include:

- failing to comply with a written notice given to the pool safety inspector under the QBCC Act, section 50C(2); and
- obstructing an investigator under the QBCC Act, section 107A.

Part 3 – Amendment of Plumbing and Drainage Act 2002

238 Act amended

Clause 239 provides that this part amends the *Plumbing and Drainage Act 2002* (PDA).

239 Amendment of pt 2, div 6, hdg

Clause 232 omits part 2, division 6 heading, 'Investigators appointed by QBCC commissioner' and inserts a new heading, 'Auditing and record keeping'.

240 Omission of pt 2, div 6, sdiv 1–sdiv 3

Clause 240 omits part 2, division 6, subdivision 1 to subdivision 3. These provisions relate to investigators appointed by the QBCC commissioner and provide for:

- investigator appointments;
- investigator functions;
- appointment conditions and limit on powers;
- issue of identity cards;
- production or display of identity cards;
- when an investigator ceases to hold office;
- resignation;

- return of identity card;
- power to enter places;
- entry with consent;
- application for a warrant;
- issue of a warrant;
- application by electronic communication and duplicate warrant;
- defect in relation to a warrant;
- warrants—procedures before entry;
- general powers of investigators after entering places;
- power to require reasonable help or information;
- power to require name and address;
- power to require production of documents; and
- failure to state name and address or produce document.

The Bill consolidates these investigator provisions into chapter 9 of the QBCC Act to improve consistency and equity for QBCC licensees, and so these provisions are redundant. It also makes it easier for consumers and industry to understand their rights and responsibilities by providing a single point of reference in the legislation.

241 Omission pt 2, div 6, sdiv 3A, hdg (Audit programs and auditing licensees)

Clause 241 omits the heading of part 2, division 6, subdivision 3A.

242 Amendment of s 33TA (Definitions for sdiv 3A)

Clause 235 changes the heading of section 33TA from ‘Definitions for sdiv 3A’ to ‘Definitions for part’.

243 Omission pt 2, div 6, sdiv 4, hdg (Miscellaneous provisions)

Clause 236 omits the heading of part 2, division 6, subdivision 4.

244 Omission of ss 33U and 33W

Clause 244 omits sections 33U and 33V which provide for notices of damage and compensation for the exercise of an investigator’s powers. These provisions have been consolidated in chapter 9 of the QBCC Act.

245 Amendment of s 128RA (False or misleading statements)

Clause 245 omits a reference to ‘investigator’ in section 128RA.

246 Amendment of s 128S (False or misleading documents)

Clause 246 omits a reference to ‘investigator’ in section 128S.

247 Amendment of s 128T (Obstruction of investigators or inspectors)

Clause 247 omits references to ‘investigators’ in section 128T and section 128T(1).

248 Amendment of s 128U (Impersonation of investigator or inspector)

Clause 248 omits a reference to 'investigator' in section 128U.

249 Amendment of schedule (Dictionary)

Clause 249 inserts a new definition of 'investigator' in schedule 2. An 'investigator' means a person appointed under section 104 of the QBCC Act as an investigator to investigate, monitor and enforce compliance with this Act. This new definition helps to consolidate all the investigator provisions into the QBCC Act.

Part 4 – Amendment of Queensland Building and Construction Commission Act 1991

250 Act amended

Clause 250 provides that this part amends the QBCC Act.

251 Amendment of s 3 (Objects of Act)

Clause 251 amends the objects of the QBCC Act to include the proper, efficient and effective management of the commission in the performance of its functions.

252 Insertion of new s 4AAA

Clause 252 inserts a new section 4AAA which defines an influential person for a company as an individual, other than a director or secretary of the company, who controls or substantially influences the company's conduct. The new definition also describes a number of activities, relationships, functions and roles that may result in a person being considered an 'influential person' for a company, including:

- a chief executive officer or general manager of the company, or a person who holds an equivalent position in the company;
- a person acting in a position described directly above;
- a person who directly or indirectly owns, holds or controls 50% or more of the shares in the company, or 50% or more of a class of shares in the company;
- a person who gives instructions to an officer of the company and the officer generally acts on those instructions;
- a person who makes, or participates in making, decisions that affect the whole or a substantial part of the company's business or financial standing; and
- a person who engages in conduct or makes representations that would cause someone else to reasonably believe the person controls, or substantially influences, the company's business.

A person will not be considered an 'influential person' if they influence a company's conduct in their capacity as:

- a professional providing advice to a client, provided they are not working as an employee of the client;

- a regulator exercising a power or performing a function under an Act or other law; or
- an administrator, controller, provisional liquidator or liquidator within the meaning of the *Corporations Act 2001 (Cwlth)*, section 9.

This amendment broadens the definition of an 'influential person' to help address the issue of 'phoenixing'. It ensures that a person who is influential in a company failure will be excluded from holding a QBCC licence and be prevented from being in a position of influence in the business of another QBCC licensee.

253 Amendment of s 11 (Functions)

Clause 253 removes the QBCC Board's function to make and review policies governing the administration of the QBCC Act. This is to provide more transparency in relation to policies as they will be required to be made by regulation.

254 Amendment of s 12 (Appointment)

Clause 254 amends the QBCC Board's appointment provisions. Representation on the Board has been expanded from 7 members to not more than 10 members.

In appointing a person as a member of the board, the Governor in Council must now also have regard to the person's experience and competence in the areas of:

- building and construction;
- finance;
- corporate governance and risk;
- insurance, including knowledge and experience in the reinsurance market;
- consumer advocacy and awareness; and
- public sector governance, including administration and enforcement of laws.

The Governor in Council must, as far as possible, ensure the board is equally representative of these areas of experience and competence.

255 Omission of pt 2, div 2, sdiv 3 (Board's policies)

Clause 255 omits section 19 which details the scope of the QBCC Board's policy making power with respect to making and reviewing policies governing the administration of the QBCC Act.

The omission of section 19 is a consequence of removing the QBCC Board's policy making function in section 11(c).

256 Amendment of s 20A (Meetings)

Clause 256 amends 20A to provide that, for a QBCC Board meeting, the number of members that is half the number appointed at the time of the meeting constitutes a quorum. This amendment has been made due to the expansion of the board from 7 members to not more than 10 members.

257 Amendment of s 31 (Entitlement to contractor's licence)

Clause 257 changes a reference in section 31(c) from 'the relevant financial requirements stated in the board's policies' to 'the minimum financial requirements for the licence'.

258 Amendment of s 35 (Imposition of conditions etc. on grant of licence)

Clause 258 changes references in section 35 from 'the relevant financial requirements stated in the board's policies' to 'the minimum financial requirements for the licence'.

259 Amendment of s 37A (Commission to advise licensee before licence due for renewal)

Clause 259 changes a reference in section 37A(2)(d) from 'the relevant financial requirements stated in the board's policies' to 'the minimum financial requirements for the licence'.

260 Amendment of s 42 (Unlawful carrying out of building work)

Clause 260 introduces escalating maximum penalties for the unlawful carrying out of building work under section 42. It also introduces a new circumstance of aggravation if the unlawfully carried out building work is tier 1 defective work as defined in section 67AB of the QBCC Act.

The maximum penalties are as follows:

- For a first offence—250 penalty units; or
- For a second offence—300 penalty units; or
- For a third or later offence, or if the building work carried out is tier 1 defective work—350 penalty units or 1 year's imprisonment.

Consultation has shown that unlawfully carrying out building work is considered a serious offence due to the significant safety and financial implications for consumers. It is considered that higher penalties may provide a greater deterrent to unlicensed persons entering the market, which will improve the rate of compliance with standards and protect consumers and licensees from loss.

The proposed new penalties align Queensland more closely with other states and territories, which generally have higher penalties for unlicensed building work. For example, the maximum penalty in both Victoria and New South Wales is 500 penalty units, with the possibility of 12 months' imprisonment in New South Wales for second and subsequent offences. South Australia also applies escalating penalties including imprisonment.

The possibility of imprisonment is particularly targeted at repeat and high-level offenders. For a third or later offence, or if the building work carried out is tier 1 defective work, the offence will also be considered a crime.

261 Amendment of s 42B (Carrying out building work without a nominee)

Clause 261 introduces escalating maximum penalties for the carrying out of building work without a nominee under section 42B. It also introduces a new circumstance of aggravation if the building work carried out is tier 1 defective work as defined in section 67AB of the QBCC Act.

The maximum penalties are as follows:

- For a first offence—250 penalty units; or
- For a second offence—300 penalty units; or
- For a third or later offence, or if the building work carried out is tier 1 defective work—350 penalty units.

Consultation has shown that carrying out building work without a nominee is considered a serious offence due to the significant safety and financial implications for consumers. It is considered that higher penalties may provide a greater deterrent to companies carrying out building without a nominee, which will improve the rate of compliance with standards and protect consumers and licensees from loss. Particular consideration has been given to repeat offenders, and for those who perform tier 1 defective work.

Higher penalties for carrying out building work without a nominee will also help to ensure that company employees are adequately supervised when performing building work, further improving on-site safety standards.

262 Amendment of s 42C (Unlawful carrying out of fire protection work)

Clause 262 introduces escalating maximum penalties for the unlawful carrying out of fire protection work under section 42C. It also introduces a new circumstance of aggravation if the fire protection work carried out is tier 1 defective work as defined in section 67AB of the QBCC Act.

The maximum penalties are as follows:

- For a first offence—250 penalty units; or
- For a second offence—300 penalty units; or
- For a third or later offence, or if the building work carried out is tier 1 defective work—350 penalty units or 1 year's imprisonment.

Consultation has shown that unlawfully undertaking fire protection work is considered a serious offence due to the significant safety and financial implications for consumers. It is considered that higher penalties may provide a greater deterrent to unlicensed persons entering the market, which will improve the rate of compliance with standards and protect consumers and licensees from loss.

The proposed new penalties align Queensland more closely with other states and territories, which generally have higher penalties for unlicensed building work. For example, the maximum penalty in both Victoria and New South Wales is 500 penalty units, with the possibility of 12 months' imprisonment in New South Wales for second

and subsequent offences. South Australia also applies escalating penalties including imprisonment.

The possibility of imprisonment is particularly targeted at repeat and high-level offenders. For a third or later offence, or if the building work carried out is tier 1 defective work, the offence will also be considered a crime.

263 Amendment of s 42D (Licensed contractor must not engage or direct unauthorised person for fire protection work)

Clause 263 introduces escalating maximum penalties for a licensed contractor who engages or directs an unauthorised person for fire protection work under section 42D. It also introduces a new circumstance of aggravation if the fire protection work carried out is tier 1 defective work as defined in section 67AB of the QBCC Act.

The maximum penalties are as follows:

- For a first offence—250 penalty units; or
- For a second offence—300 penalty units; or
- For a third or later offence, or if the building work carried out is tier 1 defective work—350 penalty units or 1 year's imprisonment.

Consultation has shown that licensed contractors engaging or directing unauthorised persons for fire protection work is considered a serious offence due to the significant safety and financial implications for consumers. It is considered that higher penalties may provide a greater deterrent to this practice occurring in the market, which will improve the rate of compliance with standards and protect consumers and licensees from loss.

The possibility of imprisonment is particularly targeted at repeat and high-level offenders. For a third or later offence, or if the building work carried out is tier 1 defective work, the offence will also be considered a crime.

264 Insertion of new s 42E

Clause 264 provides that a person who is a party to a building contract must not, without reasonable excuse, cause another party to a building contract to suffer significant financial loss because the person deliberately avoids complying with, or fails to comply with, the contract. The provision prescribes a maximum penalty of 350 penalty units.

This offence provision is considered necessary due to the prevalence of poor contractual practices in the building and construction industry. Consultation has revealed that certain contractors deliberately and regularly avoid their contractual obligations, often causing significant financial loss to innocent parties.

Consultation has further revealed that those who suffer significant financial loss may be reluctant to enforce their contractual rights due to the cost involved in doing so, or for fear of being 'blacklisted' in the industry.

This provision is particularly aimed at addressing conduct such as poor payment practices and deliberate avoidance of contractual obligations and may also help avoid phoenixing activity that can cause significant financial loss to lower contractors.

265 Amendment of pt 3, div 9A, hdg (Monitoring continued satisfaction of financial requirements and compliance with parts 4 and 5, and schedule 1B)

Clause 265 changes the reference to ‘financial requirements’ in the heading of Part 3, division 9A to ‘minimum financial requirements and particular laws’.

266 Amendment of s 50A (Approved audit program)

Clause 266 changes a reference in section 50A from ‘the relevant financial requirements stated in the board’s policies’ to ‘the minimum financial requirements’.

The clause also provides that the commissioner may approve a program under which the commissioner may audit licensees to find out if they have been complying with:

- chapter 2 of the *Building Industry Fairness (Security of Payment) Act 2007*;
- chapter 8 of the *Building Act 1975*.

A ‘licensee’, for this section, includes a pool safety inspector under the *Building Act 1975*, schedule 2.

267 Amendment of s 50C (Supply of financial records and other documents under approved audit program or for other reason)

Clause 267 changes references in section 50C from ‘the relevant financial requirements stated in the board’s policies’ to ‘the minimum financial requirements’.

It also changes references from ‘part 4A, part 5 or schedule 1B’ to ‘the provision of an Act mentioned in section 50A(1)’ to account for the new provisions inserted into 50(A)(1).

A ‘licensee’, for this section, includes a pool safety inspector under the *Building Act 1975*, schedule 2.

268 Amendment of s 53A (Satisfying financial requirements at renewal)

Clause 268 changes a reference in the heading of section 53A from ‘financial requirements’ to ‘minimum financial requirements’, and a reference in section 53A(1) from ‘financial requirement stated in the board’s policies’ to ‘minimum financial requirements’.

269 Amendment of s 53B (False or misleading documents about financial requirements)

Clause 269 changes a reference in the heading of section 53B from ‘financial requirements’ to ‘minimum financial requirements’, and a reference in section 53B(1)

from 'financial requirement stated in the board's policies' to 'minimum financial requirements'.

270 Amendment of s 54 (Advertisements)

Clause 270 prohibits licensees from making advertisements that contain false or misleading information, and from omitting any information without which would make the advertisement misleading.

This is intended to create better advertising practices in the building and construction industry and improve both consumer protection and consumer confidence.

271 Amendment of s 56AC (Excluded individuals and excluded companies)

Clause 271 amends section 56AC so that a person will be considered an 'excluded individual' if they were, within the period of 2 years immediately before a relevant company event happened, a director or secretary of, or an influential person for a construction company.

The clause also amends the definition of 'construction company' to mean a company that directly or indirectly carries out building work or building work services in this or another State. The amendment ensures that a construction company, as defined, includes a company operating outside of Queensland but within Australia.

These amendments strengthen the excluded individuals and excluded companies provisions to help address the issue of 'phoenixing' and ensure that individuals involved in a company failure are barred from holding a QBCC licence.

272 Amendment of s 67AQ (Definitions for pt 3E)

Clause 272 inserts a new definition of 'demerit matter' in part 3E which includes 'being given a direction to rectify or remedy'.

273 Amendment of s 67AW (Demerit points for demerit matters)

Clause 273 amends 67AW to allow the commission to allocate 4 demerit points to a person when they are issued with a direction to rectify or remedy.

It is considered that this will provide a suitable deterrent for carrying out defective building work and will subsequently improve the standard of work being performed in the building and construction industry.

274 Insertion of new s 67AZAA

Clause 274 is a new provision which provides that the commission must allocate demerit points to a person issued with a direction to rectify or remedy as possible after giving the direction. It further provides that the demerit points take effect at the end of the period within which the person may apply for a review of the decision under part 7, division 3.

275 Amendment of s 67A (Definitions for pt 4A)

Clause 275 omits the definition of ‘contract price’ and inserts definitions for ‘defects liability period’ and ‘practical completion’ in Part 4A.

276 Insertion of new ss 67GA and 67GB

Clause 276 inserts new sections 67GA and 67GB. Section 67GA provides that a building contractor must not enter into a building contract that does not include conditions prescribed by regulation for inclusion in that type of building contract, and prescribes a maximum penalty of 80 penalty units. Section 67GA does not apply to a building contractor who enters into a building contract in their capacity as a principal.

This provision aims to achieve greater consistency across the building and construction industry by prescribing certain mandatory conditions that must be included in building contracts.

Section 67GB provides that a building contractor must not enter into a building contract that includes a prohibited condition prescribed by regulation, and prescribes a maximum penalty of 80 penalty units. A provision of a building contract is void if it incorporates a prohibited condition or may be reasonably construed as an attempt to enforce a prohibited condition.

This provision aims to eliminate the prevalence of unconscionable or unfair contract provisions in building contracts and seeks to improve fairness in the building and construction industry.

277 Amendment of s 67N (Limit for retention amounts and securities for building contracts after practical completion)

Clause 277 changes a reference in section 67N(2) from ‘under the contract’ to ‘for the contract’.

278 Insertion of new ss 67NA–67NC

Clause 278 inserts new sections 67NA, 67NB and 67NC.

Section 67NA imposes a statutory defects liability period on a building contract if, under the contract, a retention amount or security is held to correct defects and the contract does not provide for a defects liability period. The building contract is made subject to a condition that the retention amount or security must be released at the end of 12 months starting on the day of practical completion for the contract. This provision aims to create certainty for when a retention amount or security will be released where a contract fails to stipulate a proper timeframe, thus ensuring that contracted parties are paid what they are owed.

Section 67NB provides that if a retention amount is withheld under a building contract, the contracting party must, unless they have a reasonable excuse, release the

retention amount to the contracted party in accordance with the contract. This provision has a maximum penalty of 200 penalty units or 1 year imprisonment. This section does not apply to a retention amount that is paid into court to satisfy a notice of claim under the *Building Industry Fairness (Security of Payment) Act 2017*, or is the subject of a dispute between the parties to the building contract unless, as an outcome of the dispute, the amount is to be paid to the contracted party.

It is current industry practice for some head contractors to fail to pay subcontractors the retention money they are owed at the end of the defects liability period. Consultation revealed that subcontractors may be reluctant to pursue the head contractor due to the costs involved or for fear of being 'blacklisted' in the industry.

Section 67NB is intended to change the culture within the building and construction industry to one where it is the norm for subcontractors to be paid what they are owed. Therefore, it is critical that the penalty provide strong encouragement for contractors to comply with their payment obligations.

Section 67NC provides that where a retention amount or security is held under a building contract, a contracting party must give the contracted party a notice within 10 days prior to the end of the defects liability period stating the following:

- the date the defects liability period ends;
- for a retention amount—the amount to be paid to the contracting party at the end of the defects liability period, if no amount is required to correct defects in the building work under the contract; and
- for a retention amount—the date the retention amount is to be paid to the contracting part.

This provision has a maximum penalty of 100 penalty units.

The obligation to provide a notice to contracted parties will help to ensure subcontracts are made aware of the end of the defects liability period and allow them to pursue their right to retention money which is owed to them.

279 Omission of s 71G (Definition for pt 6)

Clause 279 omits section 71G which contains the definition of 'direction to rectify or remedy' for Part 6.

280 Amendment of s 71J (Requests for rectification of building work or remediation of consequential damage)

Clause 280 provides that a person making a request for rectification of building work or remediation of consequential damage under section 71J(1) and 71J(2) must make the request within 12 months of becoming aware of the building work they consider to be defective or incomplete, or the consequential damage to the property.

281 Amendment of s 72 (Power to require rectification of building work and remediation of consequential damage)

Clause 281 provides that the commission must make a direction to rectify or remedy no later than the end of the period prescribed by regulation.

The clause also amends section 72(4) to provide that the period stated in a direction to rectify or remedy must be the period prescribed by regulation. This provision formerly provided that a period stated in a direction to rectify or remedy must be at least 28 days.

282 Amendment of s 72A (Powers and limitations of directions to rectify or remedy)

Clause 282 changes the timeframe in which the commission can issue a direction to rectify or remedy under section 72A(4) from '6 years and 3 months' to '6 years and 6 months' to achieve greater consistency throughout the Act.

283 Insertion of new s 72B

Clause 283 is a new provision which allows a person who has been given a direction to rectify or remedy the ability to apply to the commission for an extension of time to comply with the direction.

The provision aims to achieve a reasonable balance between the interests of building contractors and consumers. The extension of time is intended to be used where a licensee who has been issued a direction to rectify work is legitimately unable to comply with the timeframe stated in the direction.

The decision to issue an extension of time is a non-reviewable decision. This is due to the fact any additional review process has the potential to delay the QBCC's ability to assist consumers under the Queensland Home Warranty Scheme and there is a risk of inappropriate use to achieve such an outcome.

284 Amendment of s 73 (Offence to fail to comply with direction to rectify or remedy)

Clause 284 amends section 73 to provide that an offence for failure to comply with a direction to rectify or remedy is subject to any extension of time granted under section 72B.

285 Amendment of s 74B (Proper grounds for taking disciplinary action against a licensee and former licensees)

Clause 285 inserts new grounds for taking disciplinary action against a licensee and former licensee under section 74B. These grounds include:

- the licensee contravenes an offence provision of the *Building Industry Fairness (Security of Payment) Act 2017*;
- the licensee contravenes section 67NC.

286 Amendment of s 86 (Reviewable decisions)

Clause 286 changes a reference in section 86 from ‘the relevant financial requirements stated in the board’s policies’ to ‘the minimum financial requirements’.

287 Amendment of s 92 (Tribunal may conduct public examination)

Clause 287 changes a reference in section 86 from ‘meets the financial requirements imposed for the licence held by the person’ to ‘satisfies the minimum financial requirements for the licence held by the person’.

288 Amendment of s 103B (Developer register)

Clause 288 changes a reference in section 103B(1) from ‘section 72(5)(g)’ to ‘section 71I(1)’, and changes a reference in section 103B(2) and (5) from ‘section 72(10)’ to ‘section 73’.

289 Amendment of part 9, hdg (Inspector)

Clause 289 changes a reference in the heading of part 9 from ‘inspector’ to ‘investigator’.

290 Amendment of s 103G (Definitions for part)

Clause 290 amends the definitions of ‘identity card’, ‘offence warning’ and ‘relevant Act’ in section 103G.

291 Amendment of s 103H (References to exercise of powers)

Clause 291 changes references in section 103H from ‘inspector’ and ‘inspectors’ powers’ to ‘investigator’ and ‘investigators’ powers’ respectively.

292 Amendment of part 9, division 2, hdg (Appointment of inspector)

Clause 292 changes a reference in the heading of part 9, division 2 from ‘inspectors’ to ‘investigators’.

293 Replacement of s 104 (Appointment of inspectors)

Clause 293 replaces section 104 (Appointment of inspectors) with new subdivisions 1 and 2. Subdivision 1 (Appointment) provides for:

- investigators;
- functions of investigators;
- appointment and qualifications;
- appointment conditions and limit on powers; and
- when office ends.

Subdivision 2 (Identity cards) provides for:

- the issue of identity cards for investigators;
- production or display of identity cards; and

- return of identity cards.

The insertion of these new provisions helps to achieve the consolidation of investigator powers in the chapter 9 of the QBCC Act.

294 Amendment of part 9, divs 3 to 8

Clause 294 changes references to ‘inspector’, ‘inspectors’ and ‘inspector’s’ throughout part 9, division 3 to 8 to ‘investigator’, ‘investigators’ and ‘investigator’s’ respectively.

295 Insertion of new pt 9, div 7A

Clause 295 inserts new provisions in chapter 9 covering damage and compensation which may arise during the exercise of an investigator’s power. The provisions provide for:

- a duty to avoid inconvenience and minimise damage;
- notices of damage; and
- compensation.

296 Amendment of s 107A (Obstructing inspectors)

Clause 296 changes references in section 107A from ‘inspectors’ and ‘inspector’ to ‘investigators’ and ‘investigator’ respectively.

297 Insertion of s 107B

Clause 297 is a new provision which provides that a person must not impersonate an investigator. This offence has a maximum penalty of 40 penalty units.

298 Amendment of s 108A (Documents that must be kept for 7 years)

Clause 298 changes the reference in section 108A from ‘the relevant financial requirements stated in the board’s policies’ to ‘the minimum financial requirements’.

299 Amendment of s 108B (False or misleading statement)

Clause 299 changes a reference in the definition of ‘official’ in section 108B(3) from ‘inspector’ to ‘investigator’.

300 Amendment of s 108C (False or misleading document)

Clause 300 changes a reference in the definition of ‘official’ in section 108C(5) from ‘inspector’ to ‘investigator’.

301 Amendment of s 111 (Prosecutions for offences)

Clause 301 replaces section 111(2) and provides that a prosecution may be started by a person authorised by the QBCC, or the Attorney-General (either generally or in

the particular case) to bring the prosecution. However, the QBCC must not bring a prosecution for an offence against this Act that is a crime.

302 Amendment of s 111B (Liability of executive officer—particular offences committed by company)

Clause 302 changes a reference in the definition of ‘executive liability provision’ in section 111B(5) from ‘section 42(9)’ to ‘section 42’.

303 Insertion of new s 115B

Clause 303 inserts a new provision which provides that the commissioner may make policies about:

- compliance with the QBCC Act;
- making decisions under the QBCC Act;
- consumers’ and licensees’ rights under QBCC Act; or
- enforcement of the QBCC Act.

The policies do not take effect until approved by regulation.

This provision further provides that the commissioner must:

- publish the policies on its website;
- keep copies of the policies available for inspection, free of charge, at the commission’s office when the office is open to the public; and
- if asked by a person, advise where copies of the policies may be obtained

304 Amendment of s 116 (Regulations)

Clause 304 provides that a regulation may prescribed the minimum financial requirements for the licence under this Act. It is intended for the financial requirements stated in the board’s policies to be transferred into regulation.

305 Insertion of new sch 1, pt 15

Clause 305 inserts a new part 15 in Schedule 1 which provides transitional provisions for the *Building Industry Fairness (Security of Payment) Act 2017*.

The provisions provide for the transitional operation of QBC board policies and the continuation of existing appointments of particular investigators and inspectors.

306 Amendment of sch 1B, s 45 (Relationship with other Acts)

Clause 306 omits section 45(2) from Schedule 1B.

307 Amendment of sch 2 (Dictionary)

Clause 307 removes the definition of ‘demerit matter’ and inserts definitions for ‘contract price’, ‘demerit points’, ‘direction to rectify or remedy’, ‘influential person’,

'minimum financial requirements' in Schedule 2 to reflect changes made throughout the QBCC Act in this Bill.

Part 5 – Consequential amendments

308 Acts amended

Clause 308 provides that schedule 1 amends the Acts it mentions.

Schedule 1 – Consequential amendments

Schedule 1 of the Bill provides for a number of minor consequential amendments to the *Judicial Review Act 1991* and QBCC Act.

Schedule 2 – Dictionary

Schedule 2 of the Bill contains the dictionary defining words and phrases for the purpose of the Act.