


Building Industry Fairness (Security of Payment) Bill 2017

Queensland Legislative Assembly	
Number: <u>5517T2141</u>	Tabled <input checked="" type="checkbox"/>
 26 OCT 2017	By Leave <input type="checkbox"/>
MP: <u>HON DE BROWNE</u>	
Clerk's Signature: <u>MARIE</u>	

Explanatory Notes

For amendments to be moved during consideration in detail by
The Honourable Mick de Brenni MP
Minister for Housing and Public Works and
Minister for Sport

Short title

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

Objectives of the amendments and reasons for them

In its Report No.50 which was tabled on 13 October 2017, the Public Works and Utilities Committee provided its recommendations on the Building Industry Fairness (Security of Payment) Bill 2017 (the Bill). The Committee made the following recommendations.

1. The committee recommends the Building Industry Fairness (Security of Payment) Bill 2017 be passed.
2. The committee recommends that the Minister consider ensuring the review of phase 1 of the Project Bank Account provisions:
 - o commence at least three months prior to the commencement of phase 2;
 - o be undertaken in consultation with representatives of the building and construction industry; and
 - o the Minister report the review findings to the Legislative Assembly prior to the sections of the bill that commence phase 2 being proclaimed.
3. The committee recommends that the Minister review the appropriateness of the proposed imprisonment penalties for a number of new offences contained in the bill.
4. The committee recommends that the Minister consider amending the bill to require the QBCC to provide licensees with the opportunity to rectify building work, within a specified timeframe, before a direction to rectify is issued and a demerit point penalty is applied.
5. The committee recommends the Minister consult with the building and construction industry when developing the regulation that will mandate and prohibit certain conditions for building contracts and with regard to any subsequent amendments to the regulation.

6. The committee recommends that the Minister report to the House during the second reading speech on those issues raised by stakeholders about the bill where the department indicated it would undertake further consideration.
7. The committee recommends that the Minister in his second reading speech provide examples of any proposed regulations that he intends to make should the bill be passed.

The objectives of the proposed amendments 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.

Achievement of policy objectives

The objectives are achieved by making the following amendments:

- Providing increased clarity to the provisions of the Building Industry Fairness (Security of Payment) Bill 2017 especially regarding terminology and definitions
- Correct minor drafting issues
- Address feedback obtained on the bill.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objective.

Estimated cost for government implementation

There are no additional anticipated financial costs for Government arising from the amendments to be moved during consideration in detail.

Consistency with fundamental legislative principles

The amendments are consistent with the fundamental legislative principles.

Consultation

The amendments have been informed by community, industry and government stakeholder feedback on the Bill, including through submissions to the Public Works and Utilities Parliamentary Committee and at the public hearing of the Committee on 20 September 2017.

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

1 Clause 2 (Commencement)

Clause 2 is amended to provide for the commencement of clauses 278 and 281 on a day fixed by proclamation. This amendment will allow industry sufficient time to be ready for the changes.

2 Clause 8 (Definitions for chapter)

Clause 8 is amended to omit the definition of 'defects liability period'. The term will be defined in the Dictionary.

3 Clause 8 (Definitions for chapter)

Clause 8 is amended to omit the reference in the clause to "thing" and replace it with "building" to provide clarification.

4 Clause 8 (Definitions for chapter)

Clause 8 is amended to make a minor drafting correction to place the definition of "payment dispute" in the Dictionary.

5 Clause 8 (Definitions for chapter)

Clause 8 is amended to omit the definition of 'practical completion'. The term is defined in the Dictionary.

6 Clause 8 (Definitions for chapter)

Clause 8 is amended to omit the definitions of 'retention amount', 'site testing', and 'State authority' and to insert an amended definition of 'State authority'.

The definition of 'retention amount' is provided in the Dictionary.

The term 'site testing' is not used in the Bill and is therefore unnecessary.

The definition of 'State authority' has been amended to provide greater clarity about which government entities will be required to use PBAs during Phase 1 and which government entities may choose to use PBAs during Phase 1. Government departments will be included in Phase 1.

7 Clause 15 (Amendment of building contract)

Clause 15(2) is amended to clarify which amendments of a contract may cause a contract to become a building contract under clause 14.

8 Clause 16 (Building contracts for residential construction work)

Clause 16(1) is amended to make a minor drafting correction.

9 Clause 16 (Building contracts for residential construction work)

Clause 16 is amended to correct a duplication.

10 Clause 16 (Building contracts for residential construction work)

Clause 16(4) definition of 'residential construction work' is amended and inserts the definition for 'residence' to clarify the definitions.

11 Clause 23 (Head contractor must establish project bank account)

Clause 23 is amended to require that a head contractor must establish a PBA within 20 business days of entering into the first subcontract for the building contract or an earlier date provided for in the building contract which can be no earlier than 20 business days after entering into the building contract and no later than 20 days after the head contractor enters into the first subcontract.

New clause 23 also states that if a contract has a date for establishment of a project bank account, and that date is incompatible with clause 23(5), then the project bank account must be established within 20 business days of the head contractor entering into a subcontract for the building contract. This provision is necessary to stop 'contracting out' of the provisions of the Act.

New clause 23 also amends several typographical errors.

If a project bank account is not established by the date provided for under the contract, or if the project bank account is not established within 20 business days after the head contractor enters into the first subcontract of the building contract, 500 penalty units apply.

New clause 23 also provides a definition of practical completion, specific to this clause.

New clause 23(8) clarifies the policy intent, that it applies from the day a project bank account would have been required for a contract, but for that subsection.

For clause 23(6), the PBA would only be required to be established by business day 20 after the PBA becomes required, for example where a contract variation increases the contract price over the \$1 million mark.

12 Clause 24 (Particular requirements for trust accounts)

Clause 24 is amended to make it clear that the head contractor must provide information relevant to a payment instruction. It also corrects a small typographical error.

13 Clause 27 (All payments from principal to be deposited in project bank account)

Clause 27 is amended to clarify that a principal is not obliged to deposit the amount into the general trust account if the amount is paid into court or paid directly to a person under chapter 4. It also corrects small typographical errors.

14 Clause 28 (Limited purposes for which money may be deposited into project bank account)

Clause 28 is amended to further clarify the circumstances in which money may be deposited into a PBA. This can include paying an amount into the retention fund when the obligation to retain the amount arises under the contract, paying an amount the subject of a payment dispute, or making another payment prescribed by regulation.

15 Clause 30 (Head contractor to cover shortfalls)

Clause 30 is amended to make it clear that the timing of the shortfall payment into the PBA is required as soon as the head contractor becomes aware of the shortfall. This is to prevent the scenario where a head contractor does not top up the PBA in time, and then the payment instruction cannot be actioned by the bank, due to the insufficient funds.

16 Clause 31 (Limited purposes for which money may be withdrawn from project bank account)

Clause 31 is amended to clarify that a withdrawal from one account to another account within the trust account is permitted.

17 Clause 32 (Order of priority)

Clause 32(1) is amended to clarify the amounts for which there is an insufficient amount available in a trust account to pay.

18 Clause 33 (Insufficient amounts available for payments)

Clause 33 makes it clear that it is the head contractor who must pay the amount to be paid to each subcontractor beneficiary.

19 Clause 34 (Dealing with retention amounts)

Clause 34 is amended to clarify that the head contractor is only permitted to exercise a right of recourse to a retention amount where such a right is granted by the relevant subcontract.

20 Clause 35 (When payment dispute occurs)

Clause 35 is amended to clarify when a payment dispute arises. A payment dispute will occur 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. A payment dispute will also occur when a head contractor fails to provide a payment schedule under the Act to a subcontractor and becomes liable to pay the subcontractor beneficiary the amount claimed in the payment claim.

21 Clause 36 (Dealing with amounts if payment dispute occurs)

Clause 36 is amended to provide that where clause 36 applies, the head contractor must, to the extent that there is a discrepancy between the amount stated in the payment schedule and the amount stated in the payment instruction, place the difference between the two amounts in the disputed funds account. Also, if a head contractor fails to provide a payment schedule to a subcontractor beneficiary, they must transfer the amount claimed by the subcontractor in the payment claim into the disputed funds account.

New clause 36(2) provides the timeframes for when a head contractor must transfer an amount into the disputed funds account.

New clause 36(3) provides that a head contractor need not transfer an amount into the disputed funds account to the extent that the amount to be transferred is more than the contract price for the subcontract with the subcontractor beneficiary.

New clause 36(4) states who a head contractor may pay from the disputed funds account.

New clause 36(5) provides that the head contractor must not pay another person than those specified in 36(4).

New clause 36(6) provides that a head contractor must inform the subcontractor beneficiary immediately in writing of when the amount was transferred.

New clause 36(7) applies to a payment dispute and a subcontractor beneficiary where the funds are held in the disputed funds account, if 60 days have elapsed since the notice of the transfer was given under 36(6).

New clause 36(8) provides for the circumstances in which a head contractor can return an amount still held out of the disputed funds account to the trust account.

22 Clause 38 (Unauthorised ending of project bank account)

Clause 38(2) is amended to clarify the circumstances which will cause a PBA to be dissolved in an unauthorised manner. A number of situations could occur where the head contractor withdraws all amounts held in trust without intending to close, or end the project bank account. For example, this could occur where there are no retention monies held, no disputed funds and no progress payments at that particular time. Instead of considering the withdrawal of all amounts held in trust to be dissolving the project bank account, this amendment will clarify that a project bank account is only dissolved if the account is closed. This will provide greater clarity to head contractors, particularly as an offence attaches to this requirement if the project bank account was still required to be operational under the legislation.

23 Clause 40 (No power of head contractor to invest)

Clause 40 is amended to align it with clause 44 to refer to interest 'earned' rather than just "interest."

24 Clause 45 (Account to be kept by head contractor)

Clause 45 is amended to insert the word 'account' after 'trust' to clarify that it is a trust account that is being referred to. This will improve the readability of the clause.

25 Clause 50 (Principal to be given information about subcontracts)

Clause 50 is amended to make it clear that the head contractor, after entering a subcontract for the building contract, must give the principal, within 5 days, the information required by regulation. This makes it clear that the timing of this information is not depending on when the project bank account is established, but rather, that the time starts when a subcontract for the building contract is entered by a head contractor.

26 Clause 50 (Principal to be given information about subcontracts)

Clause 50 is amended to provide that the head contractor must provide to the principal the change of information within 5 days of becoming aware of the change, in the approved form.

27 Clause 51 (Principal and subcontractor to be given copy of payment instruction)

Clause 51 is amended to include the word 'information.'

28 Clause 51 (Principal and subcontractor to be given copy of payment instruction)

Clause 51 is amended to ensure consistency of wording throughout the Act. It makes it clear that the head contractor has to give a copy of the information contained in the payment instruction to the principal. If the payment is to a subcontractor beneficiary, the head contractor must provide that information to that subcontractor beneficiary.

29 Clause 51 (Principal and subcontractor to be given copy of payment instruction)

Clause 51 is amended to provide that the head contractor must provide a copy of information about the payment instruction to the principal and subcontractor beneficiaries. This also amends the heading.

30 Clause 52 (Principal to inform commissioner of discrepancies)

Clause 52 is amended to clarify the extent of the principal's obligation to inform the Commissioner of discrepancies in the payment instruction.

31 Clause 52 (Principal to inform commissioner of discrepancies)

Clause 52 is amended to make a minor drafting correction. The word 'an' has been replaced by 'a'.

32 Clause 54 (Right of principal to step in as trustee)

Clause 54 is amended to make a minor drafting correction. The word 'it' has been replaced by the words 'the company.'

33 Clause 54 (Right of principal to step in as trustee)

Clause 54 is amended to make a minor drafting correction. It makes it clear that if an event that is prescribed by regulation happens, the section applies. Further, it makes it clear that the principal may give a written notice to the head contractor advising that the principal will replace the head contractor as trustee for the project bank account.

34 Clause 54 (Right of principal to step in as trustee)

Clause 54 is amended to clarify that the notice divests the amounts held in trust under the project bank account from the head contractor as trustee. The notice vests the amounts held in trust to the principal as trustee. However, the head contractor continues to be entitled to interest that it would have been entitled to up until the time of the divestment.

Nothing in the section relieves the head contractor from liability for an act or failure committed as a trustee.

35 Clause 55 (Information to be given to principal as trustee)

Clause 55 is amended to compel a person with information that the principal will need in order to act as trustee, to give that information to the principal if requested by the principal in writing. New clause 55 also provides 50 penalty units in relation to clause 55(4).

36 Clause 56 (Principal as trustee)

Clause 56 is amended to provide further details about the rights and obligations of the principal if the principal is appointed as trustee for the PBA.

The principal as trustee is not entitled to any payment from the project bank account, other than payment of an amount for interest earned under clause 44. The principal as trustee is also responsible for preparing any payment instructions required for payments from the project bank account.

37 Clause 61 (Application of chapter)

Clause 61(1) is amended to clarify that the chapter will apply to all construction contracts after the commencement of the chapter.

38 Clause 62 (Effect of giving notice of claim for subcontractors' charges)

Clause 62 is amended to make a minor drafting correction.

39 Clause 68 (Meaning of payment claim)

Clause 68 is to make clear that an invoice satisfies clause 68(1)(c).

40 Clause 69 (Meaning of payment schedule)

Clause 69 is amended to insert a new subsection to include other information prescribed by regulation.

41 Clause 70 (Right to progress payments)

Clause 70 is amended to replicate the language in section 12 of the repealed *Building and Construction Industry Payments Act 2004* (BCIPA).

42 Clause 72 (Valuation of construction work and related goods and services)

Clause 72 is amended to consistency with the current provisions of the BCIPA (to be repealed in this bill. It provides that if a contract does not provide for a certain matter, the contract price for the work or the contract price for the goods and services may be given regard, for clause 72(1)(b)(i) and 72(2)(b)(i) respectively.

43 Clause 73 (Due date for payment)

Clause 73 is amended to make a minor drafting correction.

44 Clause 75 (Making payment claim)

Clause 75 is states that a payment claim may include an amount that was included in a previous payment claim.

45 Clause 76 (Responding to payment claim)

Clause 76 is amended to provide that a respondent is not required to give the claimant a payment schedule if the respondent pays the amount claimed in the payment claim before the end of the response period.

However, the respondent is not required to give the claimant a payment schedule if the respondent pays the amount in the payment claim before the end of the response period.

The "response period" for responding to a payment claim is the shorter of (a) the period provided under the contract for responding to the claim; or (b) 15 business days after the payment claim is given to the respondent.

46 Clause 79 (Application for adjudication)

Clause 79 is amended to state that for an application relating to a failure to give a payment schedule and pay the full amount stated in a payment schedule, an adjudication application can be made 30 business days after the later of (a) due date for the progress payment to which the claim relates; or (b) the last day that the respondent could have given the payment schedule under clause 76.

47 Clause 79 (Application for adjudication)

Clause 79 is amended to state that for an application relating to a failure to pay the full amount stated in a payment claim, an adjudication application can be made 20 business days after the due date for the progress payment to which the claim relates.

48 Clause 79 (Application for adjudication)

Clause 79 is amended to require a copy of the adjudication application to be given the respondent. The registrar must refer it to an adjudicator within 4 business days of the application being received.

49 Clause 81 (Appointment of adjudicator)

Clause 81 is amended to make a minor drafting correction. The word 'section' has been omitted and replaced with 'subsection'.

50 Clause 81 (Appointment of adjudicator)

Clause 81 is amended to make a minor drafting correction. The reference '(4)' has been omitted and replaced with '(5)'.

51 Clause 82 (Adjudication response)

Clause 82 is amended to ensure there are no new reasons in an adjudication response. This is to generate communication between the parties at an earlier stage, rather than having the reasons in an adjudication application. The provisions in the bill relating to length and type of submissions are dealt with in the regulation making power in the bill.

52 Clause 83 (Time for making adjudication response)

Clause 83(3) is amended to confine the provision to complex payment claims, to replicate section 24A(5) of the repealed BCIPA.

53 Clause 84 (Adjudication procedures)

Clause 84 is amended to provide the adjudicator a discretion to allow the parties to have legal representation present at the conference. This amendment addresses feedback received from industry.

54 Clause 86 (Extending time for deciding adjudication application)

Clause 86 is amended to clarify the circumstances in which a claimant and respondent may agree to an adjudicator having additional time to decide the application. An adjudicator may also decide to take longer time period.

55 Clause 87 (Valuation of work etc. in later adjudication application)

Clause 87(2) is amended to clarify that the intent of the clause is that all subsequent adjudicators when working out the value of the construction work or of the related goods and services, must give the work, or the goods and services, the same value as that previously decided by a previous adjudicator unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision. This amendment maintains the policy intent of section 27 of the repealed BCIPA.

56 Clause 88 (Adjudicator's decision)

Clause 88 is amended to clarify that an adjudicator may disregard an adjudication application or adjudication response to the extent that the submissions or accompanying documents contravene any limitations relating to submissions or accompanying documents prescribed by regulation.

57 Clause 89 (Adjudicator may correct clerical mistakes etc.)

Clause 89 is amended to make it clear that an adjudicator is not compelled to correct an adjudication decision at the request of the adjudication registrar. Rather, that adjudicator has the discretion to amend the decision.

58 Clause 94 (Claimant may make new application in certain circumstances)

Clause 94(4)(c)(i) is amended to make a minor drafting correction. The word 'for' has been omitted and replaced with 'from'.

59 Clause 94 (Claimant may make new application in certain circumstances)

Clause 94(6) is amended to make a minor drafting correction. The word 'section' has been omitted and replaced with 'subsection'.

60 Clause 96 (Deciding fees payable by claimant and respondent)

Clause 96 is amended for drafting consistency.

61 Clause 98 (Claimant's right to suspend work)

Clause 98 is amended to make a minor drafting correction. The section cross-reference has been amended.

62 Clause 102 (Service of notices)

Clause 102(1) is amended to insert an example to assist the industry in understanding the provision, and to make it clear that service of notices may occur by email if provided for in the contract.

63 Clause 104 (Definitions)

Clause 104 is amended to omit the definition of 'defects liability period'. This term will be defined in the Dictionary.

64 Clause 104 (Definitions)

Clause 104 is amended to omit the definitions of 'practical completion' and 'retention amount'. These terms will be defined in the Dictionary.

65 Clause 106 (References to amount payable under contract and to completion of work specified in subcontract)

Clause 106(c) is amended to further simplify and clarify the provision which is derived from section 3A(b) of the repealed *Subcontractors' Charges Act 1974* (SCA).

66 Clause 107 (When work specified in contract completed)

Clause 107(a) is amended to further simplify and clarify the provision which is derived from section 3B(a) of the repealed SCA.

67 Clause 115 (Insufficient money available for claims)

Clause 115 is amended to make a minor drafting correction.

68 Clause 115 (Insufficient money available for claims)

Clause 115 is amended to make a minor drafting correction.

69 Clause 115 (Insufficient money available for claims)

Clause 115 is amended to make a minor drafting correction.

70 Clause 119 (Request for information about building contract or security)

Clause 119 is amended to provide that the contractor must give the subcontractor the requested information within 10 business day days after the request is made, unless the contractor has a reasonable excuse. The 'reasonable excuse' is necessary to cater for situations where the contractor is incapacitated or an event prevents their response being given.

71 Clause 119 (Request for information about building contract or security)

Clause 119 is amended to provide, if requested in writing by the subcontractor, the person who engaged the contractor under the contract must give the subcontractor the name and address of the holder of the security within 10 business days after the request is made, unless the person has a reasonable excuse. The 'reasonable excuse' is necessary to cater for situations where the person is incapacitated or an event prevents their response being given.

72 Clause 119 (Request for information about building contract or security)

Clause 119 is amended to make a minor drafting correction.

73 Clause 127 (Person given notice of claim must comply with request from security holder about s 130 or 131)

Clause 127 is amended to make a minor drafting correction.

74 Clause 128 (Contractor given copy of notice of claim must respond)

Clause 128 is amended to make a minor drafting correction.

75 Clause 128 (Contractor given copy of notice of claim must respond)

Clause 128 is amended to provide that the contractor must give the subcontractor and the person given the notice of claim a written response within 10 business days after the contractor is given the copy of the notice of claim, unless the contractor has a reasonable excuse. The 'reasonable excuse' is necessary to cater for situations where the contractor is incapacitated or an event prevents their response being given.

Clause 128 is amended to require that the response must be made within 10 business days of the contractor receiving the copy of the notice of the claim instead of 5 business days. This is to address feedback provided by the industry. Previously the requirement was within 14 days under the repealed SCA. Penalties apply for contravening this requirement.

76 Clause 128 (Contractor given copy of notice of claim must respond)

Clause 128(3) is amended to provide clarity. The drafting of clause 128(3) previously stated that 'the response to the claim must be made in the approved form and *either ...*'. New clause 128(3) removes the word 'either'. This makes it clear that the response to the claim must be made in the approved form *and* that the response must satisfy one of the subclauses in new clause 128(3)(a)-(c).

77 Clause 129 (Payment of amount claimed)

Clause 129 is amended to provide for a more specific definition of the terms 'retained amount' and 'unsatisfied amount' for clause 129. New clause 126(6) provides that retained amounts apply to the total of all the amounts retained by the person under

clause 126(2) and paid into court in accordance with clause 126(4). This clarification makes it clear that a retained amount can be broader than 1 claim.

78 Clause 130 (Use of security for benefit of subcontractor if contractor accepts liability for all claims)

Clause 130 is amended. New clause 130(2)(a) clarifies that the subsection applies to a subcontractor's charge, and clarifies that the reference to 'court' only applies to the court in which that subcontractor's claim is heard.

79 Clause 130 (Use of security for benefit of subcontractor if contractor accepts liability for all claims)

Clause 130(7) is amended to update the definition of a retained amount. It updates the definition to amend a section reference for clarity. The new definition for retained amount in this section states "all amounts a person is retaining under section 126(2) for the contract ..." This subsection reference was previously s126(1).

80 Clause 130 (Use of security for benefit of subcontractor if contractor accepts liability for all claims)

Clause 130(7) is amended to update the definition of unsatisfied amount. It updates the definition to amend a section reference for clarity. The new definition for unsatisfied amount in this section states "satisfied for the payment under section 129(2) or (3) ..." This subsection reference was previously s126(2) or (3).

81 Clause 131 (Use of security for benefit of subcontractor if contractor does not accept liability for all claims)

Clause 131 is amended. Similar to the amendment for new clause 130, new clause 131(2)(a) clarifies that the subsection applies to a subcontractor's charge, and clarifies that the reference to 'court' only applies to the court in which that subcontractor's claim is heard.

82 Clause 131 (Use of security for benefit of subcontractor if contractor does not accept liability for all claims)

Clause 131 is amended to update the definition of unsatisfied amount. Similar to new clause 130, this amendment updates the definition to amend a section reference for clarity. The new definition for unsatisfied amount in this section states "satisfied by payment under section 129(2) or (3) ..." This subsection reference was previously s126(2) or (3).

83 Clause 134 (Recovering amount claimed)

Clause 134 is amended to update a section reference in new clause 134(3) to refer to section 126(2), rather than section 129.

84 Clause 135 (Enforcing subcontractor's charge on behalf of other subcontractors)

Clause 135 is amended to insert the word 'section' before the section numbers referenced in clause 135(2)(a) and (b).

85 Clause 139 (Application to court by person prejudicially affected)

Clause 139 is amended to address a typographical error. New clause 139(1) removes the word 'the' before the word 'any'.

86 Clause 162 (Request for further information)

Clause 162 is amended to remedy a minor typographical error. In new clause 162, the phrase becomes 'time to comply'.

87 Clause 165 (Conditions of registration)

Clause 165 is amended to expand the requirement for an adjudicator to comply with a specific chapter of the Bill. New clause 165 requires an adjudicator to comply with Chapter 3, in addition to Chapter 5.

88 Clause 165 (Conditions of registration)

Clause 165(2) is amended for clarity. New clause 165(2) states 'conditions may be imposed on an adjudicator's registration'. Clause 165(2) previously stated 'conditions may be imposed under subsection (1)(b)'.

89 Clause 165 (Conditions of registration)

Clause 165(3) is amended. New clause 165(3) states that "if the registrar decides to impose conditions on the registration under subsection (1)(c)", rather than under subsection (2)(b).

90 Clause 168 (Request for further information)

Clause 168 is amended to remedy a typographical error. Similar to new clause 162, new clause 168(4) replaces the word 'comply' with the word 'complying'.

91 Clause 181 (Code of conduct for adjudicators)

Clause 181(4) is amended to rectify a typographical error. New clause 181(4) refers to subsection (3), rather than (4).

92 Clause 181 (Code of conduct for adjudicators)

Clause 181(5)(c) is amended to correct a typographical error. New clause 181(5)(c) now states 'if asked, advise where copies of the code of conduct may be obtained'.

93 Clause 185 (Adjudicator must give information to registrar)

Clause 185 is amended to require an adjudicator to notify the Registry of any change of address for service in Queensland.

94 Clause 185 (Adjudicator must give information to registrar)

Clause 185(2) is amended to update a section reference. New clause 185(2) now refers to clause 161(3).

95 Clause 189 (Proceedings for offences)

Clause 189 is omitted as it is not intended for all offence under the QBCC Act to be heard summarily. It is intended for existing law to be relied on, including the *Justices Act 1886*.

96 Clause 193 (Application of division)

Clause 193 is amended to state the applicability of the part, rather than the division.

97 Clause 198 (Approved forms)

Clause 198 (1) is amended to allow both the Chief Executive and the Commissioner to approve forms for use under this Act.

98 After Clause 200

New clause 200A is inserted regarding a review of the suite of 2017 building and construction reforms. The review must be conducted by a panel of not more than 4 appropriately qualified persons appointed by the Minister. The review must be started no later than 1 September 2018, and it must be tabled in the Legislative Assembly as soon as practicable following its completion.

99 Clause 201 (Regulation-making power)

Clause 201 is amended to allow a regulation to prescribe limitations on submissions and documentation for adjudication applications and adjudication responses.

100 Clause 203 (Definitions for part)

Clause 203 is amended. It removes the definition for 'repealed'.

101 Clause 204 (Continuation of existing appointments and employment)

Clause 204 is amended. It provides additional clarification about the registration of existing adjudicators, through new clause 82(1) and (2). Existing registrations under part 4 of the *Building and Construction Industry Payments Act 2004* (BCIPA). Those registrations continue for the remainder of that registration's term, as in accordance with the BCIPA. In addition, the conditions previously imposed continue, to the extent those conditions are consistent with the Act.

The ongoing registration is subject to the terms of this Act, including regarding eligibility under section 161, conditions in s165(1) and any other condition imposed in accordance with that section. Further, the continued registration is subject to this Act's provisions concerning suspension or cancellation.

102 Clause 207 (Definitions for part)

Clause 207 is amended to update the definition of 'repealed' for that part. New clause 207 states that 'repealed', in relation to a provision, means that provision of the repealed Act.'

103 Clause 214 (Replacement of s 14 (Particular private and government building contracts))

Clause 214 is amended to remove clause 14(c) which provides that a building contract is a PBA contract if the head contract enters into a subcontract for all or part of the contracted building work. This clause is not required as the requirement is already contained in clause 13(1)(b) which will continue to apply when Phase 2 of PBAs commences.

Clause 14(d) will also become new 14(c).

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

Clause 215 is amended to address a minor typographical error. The word 'means' is inserted at the start of (a).

105 Clause 219 (Amendment of s 9 (What is a project bank account))

Clause 219 is amended to correctly remove references to 'first tier' in 'section 9(1) and (5)'. The Bill currently only removes the reference in section 9(1)(b). This clause will come into effect when the application of project bank accounts is extended to all subcontractors in Phase 3.

106 Clause 224 (Amendment of s 18A (Private or local government contracts entered into before particular date))

Clause 224 is amended to replace an incorrect reference to 'section 18A(1)(b)' with 'section 18A(1)(a)'.

107 Clause 225 (Amendment of s 20 (Application of chapter if parties to a subcontract are related entities))

Clause 225 is amended to correctly refer to 'section 20(5)'. This clause will come into effect when the application of project bank accounts is extended to all subcontractors in Phase 3.

108 Clause 228 (Amendment of ch 2, pt 4 (Information Sharing))

Clause 228 is amended to state the heading is now 'Information Sharing'.

109 Clause 231 (Amendment of sch 2 (Dictionary))

Clause 231 is amended to omit and replace certain definitions. This clause will come into effect when the application of project bank accounts is extended to all subcontractors in Phase 3.

110 Clause 235 (Amendment of ch 8, pt 7, div 2, hdg (Investigations))

Clause 235 is amended to make a minor drafting correction to remove the heading of chapter 8, part 7, division 2 of the Building Act 1975.

111 Clause 252 (Insertion of new s 4AA)

Clause 252 is amended. This clause inserts a new definition of an 'influential person for a company' in the *Queensland Building and Construction Commission Act 1991* (QBCC Act).

The definition in the bill currently states that an influential person, for a company, is an individual, other than a director or secretary of the company, who controls or substantially influences the company's conduct.

The amendment changes the wording 'who controls or substantially influences' to 'who is in a position to control or substantially influence'. This aligns the definition more closely with what is currently in the QBCC Act.

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

Clause 271 is amended. This clause amends the excluded individuals and excluded companies provisions of the QBCC Act.

Section 56AC(4) of the QBCC Act has been amended so that a person will not be considered an excluded individual if they can satisfy the commissioner that at the time they ceased to be an influential person, director or secretary for the construction company, the company was solvent. This amendment has been made in response to industry concerns that the extended 2 year timeframe prescribed in 56AC(2)(c)(ii) may operate harshly on some directors, secretaries and influential persons who left a company in good financial health well before it started to suffer any financial difficulties.

The definition of construction company has also been amended so that it now includes a company that directly or indirectly carried out building work or building work services within 2 years before a relevant company event. The introduction of the 2 year timeframe will prevent situations arising where a company with debts from building work claims that it is not a 'construction company' because when liquidators were appointed, the company ceased to carry out building work.

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

Clause 272 is amended to remove the revised definition of 'demerit matter', which included being given a direction to rectify or remedy.

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

Clause 273 is amended so that 4 demerit points will no longer be allocated to a person for receiving a direction to rectify or remedy.

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

Clause 275 is amended to insert revised definitions of 'defects liability period' and 'practical completion' in section 67A of the QBCC Act.

Paragraph (b) of the definition of 'defects liability period' has been amended to clarify that the 'statutory defects liability period' is provided for in section 67NA(2) of the QBCC Act.

The definition of 'practical completion' has been amended to fix incorrect references to 'day for practical completion' and 'day of practical completion', which are well recognised in industry as having different meanings.

116 Clause 276 (Insertion of new ss 67GA and 67GB)

Clause 276 is amended to clarify who is subject to the requirement in section 67GA(1) to not enter into a building contract that does not include 'mandatory conditions'.

Section 67GA(2) has been amended to clarify that the requirement under section 67GA(1) to not enter into a building contract that does not include 'mandatory conditions' also extends to a building contractor who enters into a subcontract as the contracting party.

This amendment addresses industry concerns that the previous drafting of section 67GA(2) unintentionally excluded a building contractor who entered into a subcontract as a contracting party from needing to comply with section 67GA(1).

117 Clause 276 (Insertion of new ss 67GA and 67GB)

Clause 276 is amended to clarify who is subject to the requirement in section 67GB(1) to not enter into a building contract that includes a 'prohibited condition'.

Section 67GB(2) has been amended to clarify that the requirement under section 67GB(1) to not enter into a building contract that includes a 'prohibited condition' also extends to a building contractor who enters into a subcontract as the contracting party.

This amendment addresses industry concerns that the previous drafting of section 67GB(2) unintentionally excluded a building contractor who entered into a subcontract as a contracting party from needing to comply with section 67GB(1).

118 Clause 278 (Insertion of new ss 67NA–67NC)

Clause 278 is amended to improve clarify in section 67NA (Statutory defects liability period). The section has been restructured so that it no longer requires the definition of 'defects liability period' to be included in the section.

The amendment also clarifies that the retention amount or security may only be released to the party entitled to it, at the end of the 12 month period.

119 Clause 278 (Insertion of new ss 67NA–67NC)

Clause 278 is amended to replace incorrect references to 'contracting party' with 'contracted party' in section 67NC.

120 After clause 282

New clause 282A inserts new section 72AA (Delaying or obstructing compliance with direction to rectify or remedy) in the QBCC Act.

The new section provides that a person must not, without reasonable excuse, delay rectifying building work that is defective or incomplete, or to remedy consequential damage, as required by a direction to rectify or remedy.

It also provides that a person must not, without reasonable excuse, obstruct another person rectifying building work that is defective or incomplete, or to remedy consequential damage, as required by a direction to rectify or remedy.

It will be prescribed by regulation that a person who fails to comply with these provisions will receive 4 demerit points.

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

Clause 285 is amended to replace the reference to 'section 74B' with 'section 74B(1)'.

122 Clause 293 (Replacement of s 104 (Appointment of inspectors))

Clause 293 is amended to replace the word 'with' with 'within' in section 104H.

123 Clause 295 (Insertion of new pt 9, div 7A)

Clause 295 is amended to insert a new section 160U(4)(c) in the QBCC Act. Section 106U provides for when compensation may be claimed for a loss arising from the exercise, or purported exercise, of a power by or for an investigator.

New section 106U(4)(c) provides that when considering whether it is just to order compensation, the court must have regard to whether the loss arose from performing a function or exercising a power of an investigator in good faith and without negligence.

124 After clause 301

New clause 301A is inserted. This new clause inserts a new section 111AAA (Enforcement action to comply with prescribed guidelines) in the QBCC Act.

Clause 191 of the Bill requires an entity to consider a guideline prescribed by regulation when considering taking enforcement action for an offence against the Bill. This amendment inserts a provision identical to clause 191 in the QBCC Act so that the guideline will also apply to an entity taking enforcement action for offences against the QBCC Act.

125 After clause 303

New clause 303A is inserted. This new clause inserts a new section 115CA (Approved forms) in the QBCC Act.

The Bill introduces the use of an approved form in section 67NC (Notice about end of defects liability period) of the QBCC Act, however, there is no existing power to approve forms in the Act. This amendment inserts a head of power in the QBCC Act to allow the Chief Executive or the Commissioner to approve forms.

126 Clause 304 (Amendment of s 116 (Regulations))

Clause 304 is amended to insert a head of power into the QBCC Act to allow the QBCC to allocate a sliding demerit point scale for the section 73 demerit offence.

127 Clause 307 (Amendment of sch 2 (Dictionary))

Clause 307 inserts a definition of 'approved form' in the Dictionary. It is defined as 'a form approved by the chief executive or the commissioner under section 115C'.

128 Clause 307 (Amendment of sch 2 (Dictionary))

Clause 307 is amended to replace an incorrect reference to 'commissioner under this part for—' with 'commissioner under part 3E for—' in the definition of 'demerit points' in Schedule 2.

129 Schedule 1 (Consequential amendments)

Schedule 1 is amended to omit an incorrect consequential amendment to section 45(2) of the QBCC Act.

130 Schedule 2 (Dictionary)

Schedule 2 is amended to replace a reference to 'section 8' with 'section 5'.

131 Schedule 2 (Dictionary)

Schedule 2 is amended to remove the words 'for chapter 3' from the definitions of 'adjudication application', 'adjudication certificate' and 'adjudication response'. The application of these definitions is not limited to chapter 3 of the Bill.

132 Schedule 2 (Dictionary)

Schedule 2 is amended to replace the reference to 'commissioner' with 'chief executive or the commissioner' in the definition of 'approved form'.

133 Schedule 2 (Dictionary)

Schedule 2 is amended to omit the definition of 'contracting party' from the dictionary.

134 Schedule 2 (Dictionary)

Schedule 2 is amended to replace the definition of 'defects liability period' in the dictionary. The current definition in the Dictionary provides for different definitions in chapters 2 and 4. This amendment consolidates these definitions in Schedule 2.

In the new definition, minor amendments have been made to paragraph (a) to improve clarity. Also, the reference to 'section 67NA' in paragraph (b) has been changed to 'section 67NA(2)' to ensure consistency with the definition being inserted into the QBCC Act.

135 Schedule 2 (Dictionary)

Schedule 2 is amended to remove the words 'for chapter 4' from the definition of 'notice of claim'. The application of this definition is not limited to chapter 4 of the Bill.

136 Schedule 2 (Dictionary)

Schedule 2 is amended to remove the words 'for chapter 3' from the definition of 'payment claim'. The application of this definition is not limited to chapter 3 of the Bill.

137 Schedule 2 (Dictionary)

Schedule 2 is amended to change to the reference to 'section 35(2)' to 'section 35' in the definition of 'payment dispute'.

138 Schedule 2 (Dictionary)

Schedule 2 is amended to insert a definition of 'payment instruction' in the Dictionary to improve clarity. The new definition provides that a 'payment instruction' means an instruction to a financial institution for the payment of an amount from an account'.

Banks which are likely to accommodate PBAs have provided feedback that a head contractor will, in practice, give all instructions to the bank concerning the payment of money from PBA trust accounts (e.g. payments to the head contractor itself and

payments to subcontractors) by entering details into a computer, which is linked via the internet to the bank, and then causing those details to be uploaded into the bank's system. There will not be any 'document' in the usual sense of that word which comprises the relevant instructions. This definition 'payment instruction' aligns with this process of electronically uploading instruction to a bank.

139 Schedule 2 (Dictionary)

Schedule 2 is amended to remove the words 'for chapter 3' from the definition of 'payment schedule'. The application of this definition is not limited to chapter 3 of the Bill.

140 Schedule 2 (Dictionary)

Schedule 2 is amended to replace the definition of 'practical completion' in the Dictionary. The current definition in the Dictionary provides for different definitions in chapters 2 and 4. This amendment consolidates these definitions in Schedule 2.

In the new definition, incorrect use of the terms 'day for practical completion' and 'day of practical completion' (which are well recognised in industry as having different meanings) has been addressed

141 Schedule 2 (Dictionary)

Schedule 2 is amended to remove the words 'for chapter 3' from the definition of 'progress payment'. The application of this definition is not limited to chapter 3 of the Bill.

142 Schedule 2 (Dictionary)

Schedule 2 is amended to replace the definition of 'retention amount' in the Dictionary. The current definition in the dictionary provides for different definitions in chapters 2 and 4. This amendment consolidates these definitions in Schedule 2.

The term 'maintenance period' is no longer referred to in paragraph (a) of the definition of 'retention amount' because its meaning is unclear. Instead, the term 'defects liability period' has been substituted to improve clarity.

Paragraph (b) has also been amended to clarify that a retention amount is withheld for the purpose of giving financial protection to the payee. The current drafting in the Bill is vague in that it only refers to 'giving financial protection'.

143 Schedule 2 (Dictionary)

Schedule 2 is amended to omit the definition of 'site testing' from the dictionary. The term is not used in the Bill and is therefore unnecessary.