

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

Explanatory Notes

Short title

The short title of the Bill is the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020

Policy objectives and the reasons for them

The objectives of the Bill are to:

- implement the recommendations of the Building Industry Fairness Reforms Implementation and Evaluation Panel (Panel)
- implement the recommendations of the Special Joint Taskforce (Taskforce) that investigated subcontractor non-payment in the Queensland building industry
- enhance Queensland's security of payment legislation and further extend the protections for industry
- improve the Queensland Building and Construction Commission's (QBCC) ability to address fraudulent behaviour in the industry
- strengthen Queensland's building laws to enhance regulatory oversight capabilities, clarify licensing requirements, improve building safety and support industry professionals
- implement reforms arising from the Queensland Building Plan (QBP) to strengthen the certification and inspection process and improve professional standards and compliance in the certification sector
- implement reforms arising from the Building Confidence Report (BCR) such as enhancements to the regulation of architects and registered professional engineers
- ensure the continuation of external review rights for decisions about transition plans for retirement village schemes.

Security of payment reforms

Security of payment in Australia's building and construction industry continues to be a priority for the Queensland Government, as subcontractor late and non-payment remains an issue for the industry.

To address this, the Queensland Government introduced nation-leading reforms in 2017 through the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act). The centrepiece of the reforms was the introduction of Project Bank Accounts (PBA), which require money to be held in trust for subcontractors. PBAs have been in place for government building contracts valued between \$1 million and \$10 million since 2018.

Since its commencement, these reforms have offered protections to over 200 contracts, amounting to over \$800 million in project value.

To maximise the effectiveness and operation of the security of payment reforms, the BIF Act required a review of the initial implementation of PBAs. To satisfy this requirement the government appointed the independent Panel. The Panel engaged in extensive evaluation and consultation activities with government and the building and construction industry to inform its recommendations.

In its report the Panel confirmed that the BIF Act meets the government's intent of making systemic reform to encourage cultural change and improve payment outcomes across the industry.

The Panel made 20 recommendations for reform. These provide a clear pathway to implement the reforms in a way that continues to enhance protections over subcontractor money, while managing the significant financial, operational and cultural transition across the entire building and construction industry in Queensland.

The 20 recommendations can be grouped into three themes: simplify the framework, improve protections and oversight, and manage the financial transition.

All 20 recommendations were accepted in full or in-principle by the Queensland Government. The Panel's report, and the government response to the report, were tabled in the Legislative Assembly on 28 November 2019.

Government considers that the thorough analysis undertaken by the Panel provides a solid evidence base for refinement of the framework to enhance security of payment outcomes.

Special Joint Taskforce

As part of the Queensland Government's commitment to reforming the culture and practice of payment in the building and construction industry, the Taskforce was established in March 2019 to investigate complaints of fraudulent behaviour relating to subcontractor non-payment.

The Taskforce received 166 submissions and held appointments with 42 individuals across Queensland. Investigations resulted in the referral of 108 possible legislative breaches to nine prosecuting authorities, including the QBCC, the Queensland Police Service and the Australian Securities and Investments Commission.

The Taskforce's report provided 10 recommendations to enhance the QBCC's enforcement ability, ensure the integrity of industry participants, and increase collaboration among regulators.

The Taskforce report and the government response to the report were tabled in the Legislative Assembly on 28 November 2019.

The Queensland Government accepted all recommendations which will be primarily implemented through amendments to the *Queensland Building and Construction Commission Act 1991* (QBCC Act).

Strengthening Queensland's building laws

The Queensland Government has been creating a safer, fairer and more sustainable building and construction industry through implementation of the QBP.

The next phase of QBP delivery involves three key areas of reform, as outlined below.

Licensing requirements

A new framework for the Minimum Financial Requirements (MFR) for licensing was released in 2018 to restore financial reporting requirements. The changes have been implemented in phases, through the Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018 (MFR Regulation).

Phase 1 began on 1 January 2019 and re-introduced mandatory annual reporting for all licensees, changed how decreases in net tangible assets are reported and clarified how assets are to be treated.

Phase 2 began on 2 April 2019 and introduced higher reporting standards for category 4–7 licensees, along with measures to improve data quality and availability for the QBCC.

The MFR framework also provided for the enforcement provisions of the QBCC Act to be further strengthened, including executive officer liability and escalating penalties, to help ensure all parties involved in running a licensed company are motivated to meet the new MFR. These changes will be implemented through amendments to the QBCC Act.

The first phases of the MFR reforms led to a capital injection of \$1.2 billion into the Queensland building and construction industry, resulting in a stronger, more confident industry. The changes help support financially healthy businesses that are capable of sustained growth, as well as providing greater certainty that subcontractors will be paid for the work they do. These benefits are achieved by ensuring the QBCC has sufficient powers and oversight to support the ongoing financial health of licensees.

It is also important that other aspects of the Queensland licensing framework are clear and are being administered effectively. Improvements are needed to strengthen some existing licensing requirements and provide greater certainty, including to:

- strengthen existing 'excluded individual' provisions by ensuring these persons cannot obtain a site supervisor licence (transitional provisions will ensure those who have been previously excluded but currently hold a licence will not be impacted)
- improve sharing of licensing information between jurisdictions, for example, where a person's interstate or New Zealand licence has been cancelled or suspended
- ensure that existing landscaping licensees who have worked on tennis and other sporting courts prior to the commencement of the Queensland Building and Construction Commission (Structural Landscaping Licences) Amendment Regulation 2019 are protected from prosecution for unlawful building work
- clarify the definition of 'occupational licence' to ensure relevant licences issued under another Act, such as plumbing occupational licences, are captured.

Building certification

Building certifiers play a vital role in ensuring our built environment is safe, meet the necessary standards and are built with the right materials.

While Queensland has a strong and robust building certification profession, consultation as part of the 2017 QBP highlighted the need for improvements and enhancements to support the industry and improve public confidence in the building and construction industry.

The BCR, commissioned by the Building Ministers' Forum in 2017, highlighted significant and concerning failures in recently constructed buildings which were attributed to compliance and enforcement gaps within the industry. This report made 24 recommendations aimed at enhancing public trust in the effective implementation of building and construction standards. Queensland has, in full or partially, implemented 20 of the BCR's recommendations and is contributing to the remaining four through national work.

The Bill delivers the first phase of Queensland's building certification reforms. These will:

- strengthen certifier independence by clarifying that a certifier's primary duty of care is to act in the public interest and by doing so they do not create a conflict of interest
- improve compliance within the sector through the introduction of a demerit point system, which can lead to a certifier being disqualified from holding a licence to operate in Queensland
- improve professional standards by ensuring consistent and contemporary standards of education and competency among certifiers, including requiring accreditation bodies to submit their accreditation and professional development schemes to the chief executive for regular review
- enhance the certification and inspection process, including through providing greater transparency and options for the owner in the building process.

Architects and registered professional engineers

Architects and registered professional engineers play a crucial role in the design and construction of safe buildings. In Queensland, architects and registered professional engineers are regulated by the Board of Architects of Queensland (BOAQ) and the Board of Professional Engineers of Queensland (BPEQ) (the Boards) under the *Architects Act 2002* (Architects Act) and the *Professional Engineers Act 2002* (PE Act), respectively.

The Architects Act and PE Act are similar in operation and seek to promote public safety by ensuring that architectural and professional engineering services are only provided by qualified, registered practitioners and that these services are of a high standard.

Presently, however, the Boards have limited compliance, enforcement and disciplinary powers—particularly when compared to other industry regulators, such as the QBCC. For example, the Boards' investigatory powers are restricted to requiring information or documents from persons under investigation, which creates a risk of crucial evidence being withheld or destroyed and hinders investigations.

It is necessary to empower the Boards to discharge their public safety functions and promote high professional standards. It is also important to ensure the Boards are adequately supported by their enabling legislation and able to effectively regulate the professions.

Right of review for transition plans in retirement villages

Under part 2, division 5 of the *Retirement Villages Act 1999*, scheme operators who propose to transition control of a retirement village to a new scheme operator must prepare a transition plan which is provided to the chief executive for approval.

It is intended for decisions by the chief executive in relation to transition plans to be reviewable by the Queensland Civil and Administrative Tribunal (QCAT), however, decisions made under this division were not given an explicit right of review. This differs from comparable provisions for closure plans and redevelopment plans.

The Retirement Villages (Transitional) Regulation 2019 fixes this by enabling QCAT to review these decisions until 11 November 2020, an amendment to the *Retirement Villages Act 1999* is required to preserve this right beyond this date.

Achievement of policy objectives

Security of payment reforms

The policy objectives of the Bill in relation to security of payment are to be achieved by amending the BIF Act to implement the Panel recommendations. The 20 recommendations can be grouped into three themes: simplify the framework, improve protections and oversight, and manage the financial transition.

To 'simplify the framework', amendments in the Bill will:

- simplify the operation of PBAs
- require that only one project trust account be established by the head contractor for every eligible contract
- allow for one retention trust account per contractor or eligible principal to be established to protect retention monies
- remove the requirement to establish a disputed funds trust account and instead introduce other protective measures.

To 'improve protections and oversight', amendments in the Bill will:

- remove the principal's viewing rights and step-in ability as these will not be effective when implemented in the private sector
- increase the oversight functions of the QBCC including the ability to audit trust accounts as part of an audit program
- enable the QBCC to 'freeze' and trust accounts and to give a direction that the trustee gives the Queensland Building and Construction Commissioner (commissioner) an account review report for one or more of the trust accounts for the trustee
- introduce the ability to serve a 'payment withholding request' on a party above the respondent (including for a head contractor, a financier) to protect money that may be payable as a result of an adjudication decision, where the adjudicated amount is not paid in the timeframes required by the BIF Act
- allow a head contractor to lodge a statutory charge on property owned by a developer or a related entity of the developer, where the construction work took place, for an amount determined through adjudication that is unpaid

- provide for regular independent audits of retention trust accounts and compulsory training before opening a retention trust account to help account holders understand their obligations.

To 'manage the financial transition', amendments in the Bill will provide for the application of trust account requirements to be extended to eligible contracts as follows:

- from 1 July 2020, project and retention trusts will apply to government and Hospital and Health Services' building contracts valued at \$1 million or more (excluding GST)
- from 1 July 2021, project and retention trusts will also apply to private sector and local government building contracts valued at \$10 million or more (excluding GST)
- from 1 January 2022, project and retention trusts will also apply to private sector and local government building and construction contracts valued at \$3 million or more (excluding GST)
- from 1 July 2022, project and retention trusts will apply to all building and construction contracts valued at \$1 million or more (excluding GST)
- retention trust accounts for cash retentions will apply for all phases where a project trust is also required, and in the final phase, will apply to all parties holding cash retentions down the contractual chain where the head contract requires a project trust.

Special Joint Taskforce

The policy objectives of the Bill are to be achieved by implementing five of the Taskforce's 10 recommendations, with the remaining recommendations to be implemented through administrative and regulation changes. The recommendations seek to improve the QBCC's ability to address fraudulent and dishonest practices in the building industry.

To address these practices, amendments in the Bill will:

- strengthen and clarify an existing offence provision relating to causing significant financial loss, to improve the QBCC's ability to enforce non-compliance with contractual obligations. This includes making it clear that section 76 of the *Justices Act 1886* applies which places the onus of proof on a defendant to prove the existence of reasonable excuse for non-compliance
- create a new offence for giving false or misleading information about a licensee's financial position where that information is communicated by another person to the QBCC
- increase the timeframes for QBCC to start a prosecution
- enable the QBCC to publish details about excluded and permanently excluded individuals who are not licensees.

The Taskforce also made a recommendation to create a legal obligation for a head contractor, when making a payment claim, to declare that subcontractors have been paid in full or otherwise provide details about those subcontractors that have not been paid.

This recommendation is being implemented through an amendment to the BIF Act, which is also in line with recommendation 11 made by the Panel.

Strengthening Queensland's building laws

Licensing requirements

To strengthen the MFR framework and empower the QBCC to better regulate MFR-related offences, the Bill will:

- ensure that executive officers, as influential persons, are held accountable for ensuring a licensed entity meets its MFR obligations, through the introduction of executive officer liabilities and associated offences
- transfer the current requirement for licensees to provide the QBCC with financial information from the MFR Regulation to the QBCC Act and increase the associated penalty to 200 penalty units, to more adequately reflect the seriousness of non-compliance
- allow the QBCC to exclude an accountant who has been found to have provided false or misleading information to the QBCC from providing further financial information (including MFR reports).

To improve the QBCC's ability to ensure that excluded individuals are prevented from obtaining positions of influence, the Bill will ensure:

- a person whose equivalent licence has been suspended or cancelled in another Australian jurisdiction or in New Zealand, is not eligible to hold a licence in Queensland; and
- a person who has been excluded or permanently excluded from holding a contractor licence, because of insolvency, bankruptcy or involvement in a company collapse, is also excluded from becoming a site supervisor licensee.

Building certification

To strengthen the certification and inspection process the Bill will:

- provide for additional inspections to be carried out by a building certifier
- require a building certifier, when requested by an owner, to provide building approval and inspection documentation to the owner
- enable a new building assessment provision to be applied to a building development application via a regulation, if the Minister is satisfied that applying the building assessment provision is necessary to immediately mitigate a risk posed to the health and safety of people, and an impact assessment has been undertaken
- requires the certifier to provide their name and information about their responsibilities to the building owner, where the owner has not engaged them.

To improve professional standards and compliance within the certification sector the Bill will:

- introduce a demerit point system, whereby a building certifier who accumulates 30 points within a three-year period can be disqualified from holding a licence to operate in Queensland
- clarify that a certifier's primary duty is to act in the public interest
- require accreditation standards bodies to submit their professional development schemes to the chief executive for regular review
- increase the period that a certifier must keep inspection documentation from five years to seven years

- introduce an alternative recognition pathway for licensing of certifiers.

The Bill will also:

- clarify and modernise terminology used in the *Building Act 1975* (Building Act)
- remove duplication between the Building Act and Building Regulation 2006 (Building Regulation) in referencing certain aspects of the Queensland Development Code (QDC)
- consolidate provisions relating to accreditation standards bodies in the Building Regulation by removing the Australian Institute of Building Surveyors (AIBS) as an accreditation standards body named in the Building Act.

The QBP certification reforms described above also implement some of the BCR recommendations.

Architects and registered professional engineers

To empower the Boards to discharge their public safety functions and promote high professional standards, the Bill:

- gives the Boards the ability to conduct compliance audits, which will allow the Boards to proactively investigate and determine compliance with the Architects Act and PE Act
- provides for greater investigatory powers, including the power to enter places, to search places that have been entered and seize evidence, and to require the production of a broader range of potential evidence
- releases the Boards from the requirement to seek the practitioner's agreement before imposing a condition on a practitioner's registration.

These provisions will improve the Boards' ability to effectively promote compliance with their respective Acts. The audit power, for example, is not currently provided for in the Acts, as an investigation is only triggered by a reasonable suspicion of wrongdoing or the receipt of a complaint.

The provisions will improve the Boards' alignment with other Queensland regulators, such as the QBCC, the Queensland College of Teachers and the Valuers Registration Board of Queensland. Each of these bodies seeks to promote public safety by ensuring high standards in their respective industries.

To ensure the Boards are adequately supported by their legislation and are able to effectively regulate their respective professions, amendments also clarify and modernise existing provisions and improve the operation of the Acts. Consequently, the Bill will:

- align eligibility requirements for registration as an architect or registered professional engineer with the grounds for suspending or cancelling registration
- ensure that the Boards must be notified about changes to a practitioner's eligibility to practice
- clarify that it is an offence to provide false or misleading information to a body involved in the assessment process for registration (e.g. the Architects Accreditation Council of Australia)
- provide the BOAQ with at least one year to commence a prosecution, to allow more time to investigate potentially complex complaints against architects.

Right of review for transition plans in retirement villages

The Bill maintains the transparency and procedural fairness of chief executive decisions in relation to transition plans by ensuring a person who has been given a QCAT information notice under part 2 division 5 of the *Retirement Villages Act 1999* may apply, as provided under the *Queensland Civil and Administrative Tribunal Act 2009*, to QCAT for a review of the decision.

Alternative ways of achieving policy objectives

Security of payment reforms

The policy objectives relating to the security of payment reforms can only be achieved through legislative amendment.

The building and construction industry has higher rates of insolvency and instances of non-payment than almost all other industries in Australia. Ways of addressing the structural causes of these issues have been the subject of many inquiries and reports both in individual states and nationally¹. In response to this, Queensland introduced security of payment legislation in 2017 including the requirement to establish PBAs. To improve the PBA framework and to further address the occurrence of insolvency and non-payment, the BIF Act requires legislative amendment.

The legislative reform will be supported by effective education for industry which will occur on implementation.

Special Joint Taskforce

Some recommendations can only be implemented through legislative amendment. These include creating a new offence for providing false and misleading information in a declaration about subcontractor payment and increasing the time in which the QBCC may bring prosecutions under the QBCC Act.

The other Taskforce recommendations will be implemented administratively, for example, changes to licence application forms to require the applicant to list any aliases.

Strengthening Queensland's building laws

Licensing requirements

The policy objectives relating to the QBCC licensing requirements can only be achieved through legislative amendment, as each of the proposed areas of reform such as MFR, licensing and the creation of new offences are currently provided for in the QBCC Act.

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https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report

Building certification

The Building Act regulates various requirements regarding the role, responsibilities and obligations of building certifiers. Amendments to the Building Act are necessary to achieve the policy objectives relating to the certification sector.

Architects and registered professional engineers

The policy objectives relating to architects and registered professional engineers can only be achieved through legislative amendment. The Architects Act and PE Act establish the Boards and provide for their powers and functions. Legislative change is needed to expand the Boards' powers beyond those already provided, and to improve the operation of each Act.

Right of review for transition plans in retirement villages

The Retirement Villages (Transitional) Regulation 2019, which provides a right to apply to QCAT to review chief executive decisions related to transition plans, expires on 11 November 2020. The policy objective to preserve this right to appeal beyond this date cannot be addressed without legislative amendment.

Estimated cost for government implementation

Security of payment reforms

It is anticipated that the Bill will reduce the administrative cost for government agencies that are currently administering PBA-eligible contracts. The current PBA framework effectively requires the principal to provide oversight of all payments made through the PBA, which is not sustainable or appropriate for implementation in the private sector. Removing this requirement will significantly reduce the operational cost to affected government agencies.

Implementation activities will be shared between the Department of Housing and Public Works (DHPW) and the QBCC.

There will be some costs incurred for DHPW as the implementing government agency of the BIF Act. DHPW has been provided with additional funds to communicate the legislative changes to industry and affected stakeholders. The phasing of PBA implementation will assist DHPW's ability to meet implementation activities using existing resources.

The QBCC has been provided with additional funding for the next phases of implementation of the PBA framework. The compliance activities for the next phases were envisaged as part of the original PBA requirements. The QBCC will also undertake a risk-based approach to its oversight responsibilities which will help effectively manage the additional funding and resourcing impacts. Existing communication channels and stakeholder engagement functions will be utilised to support implementation.

Special Joint Taskforce

The Taskforce recommendations will largely make it easier for the QBCC to undertake enforcement activities, however, some costs will be incurred in relation to publishing the details of excluded and permanently excluded individuals who are not licensees.

Strengthening Queensland's building laws

Licensing requirements

Amendments to the QBCC Act support the QBCC in regulating the industry and are therefore expected to have minimal impact on QBCC resources.

Building certification

Amendments to the Building Act are not expected to impose a significant cost on the QBCC or government departments.

Expanding the existing QBCC demerit point system to building certifiers is likely to have some resource impact, however, this is expected to be offset by the savings resulting from changes about when complaints can be made about a building certifier.

Architects and registered professional engineers

In relation to the Architects Act and PE Act amendments, the Boards will incur limited additional costs in implementing the amendments. While resources will need to be allocated to measures such as the conduct of audits, other measures will improve the regulatory abilities of the Boards and the operation of the Acts. These amendments will be either cost-neutral or will result in small efficiencies for the Boards through a reduced regulatory burden.

As the Boards are self-funded statutory bodies, the amendments will not result in any direct costs for government.

Consistency with fundamental legislative principles

Generally, the Bill is consistent with fundamental legislative principles (FLPs). Potential FLP breaches are addressed below.

Whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act 1992, s 4(2)(a))

In general, the Bill balances individual rights against the rights and liberties of persons directly affected by non-payment and fraudulent practices in the building and construction industry, as well as building safety issues.

Penalties

In considering whether legislation has sufficient regard to the rights and liberties of individuals, it is necessary to consider whether the penalties imposed for offences are proportionate and relevant to the act or omission constituting the offence.

BIF Act

The Bill replicates several existing BIF Act offences, including the corresponding penalties. High maximum penalties were applied to the BIF Act when it was first made, and it is appropriate that these be retained. The penalties provide strong deterrence from non-compliance, enable the courts to impose more meaningful penalties, such as imprisonment, where appropriate and emphasise to industry and the community the seriousness of the offences under the legislation.

New offences associated with the trust account requirements have been based on existing BIF Act offences as well as other trust legislation, including the *Legal Profession Act 2007* and *Agents Financial Administration Act 2014*. The Bill also creates an offence under the BIF Act where a respondent, for a payment claim, pays less than the amount stated in a payment schedule. The offence was recommended by the Panel to deter underpayment of agreed amounts and a maximum penalty of 100 penalty units applies.

The quantum of the penalties supports the policy objective to promote improved payment practices and bring about cultural change in the building and construction industry. The penalties are proportionate and relevant to the seriousness of the conduct, as late or non-payment in the industry has significant adverse impacts for subcontractors, business owners, employees, suppliers and the wider community. In addition to the financial effects, social impacts can include relationship breakdowns, loss of reputation and stress-related illnesses.

Importantly, the penalties in the BIF Act, as well as the remainder in the Bill, are a maximum only and the courts will retain their discretion to impose lesser penalties depending on the circumstances of the breach and mitigating factors.

Building Act

New offences in the Building Act are largely aimed at the performance of building certifying functions and administrative obligations, for example:

- clause 41, new section 124A—failure to comply with an owner request to provide inspection documentation
- clause 44, new section 143B—failure to comply with an additional inspection notice.

The maximum penalties are proportionate and relevant to the seriousness of the conduct, ranging from 10 to 40 penalty units. The new demerit point system will further support improved building certifier accountability and consumer confidence.

QBCC Act

The Bill also includes new offences for licensees and executive officers of a licensed entity in relation to non-compliance with the MFR. The new offences and penalties are

consistent with the existing penalties for similar offences under the QBCC Act. This will enable the QBCC to hold to account non-licensed persons who effectively operate a QBCC-licensed entity, and to better regulate those who pose the greatest risk across the building and construction industry.

A new penalty will also be introduced for delaying or obstructing the rectification of building work. This will benefit consumers by providing a deterrent to those who may seek to prevent work from being rectified effectively and in an expeditious manner. The penalty amount is consistent with the existing penalty for failing to comply with a direction to rectify building work.

The Bill also includes a penalty for the failure of a licensee to notify the QBCC if the licensee's interstate or New Zealand licence is granted, cancelled or suspended. This is to ensure that the QBCC can effectively administer the licensing requirements and make decisions about whether someone remains a fit and proper person to hold a licence in Queensland. The penalty amount is identical to the existing penalty for failing to notify the QBCC of a change of particulars that are included in the licensee register.

Architects Act and Professional Engineers Act

There are penalties associated with proposed new offences to support the alignment of existing registration obligations and improved investigatory powers.

For example, the Bill contains offences for registered professional engineers or architects who do not advise their respective Board of changes relevant to their 'fitness to practise' under section 11 of each Act.

Other new offences in the Bill relate to the proposed improved investigatory and audit powers: failing to comply with a notice to produce documents during an audit; contravention of a help requirement during an investigation; failing to comply with a seizure requirement; and tampering or interfering with a restricted seized thing.

The maximum penalty units associated with the proposed offences are proportionate and align with existing offences in the Acts, where relevant, ranging from 50 to 100 penalty units. For example, the maximum penalty for failing to notify the Board of a disciplinary event in another jurisdiction is identical to the maximum penalty for the existing offences of failing to notify the Board of a relevant change in circumstance (i.e. 50 penalty units).

Institution of proceedings for offences

Clause 147 of the Bill amends the QBCC Act to allow proceedings for an offence to be brought within three years after the offence is committed or within two years after the offence comes to the knowledge of the QBCC. The Office of the Queensland Parliamentary Counsel (OQPC) is concerned that extending the period for instituting proceedings has the potential to affect the rights of liberties of individuals, in that a defendant's liability for prosecution should end at a reasonable time.

The amendment implements recommendation 3 of the Taskforce report. It brings Queensland in line with other states and territories. Tasmania aside, all interjurisdictional building regulators have a longer time than the QBCC within which to start a prosecution.

The QBCC regulates matters including licensing conditions, building product safety, MFR, and proper standards of building work. The three-year limitation period provides an end date at a reasonable point for the liability to be prosecuted, given the potential seriousness of the conduct and consistent with FLPs. For example, the MFR helps ensure businesses are financially sustainable, which protects consumers and subcontractors from the potential impacts of insolvency and company collapses. An important factor in time limitations for actions following a breach of the MFR is the need for sufficient time to gather evidence relating to intricate and interrelated corporate structures, which often requires forensic financial analysis.

The limitation period in the Bill is sufficiently long to allow the QBCC to recognise and consider an alleged breach and further the public interest by providing a consequence for legally wrong conduct that has potential safety, financial or social impacts, while still protecting individuals from the threat of endless prosecution.

The Bill also proposes to extend the deadline in which the BOAQ must commence a proceeding from six months to one year. This will provide the BOAQ with the same time afforded to similar regulators such as the BPEQ, and reflects the fact that, as a professional regulator, the BOAQ often deals with complex matters, which require the engagement and input of external professional experts to resolve.

Clause 55 of the Bill limits when a complaint can be made against a building certifier for matters minor in nature i.e. a matter that has not or is not likely to cause serious harm to a person or a significant financial loss. Further the Bill gives the QBCC a discretionary power to dismiss a complaint if they believe it is frivolous or vexatious. The amendment provides greater certainty to building certifiers about the likelihood of investigations for minor matters. This provision also recognises the important role that building certifiers perform by ensuring that they remain accountable for more serious breaches which risk the health and safety of people.

Increased investigatory powers

The Bill provides the Boards and its investigators with enhanced investigatory powers to effectively promote compliance with their respective Acts, discharge their public safety functions and promote high professional standards.

These powers include the power to enter places, both with consent and under a warrant. Entry may also be made outside these circumstances but is limited to public places and where the entry is made when the place is open to the public. In addition, an investigator may only enter for the purpose of conducting an investigation and cannot enter any residence without a warrant or consent. These entry powers will allow investigators to ensure compliance with the Acts. Without these powers, the Boards will continue to have limited investigatory powers which may prevent them from undertaking effective investigations into architects and registered professional engineers.

Powers after entry will also allow an investigator to search an entered place and search for or seize documents and other evidence of offences. Safeguards have been included, for example, providing for an owner to have reasonable access to, and for the return of, a seized thing. Reasonable efforts must also be made to return a thing to an owner, including issuing an information notice, before a thing is forfeited to the Boards. These

powers are similar to other regulatory bodies responsible for registering and regulating professions, particularly in relation to promoting public safety.

An investigator may also require reasonable help from an occupier of the place or a person at the place, for example to produce a document or to give information. While a person is required to provide this reasonable help, the Bill ensures sufficient protections are in place by providing that a reasonable excuse for non-compliance is if complying may tend to incriminate the person.

The Bill also introduces powers for the Boards to conduct audits of architects and registered professional engineers, including the power to require documents during an audit. The privilege against self-incrimination is also included as a reasonable excuse for non-compliance. This ensures there are sufficient protections for an individual while enabling the Boards to proactively monitor compliance with the Acts.

Right to privacy

The Bill contains provisions that may limit individuals' right to privacy. In particular, clauses 140 and 143 amend the QBCC Act to permit the publication of details of individuals who become bankrupt or are involved in a construction company collapse—known as excluded and permanently excluded individuals.

These amendments implement Taskforce recommendation 9. The Taskforce found that information about excluded and permanently excluded individuals is not always readily accessible if the individual has not previously held a licence (for example, the person was a company's chief financial officer). This makes it difficult for a consumer or subcontractor to ascertain a person's previous commercial dealings and to decide whether to conduct business with that person.

The amendments are considered justifiable, as the collection and publication of information on the website is necessary for ensuring the integrity of industry participants and promoting transparency. The Bill incorporates safeguards to lessen potential privacy impact. For example, the QBCC may only publish the details of excluded and permanently excluded individuals who are not licensees if it has issued a show cause notice and all periods for a relevant review or appeal have ended. Further, the information may not be published for longer than 10 years and must only include the suburb or locality of an individual business address if it is also the individual's residential address.

Self-incrimination

Clause 78, new section 189A provides for abrogation of the privilege against self-incrimination. It states that a person is not excused from supplying documents under an approved audit program for the BIF Act on the ground that the document may tend to incriminate the person.

The Bill seeks both to ensure there are strong powers to compel the provision of information to secure compliance with the security of payment reforms, and also to protect the rights of persons under the criminal law. The information sought through an audit program would be peculiarly within the knowledge of the person subject to the audit and would be difficult for the QBCC to establish through an alternative evidential means. The provision seeks to ensure persons cannot deliberately withhold information

that would otherwise assist the QBCC in detecting, and mitigating the effects of, a breach of the BIF Act. Limiting the information that may be available to the QBCC may compromise its ability to ensure ongoing compliance and payment protections.

Although clause 78 provides for the abrogation of privilege against self-incrimination, new section 189B states that a document or other evidence provided is not admissible as evidence against that person in civil or criminal proceedings, other than proceedings arising if the answer is misleading or false. It also provides 'derivative' use immunity in that it includes any other evidence directly or indirectly derived from the document is not admissible. This means that the person is protected against the evidence being used against them in subsequent legal proceedings.

Reversal of onus of proof

Section 42E of the QBCC Act provides that it is an offence if a person, without reasonable excuse, causes another party to a building contract to suffer a significant financial loss because of the person's deliberate noncompliance with the contract. Clause 135 of the Bill inserts a note for this provision referencing section 76 of the *Justices Act 1886*.

It is generally accepted that the effect of section 76 is to create a legal burden on the defendant to prove the existence of a reasonable excuse. The inclusion of this note highlights the intention that section 76 apply to the QBCC Act offence.

The reversal of the onus of proof is justified because the existence of a reasonable excuse is peculiarly within the defendant's knowledge. Because of this, without the reversal of the onus of proof, it would be difficult for the prosecution to prove the offence and the legislation could not otherwise be practically administered. This amendment implements recommendation 1 of the Taskforce, which considered that reversing the burden of proof of 'reasonable excuse' would alleviate practical difficulties with the operation of section 42E as well as enhance the QBCC's chances of a successful prosecution, thereby improving its ability to hold accountable those who cause significant financial loss by deliberate breach of a building contract.

Immunity

Section 4(3)(h) of the *Legislative Standards Act 1992* states that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation does not confer immunity from proceeding or prosecution without adequate justification. The general rule is that all persons are equal before the law. Clause 63 of the Bill inserts new section 53G of the BIF Act which protects the commissioner, as well as employees and agents of the QBCC, from civil liability for performing a function or exercising a power if the conduct is engaged in good faith and without negligence.

There may be justification for immunity if it is necessary for the administration of an Act, which may be the case here. Officers of the QBCC may be required to exercise judgments, make decisions and exercise power with limited information and in urgent circumstances. As a result, it is important that they and others engaged in the administration of the legislation are not deterred from exercising their skill and judgment due to fear of personal legal liability. If QBCC officers could be sued for an incident occurring when they are acting in good faith, they may be reluctant to act.

The immunity is appropriately limited in scope, as it does not attach to acts done or omissions made which are reckless, unreasonable or excessive, but attaches only to acts done or omissions made in good faith and without negligence. Additionally, liability for the consequences of actions done, or omissions made, is not extinguished by the Bill, but the liability attaches to the State instead. Therefore, where persons consider themselves to have been injured by the actions or omissions of the commissioner or an employee or agent of the QBCC, legal redress remains open to them.

Institution of Parliament

Amendment of Act only by Act

Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the institution of Parliament depends on whether a Bill authorises the amendment of an Act only by another Act.

The Bill contains several regulation-making powers, including:

- clause 62, section 8A(1)(w) provides that the scope of what constitutes ‘project trust work’, for the purposes of establishing a project trust, can be further extended in the regulation
- clause 62, section 41 requires a trustee for a retention trust account to complete training as prescribed by regulation
- clause 62, section 57A allows a regulation to prescribe the contents of an account review report for a retention trust account
- clause 37 provides for changes to building assessment provisions that must be applied to undecided and prospective building development applications to be prescribed by regulation
- clause 126 provides for the definition of ‘occupational licence’ under the QBCC Act to include an occupational licence granted under an Act prescribed by regulation. This will enable other relevant Acts to be prescribed as needed, for example, the *Plumbing and Drainage Act 2018* to capture plumbing occupational licensees following the transfer of responsibilities for issuing these licences to the QBCC.

Complex legislative schemes, such as this one, need to be facilitated by strong regulation-making powers. Not all the powers will be deployed immediately—the intent being to provide flexibility to respond to changes in the industry that may arise following implementation of the reforms. For example, new section 14D of the BIF Act, inserted by clause 63, enables certain subcontracts for which a project trust is required to be prescribed. This provision was recommended by the Panel to allow government to monitor industry practice and address potential contracting practices that seek to undermine the intent of the framework.

The Bill also allows a regulation to apply a new building assessment provision to a development application that has not yet been decided, where the Minister is satisfied it is necessary to immediately remove a risk of serious injury or illness to a person and an impact assessment has been undertaken. This amendment facilitates a timely response to significant emerging issues such as new bushfire standards or combustible cladding standards, while balancing the need to consider the full impact of making the regulation.

Flexibility is also needed where periodic amendments are likely. For example, the contents of an account review report will be informed by best practice accounting and auditing standards, which are subject to regular review and change.

The regulation-making powers are not intended to amend the authorising provisions in question—they would still be read in the same way. The provisions set clear parameters for the detail that may be prescribed by regulation, which will ensure consistency with the policy objectives of the authorising law.

In addition to the standard regulation-making powers, clauses 30, 57 and 82 of the Bill contain a transitional regulation-making power for the BIF Act, Building Act and QBCC Act, to allow provisions of a saving or transitional nature to be made where not sufficiently provided for by the Acts. Transitional regulation-making powers of this kind may raise FLP issues about whether the Bill has sufficient regard for the institution of Parliament.

The inclusion of these clauses is justified because it is intended to be a temporary measure to facilitate a smooth transition to the new legislative schemes by enabling a regulation to be made to address any emerging or unforeseen transitional issues. Importantly, the potential contravention of FLPs is mitigated in that the Bill provides for the expiry of the transitional regulation-making powers one to two years after the day of commencement.

Consultation

Security of payment reforms

The Panel's evaluation included significant consultation with a wide range of stakeholders to inform its report and recommendation on the existing PBA framework. Consultation activities were diverse and included releasing a discussion paper and online questionnaire and holding seven industry forums across Queensland which were attended by head contractors, subcontractors, sub-subcontractors, suppliers, consultants, private sector principals and accounting staff. The Panel also conducted one-on-one interviews with head contractors who were a party to a phase 1 PBA under the current BIF Act, eight banks offering PBAs and representatives of two principals (state government agencies) involved in phase 1 PBA projects. The Panel was also supported by an industry reference group². The outcomes of the consultation are available in the Panel's report and have been used to inform the drafting of the Bill.

In developing the amendments to the BIF Act the government has engaged in a consultation process with affected stakeholders and industry representatives. The government has worked closely with the Ministerial Construction Council (MCC) and sought feedback on the recommendations made by the Panel and the overarching principles of the modified trust framework. An MCC subcommittee was also formed to review detailed aspects of drafts of the Bill as it was developed³.

The organisations represented on the MCC are:

- Air Conditioning and Mechanical Contractors' Association
- Association of Wall and Ceiling Industries Queensland

² https://www.hpw.qld.gov.au/__data/assets/pdf_file/0011/9200/buildingindustryfairnessreforms.pdf

³ <https://www.hpw.qld.gov.au/news-publications/minister-meetings/construction-council-october-2019>

- Australian Institute of Architects
- Australian Institute of Building Surveyors
- Australian Manufacturers and Workers Union
- Construction, Forestry, Mining and Energy Union
- Electrical Trades Union
- Engineers Australia
- Housing Industry Association
- Landscape Queensland
- Master Builders Queensland
- Master Concreters Australia
- Master Electricians Australia
- Master Painters Queensland
- Master Plumbers Association of Queensland
- National Association of Women in Construction
- National Fire Industry Association
- Plumbers' Union Queensland
- Queensland Building and Construction Commission
- Queensland Council of Unions
- Subcontractors Alliance
- BOAQ
- BPEQ.

MCC subcommittee members provided written submissions to the government and /or attended meetings to discuss issues identified. The government also provided an opportunity to stakeholders with experience of the existing PBA framework and individuals and organisations that provided a written submission to the Panel to provide feedback on policy and draft legislation.

Overall there were nine written submissions received and 49 attendees at the consultation meetings available to the identified industry participants.

There were a range of issues raised by stakeholders which addressed the overarching policy and specific requirements being introduced as a result of the Panel's recommendations and government's experience implementing PBAs under phase 1. There was general industry support for the proposals, particularly the provisions aimed at removing principal oversight of PBA, simplifying the process and staged implementation.

Some of the key issues raised by stakeholders included the following:

Definitions

Stakeholders raised concern about the proposal to align the various definitions used in the BIF Act and QBCC Act. The definition of 'building work' is used to determine the 50 per cent threshold criteria when establishing a project trust. There was consensus amongst stakeholders that the definition must give certainty and clarity for industry. As a result, the definition of 'building work' has been renamed to 'project trust work' to reflect its specific use in determining if a project trust is required.

Similarly, the definition of 'construction work' has been renamed to 'protected work' to provide more clarity about the beneficiaries that are intended to be protected under the trust framework.

Minimum contract value

The Panel recommended that a head of power be included in the BIF Act to provide for a minimum subcontract value to define when a beneficiary must be paid through the PBA. Stakeholders with existing PBA experience and industry representatives supported this and indicated a minimum threshold would provide a balance between the administrative responsibilities of the project trust and the protections it offered.

Payment withholding request

The ability to issue a payment withholding request on a higher party in the contractual chain elicited various stakeholder responses. Some stakeholders considered it to be of benefit particularly for head contractors where it would provide additional recourse for principal non-payment. Others stated that it may have unintended consequences, for example affecting the amount of money available for payment to other subcontractors.

The provisions in the Bill reflect this feedback and provide that a payment withholding request may only be made where an adjudication decision is made in favour of the claimant and the respondent fails to pay in the timeframe prescribed in the BIF Act.

Charge over land

The proposed charge over land and its interaction with existing enforcement action available to a claimant that has not been paid an adjudicated amount was raised by some stakeholders, who questioned how the proposal would operate against third party owners of land. The Bill clarifies that a statutory charge may only be imposed by a head contractor for non-payment by the person they contracted with, the respondent. A charge can be obtained against the respondent or the related entity of respondent.

Calculation of time under sections 67U and section 67W of the QBCC Act

Stakeholders pointed out the desirability of aligning the definition of 'business days' in sections 67U and 67W of the QBCC Act with chapter 3 of the BIF Act. The current misalignment can cause compliance difficulties over the Christmas/New Year period. The Bill addresses this and aligns sections 67U and 67W with the BIF Act.

QBCC oversight functions

There was support for removing the principal oversight role in favour of extended QBCC functions and powers over trust accounts.

Special Joint Taskforce

The Taskforce sought confidential submissions in relation to allegations of fraudulent behaviour relating to building subcontractor non-payment. During the submission period, 166 submissions were received, with 146 involving complaints of non-payment and another 20, largely from industry organisations, providing suggestions for reform. The Taskforce also held face to face meetings with 42 people across the state. The full list of stakeholders who were consulted with is available in the Taskforce report⁴. The submissions and meetings informed the recommendations made by the Taskforce and are represented in the amendments proposed in this Bill.

⁴ https://www.hpw.qld.gov.au/__data/assets/pdf_file/0012/9201/special-joint-taskforce-report.pdf

Strengthening Queensland's building laws

Licensing requirements

The revised MFR framework was considered by key construction industry stakeholders, including the MCC and accountancy bodies. It was subject to four weeks' public consultation in 2018.

The Queensland Law Society's Construction and Infrastructure Law Committee was consulted and supported the proposed reforms. Accountancy bodies CPA Australia and the Chartered Accountants of Australia and New Zealand were consulted on the proposed reforms and draft Amendment Regulation. These bodies provided advice about technical drafting matters which was incorporated as far as possible.

DHPW consulted relevant stakeholders (including Landscape Queensland, Tennis Queensland, the Sports and Play Industry Association, Master Builders Queensland and the Housing Industry Association) on the proposed retrospective amendment for the landscaping licence. All parties were supportive of the amendment.

The MCC was also consulted in January 2020 on all key amendments in the Bill.

Building certification

Extensive consultation has occurred with industry regarding the building certification reforms, including state-wide QBP consultation sessions, dedicated workshops and MCC subcommittee workshops.

Generally, industry supported the reforms relating to certification, however, sought further clarification about how and when a regulation would apply to a new building assessment provision as provided in clause 37. Industry acknowledged the need to respond swiftly to significant risks likely to harm people, the economy or environment. Industry supported the requirement for an impact assessment to be performed prior to recommending the regulation be made.

The Queensland Productivity Commission was consulted regarding the reforms and advised that no further regulatory assessment is required.

Architects and registered professional engineers

The amendments proposed in the Bill predominately relate to the management of, or tasks undertaken by, the Boards. In particular, the expanded compliance and enforcement powers are only expected to materially impact those persons who breach current requirements.

The Boards were consulted during the development of the amendments.

The MCC was also consulted in January 2020 on the key amendments included in this Bill.

Consistency with legislation of other jurisdictions

Security of payment reforms

Queensland is the only Australian jurisdiction to have legislated PBAs for the building and construction industry.

Other Australian jurisdictions have implemented PBAs through contractual conditions on government projects. Jurisdictions abroad including Canada, New Zealand, the United States and United Kingdom have security of payment legislation that requires some monies to be held in trust. Each of these jurisdictions use a combination of different trust models and instruments which have been tailored to its existing security of payment legislation.

Queensland is leading the way in protecting payments in the building and construction industry through this trust account framework and as such the Bill is state-specific. This Bill will provide a model for project bank accounts that other jurisdictions can draw upon to advance security of payment reform nationally.

Special Joint Taskforce

In considering the sufficiency of existing investigative and supervisory powers and in making recommendations to the government, the Taskforce reviewed the investigative and supervisory powers available elsewhere to assist in recognising any deficiencies in Queensland. The jurisdictional analysis found that Queensland has one of the more comprehensive regulatory frameworks. One of its recommendations, to increase the timeframes for starting a prosecution, was aimed at bringing Queensland in line with other states and territories.

Strengthening Queensland's building laws

Licensing requirements

The proposed amendments to the QBCC Act are Queensland-specific and, while complementary to the building and construction laws of other Australian jurisdictions, do not form part of a nationally harmonised legislative scheme.

Building certification

Establishing an alternative recognition pathway for licensing of certifiers is consistent with other jurisdictions, except for Tasmania and the Australian Capital Territory, which only licence certifiers who hold accreditation with an accreditation standards body.

Enabling an amended assessment provision to be applied to a building development application is specific to Queensland. However, South Australia has similar powers relating to integrated planning and development assessments.

The remaining building certification reforms in the Bill, while specific to Queensland, are complementary to legislation in other jurisdictions or legislative amendments being considered by other jurisdictions.

Architects and registered professional engineers

The amendments in the Bill align with other jurisdictions that regulate these professions.

Each Australian state and territory regulates the profession of architecture, with the aim of ensuring public safety by ensuring that architectural services are only provided by registered practitioners and to a high standard. Architecture boards in other jurisdictions have varying powers in undertaking investigations. Improving the BOAQ's investigatory powers to ensure more effective regulation of the profession will support the BCR recommendations and be specific to Queensland.

Both Victoria and Queensland regulate professional engineering through legislation. As the Victorian laws also seek to promote best practice and ensure only registered engineers may provide professional engineering services, the amendments are complementary.

Notes on provisions

Part 1 Preliminary

Clause 1 Short title

Clause 1 specifies the short title of the Act may be cited as the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*.

Clause 2 Commencement

Clause 2 provides for commencement of the Acts in this Bill.

Part 2 Amendment of Architects Act 2002

Clause 3 Act amended

Clause 3 provides that the Act amends the *Architects Act 2002*.

Clause 4 Amendment of s 11 (Fitness to practise as an architect)

Clause 4 amends section 11 (Fitness to practise as an architect) to align the requirements in the Act for determining a person's 'fitness to practice' as an architect, with the grounds for cancelling or suspending an architect's registration.

Clause 5 Amendment of s 28 (Grounds for cancellation)

Clause 5 amends section 28 (Grounds for cancellation) and seeks to align the grounds for cancelling an architect's registration with the 'fitness to practice' provisions in section 11.

Clause 6 Amendment of s 29 (Procedure for cancellation)

Clause 6 amends section 29 (Procedure for cancellation) and provides the BOAQ with the ability to issue a notice to an architect requesting information to assist with BOAQ making a decision to cancel their registration.

Clause 7 Amendment of s 29A (Immediate suspension of registration)

Clause 7 amends section 29A (Immediate suspension of registration) to align the requirements in the Act for immediately suspending registration with grounds considered by the BOAQ in cancelling registration of an architect and if it is in the public interest.

Clause 8 Insertion of new s 31A

Clause 8 inserts new section 31A (Proof of giving false and misleading statements and documents). This section clarifies that the existing offences of providing false and misleading registration information to the BOAQ also applies if an applicant provides false or misleading information to a third party in the registration process.

Clause 9 Insertion of s 32AA

Clause 9 inserts new section 32AA (Notification of prescribed changes) to require an architect to notify the BOAQ about any changes in circumstances relevant to matters to their fitness to practise – as outlined in section 11.

A maximum penalty of 50 penalty units applies for non-compliance.

The maximum penalty is consistent with existing penalties for failing to notify the BOAQ about disciplinary action taken against an architect in another state or country regarding an architect's practise as an architect under section 32A and failing to notify the BOAQ about an architect's inability to practise because of mental or physical health under section 32B.

Clause 10 Replacement of s 32A (Notification of disciplinary action by other bodies)

Clause 10 replaces section 32A (Notification of disciplinary action by other bodies) to clarify that an architect must give notice to the BOAQ of a disciplinary event, unless the architect has a reasonable excuse.

The existing maximum penalty of 50 penalty units for failing to comply is retained.

Clause 11 Insertion of new pt 2B

Clause 11 inserts a new Part 2B (Audits of architects).

Part 2B (Audits of architects)

New section 35I (Approved audit programs) provides that the BOAQ may approve a program to audit 1 or more architects. Subsection 2 outlines that the purpose of the program is to ensure that the architect complies with a code of practice approved under section 108 or that a person complies with Part 7 of the Act. Subsection 3 provides that the program must state the (a) purpose of the program; (b) when the program starts and ends; (c) criteria used to select an audited architect for the program; (d) who will carry out the program; and (e) any other matter relevant to carrying out the program.

New section 35J (Power to require production of documents) allows the BOAQ to require an audited architect to give a copy of, or access to, a document for the purposes of the audit, unless there is a reasonable excuse.

A maximum penalty of 100 penalty units applies for non-compliance. The higher penalty reflects seriousness of the breach, as providing documents during an audit is essential for the BOAQ to ensure compliance with the Act. The maximum penalty is also consistent with the existing penalty for obstruction in the exercise of a power unless there is a reasonable excuse under section 67.

Subsection 4 outlines that it is a reasonable excuse not to comply, if complying might tend to incriminate the audited architect or expose the audited architect to a penalty.

Clause 12 Amendment of s 36 (Grounds for disciplining an architect)

Clause 12 amends section 36 (Grounds for disciplining an architect) to include two additional grounds for disciplining an architect: if an architect has contravened an undertaking entered into by the architect and the board under section 73(2)(b) and if an architect has contravened a condition of the architect's registration.

Clause 13 Amendment of s 50 (Issue of identity card)

Clause 13 amends section 50(1) (Issue of identity card) to improve clarity and update drafting style.

Clause 14 Amendment of s 51 (Production or display of identity card)

Clause 14 amends section 51 (Production or display of identify card) to clarify that an investigator does not exercise a power only because the inspector has entered a public place under new section 62A(1)(b).

Clause 15 Replacement of s 55 (Power to require information or attendance)

Clause 15 replaces section 55 (Power to require information or attendance) to improve clarity and update drafting style.

Clause 16 Amendment of s 56 (Offences)

Clause 16 amends section 56 (Offences) to provide clarity and update drafting style.

Clause 17 Insertion of new pt 3, divs 7A to 7C

Clause 17 inserts new divisions 7A to 7C.

Division 7A Entry of places by investigators

Subdivision 1 Power to enter

New section 62A (General power to enter places) provides for investigators to enter a place with consent, if it is a public place and the entry is made when the place is open to the public, or if the entry is authorised under a warrant.

Subdivision 2 Entry by consent

New subdivision 2 articulates the procedures for entry by consent.

New section 62B (Application of subdivision) outlines that the subdivision applies if an investigator intends to ask for an occupier of a place to consent to the investigator or another investigator entering the place under section 62A(1)(a).

New section 62C (Incidental entry to ask for access) provides that an investigator may, without the occupier's consent or warrant, enter land around premises at the place to an extent that is reasonable to contact the occupier, or enter part of the place the investigator reasonably considers members of the public ordinarily are allowed to enter when they wish to contact an occupier of the place.

New section 62D (Matters investigator must tell occupier) provides that before asking for consent, the investigator explain certain matters to the occupier, including the purpose of entry, the powers intended to be exercised, that the occupier is not required to consent, and consent may be given subject to conditions and may be withdrawn at any time.

New section 62E (Consent acknowledgement) enables the investigator to ask the occupier to sign an acknowledgement of consent. If this acknowledgement is signed, the investigator must immediately give a copy to the occupier. Subsection 4 states that if any issue arises in a proceeding about whether the occupier consented to the entry, and a signed acknowledgement is not produced in evidence, the onus of proof is on the person relying on the lawfulness of the entry to prove the occupier consented.

Subdivision 3 Entry under warrant

New subdivision 3 outlines procedures for entry under warrant.

New section 62F (Application for warrant) outlines the process for an investigator to apply to a magistrate for a warrant for a place.

New section 62G (Issue of warrant) provides for the issue of a warrant, including certain matters that the warrant must state.

New section 62H (Defect in relation to a warrant) provides that a warrant is not invalidated by a defect in the warrant or compliance with this subdivision, unless the defect affects the substance of the warrant in a material particular.

New section 62I (Entry procedure) outlines the process of entry. Subsection 2 requires the investigator, before entering the place, to do or make a reasonable attempt to identify themselves, give a copy of the warrant, explain the investigator is permitted by warrant to enter the place and give the person at the place an opportunity to allow the investigator immediate entry to the place without using force. Subsection 3 provides that the investigator need not comply with subsection 2 if the investigator believes on reasonable grounds that immediately entry is required to ensure the effective execution of the warrant is not frustrated.

Division 7B (General powers of investigators after entering places)

New section 62J (Application of division) provides that the powers under this division may be exercised if an investigator enters a place under new section 62A.

New section 62K (General powers) provides a number of general powers for investigators and that the investigator may take a necessary step to allow the exercise of a general power.

New section 62L (Power to require reasonable help) enables an investigator to make a requirement (called a 'help requirement') of an occupier of the place or a person at the place to give the investigator reasonable help to exercise a general power.

New section 62M (Offence to contravene help requirement) provides that a person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse. This will enable an investigator to effectively undertake investigations and ensure compliance with the Act.

A maximum penalty of 50 penalty units applies for non-compliance. This is consistent with the existing maximum penalty unit for failing to comply with giving information to an investigator or attend to answer questions under section 56.

Subsection 2 provides that self-incrimination is a reasonable excuse.

Division 7C Power to seize evidence

New section 62N (Seizing evidence at a public place that may be entered without consent or warrant) provides that, if an investigator enters a public place, the investigator

may seize a thing at a public place if the investigator reasonably believes the thing is evidence of an offence against this Act.

New section 62O (Seizing evidence at a place that may only be entered with consent or warrant) provides for seizure of evidence when an investigator enters a place with consent by the occupier or under a warrant.

New section 62P (Power to secure a seized thing) outlines that an investigator may leave a seized thing at the place where it was seized and take reasonable action to restrict access to it or move the thing from the place of seizure.

New section 62Q (Offence to contravene a seizure requirement) establishes an offence if a person, whom the investigator reasonably believes is in control of the place or thing, does not comply with a request made by the investigator under new section 62P to restrict access to a seized thing and does not have a reasonable excuse. This will enable an investigator to ensure a seized thing is safe or will not be tampered with.

The maximum penalty is consistent with similar offences in other legislation. For example, section 106F of the QBCC Act provides a maximum penalty of 50 penalty units for contravening a seizure requirement.

New section 62R (Offence to interfere) establishes an offence for a person to tamper with a seized thing if it is restricted under new section 62P without an investigator's approval or a reasonable excuse. This provision seeks to protect a seized thing for safety or evidentiary purposes. The maximum penalty is consistent with similar offences in other legislation. For example, section 195 of the *Education (Queensland College of Teachers) Act 2005* (Education Act) provides a maximum penalty of 50 penalty units for tampering with seized things.

New section 62S (Receipt and information notice for seized thing) provides that an investigator must, as soon as practicable after seizing a thing, provide a receipt and information notice to an owner or person from whom the thing is seized.

New section 62T (Access to seized thing) provides an owner with access to a seized thing unless it is forfeited or returned.

New section 62U (Return of seized things) provides that if a seized thing is not forfeited, it must be returned to its owner at the end of 1 year or, if proceedings have begun, at the end of proceedings and any appeal.

New section 62V (Forfeiture of seized things) provides that a thing may be forfeited to the BOAQ after reasonable inquiries are made, reasonable efforts are made to locate the owner or if the BOAQ or an investigator reasonably believes it is necessary to keep the thing to prevent it being used to commit the offence for which it was seized.

New section 62W (Information notice about forfeiture decision) requires the BOAQ to give a person who owned a thing immediately before forfeiture an information notice about the decision.

New section 62X (When thing becomes property of the board) provides that if a thing is forfeited to the BOAQ, it becomes property of the BOAQ.

New section 62Y (How property may be dealt with) allows the BOAQ to deal with the thing as the BOAQ considers appropriate.

Clause 18 Amendment of s 73 (Board's decision on investigation about architects)

Clause 18 amends section 73 (Board's decision on investigation about architects) to provide BOAQ may place a condition on an architect's registration without having to first obtain the architect's consent.

Clause 19 Amendment of s75 (Board's decision about other investigations)

Clause 19 amends section 75 (Board's decision about other investigations) to provide an example of an approved undertaking.

Clause 20 Amendment of s 80 (Functions of board)

Clause 20 amends section 80 (Functions of board) by providing that the BOAQ's functions include approving a program to audit architects under Part 2B.

Clause 21 Replacement of s 90 (Report about person's criminal history)

Clause 21 amends section 90 (Report about person's criminal history) to ensure that the chief executive may make inquiries and procure a criminal history check for all proposed board member appointments, including the architect elected under the Act.

Clause 22 Amendment of s 102 (Keeping register)

Clause 22 amends section 102 (Keeping register) to provide that the register maintained by the BOAQ of persons who are, or have been, architects must record whether a person is a practising or non-practising architect.

Clause 23 Insertion of new s 107A

Clause 23 inserts new section 107A (Delegation) and allows the board to delegate its functions including powers to other parties, i.e. a board member, a committee of board members, the registrar, an appropriately qualified employee of the board or a public service employee providing services for the board under section 100A.

Clause 24 Amendment of s 115 (Claims about provision of architectural services)

Clause 24 amends section 115 (Claim about provision of architectural service) to clarify a practising architect must be at the place where an architectural service is provided and carries out, or is responsible for carrying out, the service.

Clause 25 Amendment of s 116 (Providing information about architects)

Clause 25 amends section 116 (Providing information about architects) to clarify that it is details of a practising architect that must be provided.

Clause 26 Amendment of s 117 (Information on correspondence about architectural services)

Clause 26 amends section 117 (Information on correspondence about architectural services) to clarify it is the name and contact details of a practising architect that must be stated on relevant correspondence.

Clause 27 Amendment of s 121 (Review of particular decisions)

Clause 27 amends section 121 (Review of particular decisions) and provides that a person who has been given, or is entitled to be given, an information notice about a

decision by the BOAQ to forfeit a seized thing can apply to the tribunal for a review. A person whose registration is subject to a condition imposed by the BOAQ under amended section 73(2)(d) can also apply to the tribunal for a review.

Clause 28 Replacement of s 138 (Summary proceedings for offences)

Clause 28 replaces section 138 (Summary proceedings for offences) to provide that a proceeding for an offence against the Act is to start within 1 year after commission of the offence or within 1 year after the offence comes to the complainant's knowledge but within 2 years after commission of the offence, whichever is the latter.

Clause 29 Insertion of new s 141B

Clause 29 inserts new section 141B (Statutory declarations to verify information required under the Act) to provide that if a person is required under the Act to give information to the BOAQ, that the BOAQ may ask the person to verify the information by statutory declaration.

Clause 30 Insertion of new pt 11, div 4

Clause 30 inserts new Division 4.

Division 4 Transitional provision for Building Industry Fairness (Security of Payment) Amendment Act 2020

New section 168 provides transitional provisions for limitation of time for particular summary proceedings started for an offence before commencement of this amendment.

Clause 31 Amendment of sch 2 (Dictionary)

Clause 31 amends schedule 2 (Dictionary) by inserting definitions of words used in the amended Act. The clause also omits words no longer required to be defined in the dictionary.

Part 3 Amendment of Building Act 1975

Clause 32 Act amended

Clause 32 provides that this part amends the *Building Act 1975* (The Act)

Clause 33 Replacement of s 12 (What is the *Building Code of Australia* (or *BCA*))

Clause 33 replaces section 12 (What is the Building Code of Australia (or BCA)) and clarifies that the Building Code of Australia is the current edition of the National Construction Code (NCC) volume 1 and volume 2 (including Queensland Appendices) as amended and published by the Australian Building Codes Board. This is an administrative amendment.

Clause 34 Replacement of s 13 (What is the Queensland Development Code (or QDC))

Clause 34 replaces section 13 (What is the Queensland Development Code (or QDC)). This is an administrative amendment which removes duplication in referencing the QDC as at 14 June 2011 by removing its reference in Schedule 1 of the Act. The QDC is approved by subordinate legislation. The regulation is updated to give effect to the QDC parts, making it the more appropriate reference document.

Clause 35 Amendment of s 21 (Building work that is accepted development for the Planning Act)

Clause 35 amends section 21 (Building work that is accepted development for the Planning Act). This is an administrative amendment of the definition 'relevant provisions'.

Clause 36 Amendment of s 33 (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings)

Clause 36 amends section 33 (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings). This is an administrative amendment of the heading and other relevant sub sections for consistency and to define 'relevant building'.

Clause 37 Amendment of s 37 (Provision for changes to building assessment provisions)

Clause 37 amends section 37 (Provision for changes to building assessment provisions) by inserting new subsections (5) and (6). Subsection (5) provides that a regulation may provide for an amendment to a building assessment provision to apply immediately to an advanced building design or an undecided building application. Subsection (6) restricts subsection (5) to circumstances where the Minister is satisfied that there is a risk of serious injury or illness to a person if the regulation is not made, and an impact assessment is undertaken.

Clause 38 Amendment of s 49 (Functions of private certifier (class B))

Clause 38 amends section 49 (Functions of private certifier (class B)). This is an administrative amendment for consistency as amended in clauses 6 and 7.

Clause 39 Amendment of s 50 (Restrictions on building certifying functions that a private certifier (class B) can perform)

Clause 39 amends section 50 (Restrictions on building certifying functions that a private certifier (class B) can perform). This is an administrative amendment for consistency as amended in clauses 6, 7 and 9.

Clause 40 Amendment of s 61 (Alterations to safe existing work may be approved on basis of earlier building assessment provisions)

Clause 40 amends section 61 (Alterations to safe existing work may be approved on basis of earlier building assessment provisions) to restrict the application of earlier building assessment provision to the extent a regulation in section 37(5) states an earlier building assessment provision does not apply and the approval must be given under the building assessment provisions as amended.

Clause 41 Insertion of new s 124A

Clause 41 inserts a new section 124A (Obligation to give owner inspection documentation for particular inspections). This section gives a building owner the right to request and receive all relevant inspection documentation from the building certifier for a stage of work for which the certifier has issued a certificate of inspection. The building certifier must provide the owner the documentation within 5 business days of receiving the request.

A maximum of 20 penalty units has been assigned to apply if a building certifier does not comply with this requirement. This penalty amount is equivalent to an existing offence in section 102 of the Act where a certificate of classification must be provided to the owner

as both offences impact on the ability for an owner to complete the construction of their home.

Clause 42 Amendment of s 127 (Building certifier's duty to act in public interest in performing building certifying function)

Clause 42 amends section 127 (Building certifier's duty to act in public interest in performing building certifying function) to clarify that it is the building certifier's primary duty to act in the public interest when undertaking building certifying functions.

Clause 43 Amendment of s 136 (Offence for private certifier not to act in public interest in performing private certifying function)

Clause 43 amends section 136 (Offence for private certifier not to act in public interest in performing private certifying function) and complements the amendment to section 127, to clarify that the duty to act in the public interest prevails where a conflict of interest exists within the Act or to another person. This provision also provides that by acting in the public interest the private certifier is not taken to create a conflict of interest under section 137 of the Act (Private certifier must not perform private certifying function if there is a conflict of interest).

Clause 44 Replacement of s 143 (Notice of engagement to local government)

Clause 44 replaces Section 143 (Notice of engagement to local government) by inserting a new section 143 (Notice of engagement – owner clients). Section 143 creates an offence of a maximum of 40 penalty units where a private certifier fails to give notice to the local government within 5 business days after the engagement starts. This penalty is equivalent to an existing offence in the Act under section 143 (Notice of engagement to local government).

Section 143 contains subsection 143A (Notice of engagement and contact details – other clients) which applies when the owner is not the client or applicant under the relevant building development approval.

Penalties have been included in this subsection to ensure all relevant parties are aware of the engagement and the private certifier's responsibilities. The offences in this subsection include:

- A new maximum 20 penalty unit offence under section 143A(2) to require the client to provide the private certifier with the owner's details within 10 business days. This is necessary to ensure the private certifier can then meet the requirement under section 143A(3). 20 penalty units has been suggested for this offence and the new offence under section 143A(5) because this amount applies in the only other specific reference to a penalty for a builder in section 233(3) of the Act.
- Section 143A(3) to provide the owner with their details and responsibilities within 15 business days of the engagement has been assigned a maximum of 40 penalty units which is equivalent to the offence under the existing section 143 of the Act.
- Similarly, a maximum of 40 penalty units applies under section 143A(4) where a private certifier must notify the local government of their engagement with a client within 15 business days.
- A maximum 20 penalty unit offence has been created under section 143A(5) to motivate the client (within 5 business days of being made aware of a change) to notify the private certifier about a change in the owner's contact details.

Section 143B applies when the owner is not the client or applicant and they require the performance of additional certifying functions by a building certifier. The owner can provide the client an additional inspection notice to be forwarded to the building certifier. An agreement must be reached about when the additional certification functions are to be performed or if no agreement can be reached the certifier must decide the day and notify the parties of the date.

Three new offences have been created:

- An offence has been created under Section 143B(4) to require the client to give the building certifier the additional inspection notice and a maximum of 20 penalty units apply. 20 penalty units has been suggested for this offence and the new offence under section 143A(5) because this amount applies in the only other specific reference to a penalty for a builder in section 233(3) of the Act.
- Under section 143B(5), the building certifier must comply with the notice by carrying out the additional certification function. A maximum 40 penalty unit penalty offence has been created for 143B(5) which aligns with the amount set under the existing Act in section 99 (Obligation to give inspection documentation on final inspection).
- An offence has also been created under 143B(6) with a maximum of 20 penalty units applying where a building certifier fails to give the owner and client copies of all documentation relevant to that function. A maximum 20 penalty unit offence has been introduced instead of 40 because the comparison in section 99 of the Act relates to inspection giving at the final inspection which is a more vital stage of inspection

Clause 45 Amendment of s 150 (Obligation to keep inspection documentation)

Clause 45 amends section 150 (Obligation to keep inspection documentation) to extend the time period for a building certifier to keep records of the inspection documentation for building work for which they were engaged, from 5 years to 7 years.

Clause 46 Amendment of s 155 (Who may apply)

Clause 46 amends section 155 (Who may apply). This amendment establishes an alternative recognition pathway for licensing of certifiers who do not hold a current accreditation from an accreditation standards body. However, these certifiers will need to meet the experience and qualification requirements prescribed in the regulation.

Clause 47 Amendment of s 156 (Requirements for licence application)

Clause 47 amends section 156 (Requirements for licence application) to recognise the evidence needed to licence an applicant who does not hold current accreditation with an accrediting body. This amendment facilitates the administrative process to enact clause 17.

Clause 48 Amendment of s 167 (Applying for renewal)

Clause 48 amends section 167 (Applying for renewal) to enable a person to renew their building certifier licence by recognising either a current accreditation or qualification and experience as prescribed through regulation.

Clause 49 Amendment of s 171 (Power to amend, cancel or suspend licence)

Clause 49 amends Section 171 (Power to amend, cancel or suspend licence) by inserting a second note about the QBCC's requirement to cancel a building certifier's licence where the building certifier becomes a disqualified person, referring to section 214K.

Clause 50 Amendment of s 172 (Power to change licence level)

Clause 50 amends section 172 (Power to change licence level) to recognise the alternative recognition pathway established through clause 17. The amendment enables the QBCC to exercise existing powers to suspend or cancel a building certifier licence or amend the licence to impose or remove a condition or change the level of licensing, if a licensee no longer holds accreditation with an accrediting body nor has the prescribed qualifications and experience.

Clause 51 Amendment of s 179 (Register of building certifiers)

Clause 51 amends section 179 (Register of building certifiers) to remove duplicate wording and to expand the type of information available on the QBCC register to include demerit points and the circumstances leading to the disqualification of a building certifiers licence. Consistent with other licensee information, the QBCC will have a discretion about recording unsatisfactory conduct resulting from minor breaches. This amendment improves accountability in the sector by informing consumers about the history of a licensee prior to their engagement.

Clause 52 Replacement of s 184 (Accreditation standards bodies)

Clause 52 replaces section 184 (Accreditation standards bodies) to prescribe all accrediting standards bodies through the regulation. The *Building Act 1975* prescribed one accredited body (AIBS), while other accrediting bodies (RICS) is prescribed in the Building Regulation 2006. This amendment provides consistency when prescribing an entity that is an accrediting body under the Act.

Clause 53 Amendment of s 185 (Function of accreditation standards body)

Clause 53 amends section 185 (Function of accreditation standards body) to insert new sub-sections that improve transparency and accountability of the accreditation standards bodies. The new subsections require accrediting bodies to submit their educational and experiential standards and professional development scheme to the chief executive for review at least every five years from the date the standards or scheme were approved.

The provision also requires the accreditation standards body to publish, on its website, a copy of its current educational and experiential standards and professional development scheme.

Clause 54 Amendment of s 186 (Criteria for deciding suitability of applicants and licensees)

Clause 54 amends Section 186 (Criteria for deciding suitability of applicants and licensees) to acknowledge that individuals with prescribed qualifications and experience and who are not currently accredited with an accreditation body, may be suitable to hold a building certifier licence. The amendment also enables the QBCC to consider whether an applicant/licensee is a disqualified individual when assessing their suitability for a new licence or a licence renewal. A disqualified person is not suitable to hold a licence.

Clause 55 Amendment of s 190 (Making a complaint against a building certifier)

Clause 55 amends section 190 (Making a complaint against a building certifier) to give the QBCC a discretionary power to dismiss complaints. This power is limited to situations where there is insufficient or unsubstantiated evidence to support a complaint or where the QBCC is satisfied the complaint is frivolous, vexatious or lacks credibility.

The provision also limits the period for making a complaint about conduct of a building certifier for breaches unlikely to cause serious financial loss or harm. No limitation of

time applies for making a complaint about conduct that is likely to cause serious financial loss or harm.

Clause 56 Insertion of new ch 6, pt 5

Clause 56 inserts new chapter 6, part 5 (Disqualified individuals) comprising of 3 Divisions. This Chapter introduces a point system for a building certifier's licence and enables a licence to be disqualified where an individual accumulates 30 demerit points over a 3-year period.

The new chapter 6, part 5, division 1 (Preliminary) consists of four sections (214A to 214D) which define terms relevant to the demerit point system, including when a person is a disqualified individual and how the 3-year period is to be determined.

The new chapter 6, part 5, division 2 (Calculation of demerit points) comprises four sections (214E to 214H). This Division prescribes how many points can be allocated for a breach or during an investigation or audit, when demerit points can be allocated (section 214F) and the notification requirements if the QBCC issues demerit points (section 214H).

The new chapter 6, part 5, division 3 (Disqualification) comprises four sections. (214I to 214L) which provides the administrative framework regarding the possible disqualification of a person as a result of accumulating demerit points. This division prescribes the duration of disqualification, being one year for the first disqualification or three years for a second or subsequent disqualification.

Clause 57 Insertion of new ch 11, pt 21

Clause 57 inserts new chapter 11, part 21 (Transitional provisions for *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*). This chapter provides transitional provisions which enable industry to implement the reforms, with clarity about when they will apply.

**Part 21 Transitional provisions for Building Industry Fairness
(Security of Payment) and Other Legislation Amendment Act
2020**

The new section 347 (Definitions for part) provides definitions for the part.

The new section 348 (Section 124A does not apply to building certifier engaged before commencement) provides that this section does not apply if a building certifier was engaged to inspect building work prior to commencement.

The new section 349 (Application of section 143B for owner of building) provides that an owner can only request additional building certification functions to be performed under the new section if the certifier is engaged by the client on or after the commencement of the amendment Act.

The new section 350 (Application of section 185 to existing educational and experiential standards) clarifies that the first day of the five-year period in the amended section 185, is taken to have commenced on the day the amendment Act commences.

The new section 351 (Application of disqualified person provisions) provides that demerit points cannot be applied retrospectively for convictions for a demerit point offence.

The new section 352 (Existing certificates of classification) identifies that a certificate of classification applies prior to commencement and is taken to be a certificate of occupancy which applies after commencement.

The new section 353 (Transitional regulation-making power) provides that a regulation may be made to allow or facilitate anything that needs to be done to achieve the smooth transition from the operation of the pre-amended Act to the amended Act. This provision ensures that any transitional matters that arise after the commencement of the Act may be appropriately and swiftly addressed.

A transitional regulation made under this provision may have retrospective operation to day not earlier than the commencement date and will expire 2 years after it commences.

Clause 58 Omission of sch 1 (The QDC on 14 June 2011)

Clause 58 omits Schedule 1 (The QDC on 14 June 2011) from the *Building Act 1975* to implement the policy intent of the amended section 13.

Clause 59 Amendment of sch 2 (Dictionary)

Clause 59 amends schedule 2 (Dictionary) by inserting definitions of words used in the amended Act. The clause also omits words no longer referred to in the amended Act.

Part 4 Amendment of Building Industry Fairness (Security of Payment) Act 2017

References to the BIF Act in Clause 62 to 84 is in reference to the version of the *Building Industry Fairness (Security of Payment Act) 2017* in force immediately before the amendments below.

Clause 60 Act amended

Clause 60 specifies that Part 4 of this Bill amends the *Building Industry Fairness (Security of Payment) Act 2017*.

Clause 61 Amendment of s 2 (Commencement)

Clause 61 allows for the commencement to be prescribed by regulation. This will provide for the different phases of implementation of project trusts to commence progressively. Prescribing commencement in regulation will provide certainty for industry and allow industry time to prepare their businesses for the reforms.

Clause 62 Amendment of s 3 (The main purpose of Act)

In section 3(2)(a) omits 'project bank accounts' and inserts 'statutory trusts'.

Clause 63 Replacement of ch 2 (Project bank accounts)

Clause 63 replaces chapter 2 of the BIF Act and inserts a new chapter that deals with trust accounts.

Chapter 2 Statutory trusts

Part 1 Preliminary

Section 7 defines that the purpose of the chapter is to hold certain funds on trust to protect the interests of subcontractors. This is consistent with section 3 of the BIF Act.

Section 8 provides for the definitions to be used in the chapter. The definitions are generally consistent with section 8 of the BIF Act but have been updated to reflect the new trust account framework.

Section 8A defines the meaning of project trust work. Project trust work provides the scope of work that is used to determine if a project trust account is required. It replaces the definition of building work and provides greater clarity on the work that is in scope.

Section 8B defines the meaning of protected work. Protected work is used to determine the beneficiaries of the project trust. The Panel recommended casting the definition to align with the definition of “construction work” in Chapter 3 of the BIF Act. In conjunction with section 15E and section 11A, the Panel’s recommendation that engineers, architects and those undertaking “building work services” as defined in the QBCC Act will be beneficiaries to a project trust but not need to establish a project trust.

Section 9 defines “contract price” which is used to determine if a project trust should be established. In line with the Panel’s recommendation, contract price has been amended to exclude GST which is consistent with industry practice.

Part 2 Project trusts

Division 1 Preliminary

Section 10 provides for the definitions that relate to the project trust which have been updated to reflect the new structure of the project trust framework. The section also provides for a minimum contract price that can be prescribed in regulation.

Section 10A defines who is a related entity which is consistent with the current definition as per section 19 of the BIF Act.

Section 10B provides for when an amount is liable to be paid to a subcontractor and is consistent with the definition in the BIF Act section 10A.

Section 10C provides for when certain terms are referenced within this part and is consistent with the existing references in section 12 of the BIF Act but has been updated to reflect the new terminology.

Division 2 Project trusts

Section 11 defines that a project trust is a trust that protects amounts paid by the contracting party to the contracted party. The primary objective of the project trust is to protect money for subcontractors’ benefit.

Section 11A defines who is the trustee and beneficiary of a project trust. The contracted party, as the party who controls the project trust account is the trustee and will usually be the head contractor.

Under the new framework, beneficiaries are defined under section 8B. A beneficiary also includes a subcontract that is for the supply of related services such as work completed by an architect or engineer. This is consistent with the Panel’s recommendation to

protect these consultants as beneficiaries. Only first tier subcontractors to the project trust account are beneficiaries.

New subsection (4)(c) provides the opportunity for a minimum subcontract value to be set which will determine which subcontractors must be paid through the project trust account. For example, if a minimum contract price of \$50,000 is set by regulation only subcontracts over that value would need to be paid through the project trust.

Section 11B provides that beneficiaries of a project trust have a beneficial interest in the trust where an amount is entitled to be paid under the beneficiary's subcontract and for the contracted party, the amount that remains in the trust after all payments entitled to the subcontractor beneficiary have been paid. This is consistent with section 9 of the BIF Act but has been updated to reflect the new framework.

Division 3 Contracts requiring project trusts

Subdivision 1 When project trust required

Section 12 defines when a contract requires a project trust. If the contract is eligible for a project trust, the project trust account is required the first day the contract meets the eligibility criteria and when the first subcontract is entered into. If the contract is exempt, a project trust is not required. This is generally consistent with sections 13 and 14 of the BIF Act but has been updated to reflect the new project trust framework and allow for the requirements to be applied beyond state government contracts.

Where the contract was entered into because of a tender process, the requirement does not apply unless the tender process was started on or after commencement. In subsequent phases the requirement will apply when the contract is entered into.

Subdivision 2 Eligible contracts

Section 14 defines the particular contracts that are eligible for a project trust. The eligible contracts for the next phase are where the contracting party is the State or a Hospital and Health Service and more than 50% of the contract price is for project trust work and the contract price is \$1 million or more. This is consistent with section 14 of the BIF Act but includes Hospital and Health services and the upper cap of \$10 million has been removed.

Section 14A is consistent with current requirements under section 15 of the BIF Act. It specifies that the contract will become eligible once the amendment takes effect. Only applies where the amendments increase the original contract price by 30% or more.

Section 14B is consistent with provision 217 of the BIF Act that has not yet commenced. It will protect against contracting practices which seek to avoid the requirements to establish a project trust by splitting the contract across different sites.

Section 14C provides that where a project trust account exists and a subcontractor is a related entity to the head contractor, the subcontractor may be eligible to establish a project trust account. To determine if a project trust is required the criteria under section 12 must also be met, for example, the subcontractor must further subcontract work. This is consistent with the application under the BIF Act, section 20.

New section 14D provides the ability to prescribe in regulation a certain type of contract that requires a project trust. It is not intended to prescribe any circumstances at this stage but allow for future flexibility.

New section 14E provides for the ability to prescribe in regulation subcontracts that will be required to establish a project trust. This will allow for the project trust to cascade in a limited number of circumstances. It is not intended to prescribe any circumstances at this stage but allow for future flexibility.

Subdivision 3 Exempt contracts

New section 15 confirms that subcontracts only require a project trust where they meet the requirements of new sections 14C and 14E.

New section 15A provides a head of power has been introduced to specifically exclude certain contracting parties from having to establish a project trust account. This has been introduced to allow for future flexibility.

New section 15B clarifies that a project trust account does not need to be established for a contract which is between the State and a state authority. For example, where a Hospital and Health Service has engaged QBuild to construct a building.

Section 15C is consistent with the BIF Act, section 16. It is not intended that a project trust account be required for the construction of domestic buildings. However, construction of large-scale residential projects, such as housing developments and blocks of units will be required to have a project trust account. The threshold for small scale residential construction work is where there are less than 3 living units. For example a duplex will not trigger the project trust requirements as it only has two living units, but a complex of 5 units will trigger the requirements, provided it meets the other criteria for project trust accounts.

Section 15D is consistent with the BIF Act section 17. Where a contract is for building work that is for maintenance work only, the contract will not be eligible for a project trust account.

New section 15E provides that a project trust is not required if the contract is only for building work services. This will exclude a project trust from being required where the contract only includes certain services such as architectural, design and surveying and other advisory services.

Section 15F is consistent with BIF Act section 23(8) which provides an exemption where the contracted work would be completed in less than 90 days between when a project trust account would be established and practical completion.

Division 4 Project trust administration

Subdivision 1 Establishing project trusts

New section 17 establishes that the trust status applies when the contract requires a project trust and the contracting party has commenced paying an amount to the contracted party. This ensures the trust status and protections exists, even in the instance where the trust account may not have been established.

Subdivision 2 Project trust accounts

Section 18 establishes that a contracted party must open a project trust account if the contract requires one to be opened under section 12. Once a contract is eligible for a project trust, the contracted party must open the project trust account within 20 business days of entering into the first subcontract. A contract cannot impose conditions that require the project trust to be opened earlier than the 20 days. This provision amends existing section 23 to simplify the requirement. The maximum penalty of 500 penalty units that applies is also consistent with section 23. Opening the trust account is critical to the integrity of the framework therefore the penalty is to act as a sufficient deterrent.

New subsection (4) requires that the project trust account must not be a virtual or subordinate account. Each project trust requires its own account number and Bank State Branch (BSB) number to ensure the protections of the trust.

New subsection (5) requires that only 1 project trust account is to be created for the project trust.

Section 18A requires that a project trust must be opened in the trustee's name and include the word 'trust'. This is generally consistent with the current section 25 of the BIF Act but also requires the trustee's name to ensure clarity on the who is responsible for the obligations. This provision mirrors the maximum penalty of 200 penalty units prescribed under section 25 of the BIF Act.

New subsection (1) requires that the trustee open the project trust account at an approved financial institution that has been approved by the QBCC Commissioner (commissioner). The maximum 200 penalty units is consistent with the penalty where principal viewing access is not provided. This section replaces the viewing access requirement (section 24(2) of the BIF Act) but applies the penalty consistently.

The trustee must also ensure that the deposits and withdrawals relating to the project trust are only made using methods that create an electronic record of the transaction such as an electronic transfer. This amends the current requirement under section 24(1) and provides greater flexibility for trustees. This provision mirrors the maximum penalty of 500 penalty units prescribed under section 24 of the BIF Act.

Section 18B requires that the trustee of the project trust to notify the contracting party (i.e. the principal) and commissioner information relating to the opening, closing, name change or transfer or a project trust account within 5 business days of taking the action. The information that is required to be provided will be prescribed in regulation. This is consistent with section 26 of the BIF Act but now requires the QBCC to be notified to assist in its extended compliance role over the new framework. This provision mirrors the maximum penalty of 200 penalty units prescribed under section 26 of the BIF Act.

New section 18C provides for the ability to transfer a project trust account to a different financial institution if the institution is authorised. All amounts held in trust must be transferred into the new trust account and the trustee is required to inform the contracting party, the commissioner and subcontractor beneficiaries, about the transfer.

The maximum penalty of 200 penalty units is consistent with offences prescribed under section 18A (1) and 18A (2) of the Bill as they relate to project trust account restrictions.

It is considered appropriate as the notification requirement is integral to the transparency of the account and overarching compliance and enforcement.

To enable the transfer to the new financial institution, it may be necessary for the trustee to have two project trust accounts open simultaneously (i.e. one project trust account at the financial institution where it was initially opened and one project trust account at the financial institution to which it is being transferred). However, subsection (3) provides that the trustee should not have more than one project trust open for longer than is necessary for the transfer.

Subdivision 3 Payments to project trust account

Section 19 provides that all payment from the contracting party must be paid into the project trust account. The provision is consistent with the existing requirements under section 27 but has been updated to reflect the new project trust framework and reference to the withholding request. This provision mirrors the maximum penalty of 200 penalty units prescribed under section 27(2) of the BIF Act.

Should the trustee fail to deposit money into the project trust account if an amount is deposited into an incorrect account, a maximum penalty of 200 penalty units or 2-years imprisonment can be applied. This is consistent with section 27(4) of the BIF Act.

Section 19A limits the purpose for which money can be deposited in a project trust account and is consistent with existing requirements under section 28 of the BIF Act. This provision mirrors the maximum penalty of 200 penalty units or years imprisonment prescribed under section 28 of the BIF Act.

Subdivision 4 Payments from project trust account

Section 20 requires all payments to beneficiaries be paid from the project trust account and is consistent with section 29 of the BIF Act. This provision mirrors the maximum penalty of 200 penalty units or 1 year's imprisonment prescribed under section 29 of the BIF Act.

Section 20A is consistent with existing requirements under section 31 of the BIF Act and provides for the circumstances in which money may be withdrawn from a project trust account. It includes that money can be withdrawn to make a payment for an adjudication amount in relation to the contract for which the project trust is established or a contract with a beneficiary of the project trust.

Failure to comply with the requirements that apply under subsection (1) invites a maximum penalty of 300 penalty units or 2-years imprisonment which is consistent with the existing penalties under section 31(1) of the BIF Act.

Subsection (2) requires the trustee to repay all amounts withdrawn in contravention of subsection (1). This provision mirrors the maximum penalty of 300 penalty units, or 2-years imprisonment prescribed under section 31(2) of the BIF Act.

Section 20B ensures money liable to be paid to subcontractors are paid prior to the trustee withdrawing money to pay itself. It gives an order of priority to subcontractor payments which acts as a mechanism to ensure there are sufficient amounts in the project trust to pay subcontractors and is consistent with section 32 of the BIF Act. This

provision mirrors the maximum penalty of 300 penalty units or 2-years imprisonment prescribed under section 32 of the BIF Act.

Section 20C is consistent with the BIF Act section 33 which directs that amounts liable to be paid are paid on a proportional basis where there is an insufficient amount available to cover all payments. This is to avoid payments being made to a favoured subcontractor where there are insufficient funds in the project trust.

Where there are insufficient funds to pay all subcontractors and a proportional payment is made, a new requirement means the contractor must notify the commissioner of this payment in the approved way (subsection 3)). This is to support QBCC compliance and enforcement activities. The maximum penalty for not complying with the provision is 100 penalty units. This is consistent with section 33 of the BIF Act except that it does not include imprisonment as a penalty as the offence relates to a failure to notify only.

Subsection (4) provides for an offence where payments made to a subcontractor are not paid proportionally in the circumstances prescribed. The penalty for failing to make a proportional payment maintains the same maximum penalty as section 33 of the BIF Act including 100 penalty units or 1 year's imprisonment.

Subdivision 5 Ending project trust

New section 21 directs that a project trust may be closed once there is no remaining subcontractor beneficiaries. A subcontractor is no longer a beneficiary if there are no remaining amounts liable to be paid under the subcontract. The trustee must give notice to the commissioner once the trust account has been closed. Consistent with the existing section 37 and section 44, the trustee may pay itself an amount of interest or any remaining amounts not owing in the project trust when closing the account.

Section 21A provides that the project trust cannot be closed while the trust is still required under the other provisions, which is consistent with section 38. This provision mirrors the maximum penalty of 500 penalty units or 1 year's imprisonment prescribed under section 38 of the BIF Act.

Division 5 Information sharing

Section 23 is consistent with current BIF Act section 49 however the notice is no longer required to be provided in the approved form. This will allow flexibility for contractors to make the notification in an efficient way and continue to ensure all subcontractors are aware of a project trust requirement under the BIF Act.

Should the contracted party fail to provide notice to the subcontractor the same maximum penalty under section 49 of the BIF Act will apply which is 200 penalty units or 1 year's imprisonment.

Section 23A requires the trustee to provide a subcontractor beneficiary with information relating to withdrawals made from the project trust. Where a payment is made to the subcontractor beneficiary or the withdrawal relates to a payment into a retention trust account, the trustee must notify the beneficiary of the withdrawal, as it relates to the beneficiary within 5 business days of making it. Providing this information to beneficiaries ensures transparency over the movement monies and confidence to beneficiaries of the ongoing protections over amounts.

There is no prescribed way to inform the subcontractor which will allow for flexibility across industry. This provision replaces section 51 of the BIF Act to reflect Panel recommendation 19 and the updated trust account framework and terminology.

A maximum penalty of 100 penalty units applies for non-compliance with the notification requirement under this provision within the timeframe of 5 business days required. The maximum penalty of 100 penalty units is consistent with existing section 51 of the BIF Act.

It is necessary to assign a high penalty for failing to comply with the notification requirements given the importance of a beneficiary being informed of actions undertaken in relation to money that they have a beneficial interest in. However, a reasonable excuse defence has been provided to protect contractors from strict liability where there are mitigating circumstances for non-compliance. A reasonable excuse defence for not complying with the notification requirement could be where the trustee is suddenly ill or suffers a serious illness. Where a trustee fails to understand their obligations or has relied on other individuals to meet their obligations, a reasonable excuse defence would not be available.

New section 23B allows for subcontractors to request certain information including a statement of balance for the project trust, copy of the transactions, trust records and supporting statements, as they relate to the beneficiary. The contractor must comply within 10 business days of the request being given. This provision is a result of recommendation 13 from the Panel's report. Giving beneficiaries an avenue to request information ensures transparency over money as it relates to them and confidence the protections of the project trust are being maintained.

This provision works in conjunction with section 23A to replace the requirement under section 51 of the BIF Act and for this reason, the same maximum penalty of 100 penalty units has been applied.

Division 6 Obligations of contracting party

Section 24 places a positive obligation on the contracting party (the principal) to report to the commissioner if they are aware of a related entity relationship between a head contractor and subcontractor engaged where a project trust account is required. The principal has 5 business days to inform the commissioner. This will assist the QBCC in fulfilling its regulatory functions. This provision mirrors the maximum penalty of 50 penalty units prescribed under section 21(2) of the BIF Act.

The intent of the requirement is to assist the QBCC in fulfilling its regulatory functions which is consistent with the intent of section 52 of the BIF Act. For this reason, the same maximum penalty of 100 penalty units has been applied.

New section 24A places a positive obligation on the contracting party (i.e. the principal) to inform the commissioner if they are aware that a project trust is required but has not been established. The intent of the requirement is to assist the QBCC in fulfilling its regulatory functions which is consistent with the intent of section 52 of the BIF Act. For this reason, the same maximum penalty of 100 penalty units has been applied.

Division 7 Other matters

Section 25 requires a contracted party (i.e. the head contractor) to report to the commissioner if subcontractor who is also a related entity has been engaged, within 5 business days after entering the subcontract. This provision is an existing requirement under the BIF Act and the maximum penalty of 200 penalty units has been applied consistently with section 21(4).

Section 25A is consistent with existing section 58 of the BIF Act but has been amended to reflect the updated terminology and project trust framework.

Section 25B is consistent with existing section 47 of the BIF Act but has been amended to reflect the updated terminology and project trust framework.

Part 3 Retention trusts

Division 1 Preliminary

New section 30 sets out the definitions related specifically to retention trust provisions and clarifies critical terms used in relation to the contract and associated parties and trust account.

Section 30A sets out the particular references relating to retention trusts these are consistent with section 12 of the BIF Act.

Division 2 Retention trusts

Section 31 defines that a retention trust is a trust over amounts being withheld as retention for security of performance under a building contract. The trust over amounts extends only to cash retentions being withheld and not other forms of security such as bank guarantees. This provision is primarily for the benefit of the party that is entitled to be paid retention amounts. This provision is consistent with section 34 of the BIF Act.

Section 31A defines the trustee and beneficiaries of a retention trust where there are retention amounts being withheld under a contract. The contracting party, as the party who withholds the retention amount and controls the retention trust account is the trustee and a beneficiary. This can include a principal, head contractor or subcontractor. Contracted parties become beneficiaries when a retention amount is withheld, not just when it is paid into the retention trust account.

This provision is consistent with section 9 (3) and (4) of the BIF Act. However, it has been broadened to protect all parties that are required to establish a retention trust once each phase has commenced.

New section 31B defines over what amount in a retention account a contracted party or contracting party has a beneficial interest in. It specifies that contracted parties have a beneficial interest in the amount in the retention trust account which has been withheld from payment to them. The beneficial interest of the contracted party ends when they become entitled to be paid under their contract, for example at the end of the defect liability period. The contracting party's beneficial interest generally only exists once the contracted party's beneficial interest has ended. This is a new protection to specifically

identify and create certainty about when the beneficial interest is enlivened for the retention trust.

Division 3 When retention trusts required

Section 32 outlines when a retention trust is required. A retention trust account is required when certain criteria of a contract are met, including that the contract or subcontract is one associated with a project trust account. The requirement to have a retention trust account starts when a retention amount is withheld under a contract which meets the criteria. This is generally consistent with current section 9 of the BIF Act but has been amended to reflect the separate requirements between project and retention trusts under the new framework.

This is generally consistent with current section 9 of the BIF Act but has been amended to reflect the separate requirements between project and retention trusts under the new framework.

Where a retention amount is withheld under a head contract (the contracting party is the principal), the withheld funds must be kept in a retention trust account. Should the contracted party of that contract (the first-tier subcontractor) have an amount withheld, those amounts must also be kept in a retention trust account. The requirement for holding retentions in a retention trust account only applies to that point until the phase in of all phases is complete. However, in a circumstance where project trust account is also required by a contracted party (first tier subcontractor), then the requirement extends down one more subcontractor tier.

However, a retention trust account is not required when the contracting party is the State, the Commonwealth, a state authority, local government or another entity prescribed by regulation.

New subsection 4(b) creates a head of power which will allow a minimum contract price to be set to exclude a contract from requiring a retention trust account. If a minimum value is not prescribed in regulation, no minimum value will apply. This new provision has been included to provide flexibility.

Division 4 Retention trust administration

Subdivision 1 Establishing retention trusts

New section 33 establishes the retention trust when the contracting party withholds the retention amount from payment. This is in line with the Panel's recommendation 6.

New section 33A establishes a charge over the retention funds in favour of the contracted party. This charge will apply to the funds whether they are in the trust account or not. This gives the contracted party priority interest over the amount for which the charge applies should the contracting party become insolvent. This new provision reflects the Panel's recommendation 7(e).

Subdivision 2 Retention trust accounts

New section 34 outlines that a contracting party is only required to open one retention trust account for all retention amounts withheld. The Panel recommended that having a

separate retention account per project was burdensome and the most efficient way of achieving policy intent was to have a single retention trust account per contractor (see recommendation 6).

Subsection (2) applies an offence for not opening a retention trust account prior to withholding the retention amount for payment. This provision mirrors the existing maximum penalty of 500 penalty units prescribed under section 21(4) of the BIF Act.

New subsection (4) requires the retention trust account be opened at an approved financial institution approved by the commissioner. The maximum 200 penalty units is consistent with the penalty where principal viewing access is not provided. This section replaces the viewing access requirement but applies the penalty consistently.

New section 34A outlines the restrictions for retention trust accounts.

Subsection (1) requires that the retention trust account must be held at an approved financial institution. The maximum 200 penalty units is consistent with the penalty where principal viewing access is not provided. This section replaces the viewing access requirement (section 24(2) of the BIF Act) but applies the penalty consistently.

Subsection (2) is consistent with section 25 of the BIF Act which requires that the word 'trust' must be included in the when opening the account. The inclusion of the trustee's name is to ensure clarity on the who is responsible for the obligations. This provision mirrors the maximum penalty of 200 penalty units prescribed under section 25 of the BIF Act.

Subsection (3) requires the trustee to ensure deposits and withdrawals made in relation to the retention trust be made using methods that create an electronic record of the transfer. This is consistent with section 24 of the BIF Act, but has been amended to create flexibility for trustee's while maintaining transparency and integrity of the transactions. This provision mirrors the maximum penalty of 500 penalty units prescribed under section 24 of the BIF Act.

Subsection (4) provides that the trustee must not close the retention trust account until all amounts held have been released to the entitled parties under the relevant contracts or the account has been transferred to another financial institution. This provision is to ensure the trust account remains open for the duration it is required to continue to protect retention monies withheld. To deter behaviour that may undermine the protection a maximum penalty of 200 penalty units has been prescribed.

Section 34B requires the trustee of the retention trust to notify the commissioner if a retention trust account is opened, closed, transferred to another financial institution or changes name. The trustee must provide this information to the commissioner in the approved way, within 5 business days of the taking the action. This provision is consistent with section 26 of the BIF Act, however, has been amended to reflect that Panel's recommendation that the QBCC be notified in lieu of the principal. This provision mirrors the maximum penalty of 200 penalty units prescribed under section 26 of the BIF Act.

New section 34C provides the ability for the retention trust account to be transferred to a different financial institution. A retention trust account is not limited to the life of the project and can exist indefinitely as retention funds for varying projects are withheld. Over the life of the retention trust account, the trustee may change financial institutions.

This provision provides for this to occur and sets out the actions which need to be followed to comply, including notifying relevant parties.

Not complying with section 34C(1) incurs a maximum penalty of 200 penalty units which is consistent with offences prescribed under section 34A(1) and 34A(2) of the Bill as they relate to retention trust account restrictions. The penalty is considered appropriate as the notification requirement is integral to the transparency of the account and overarching compliance and enforcement.

Subdivision 3 Payments to retention trust account

Section 35 requires all retention amounts withheld to be deposited in a retention trust account. Consistent with current section 34 of the BIF Act, any cash retentions, for a contract or subcontract associated with a project trust account, must be deposited into and held in the retention trust account. Failure to comply with this requirement incurs a maximum penalty of 200 penalty units or 2-years imprisonment which is consistent with section 34(1) of the BIF Act.

If a retention amount was withheld before the retention trust was required due to variations or contract amendments and now a project trust is required, the contracted party must deposit the amount in the retention trust account within 5 business days after the retention trust is required. Failure to comply with this requirement incurs a maximum penalty of 200 penalty units which is consistent with requirement to deposit amounts into the retention trust account as per section 35(2) of the Bill. The maximum penalty does not include imprisonment as the deterrent under section 35(2) is considered sufficient.

Section 35A limits the purpose for which money can be deposited into the retention trust account. It only allows for payments made into the account for the purpose of withholding retentions or repaying amounts withdrawn in error. This section does not apply to deposits of interest that is earned on the account. This provision is consistent with current section 28 of the BIF Act and mirrors the existing maximum penalty prescribed which is 200 penalty units or 1 year's imprisonment.

Subdivision 4 Payments from retention trust account

Section 36 is consistent with BIF Act section 34A and specifies that funds can only be released from the retention trust account to pay the contracted party money they are entitled to under the contract. In some circumstances the amount a contractor is entitled to may be less than the retention amount withheld as the contract may provide for using retention amounts to correct defects or omissions. Where this is the case, the amount can be paid to another person who is correcting the defect or omission or the trustee after the defect's liability period.

Should an amount be withdrawn for a reason other than what is provided for, the trustee must repay that amount into the trust account as soon as practicable.

Failure to comply with this provision incurs a maximum penalty of 300 penalty units or 2 years imprisonment which is consistent with the existing penalty associated with section 31 of the BIF Act.

Subsection (2) requires that an amount must not be withdrawn from a retention trust account until after the defect liability period, as it applies to the amount in question, ends. The maximum penalty is 300 penalty units or 2-years imprisonment which is

consistent with the penalty under section 36(1) of the Bill. The same penalty has been applied as the outcome of non-compliance in both circumstances is that money is prematurely withdrawn from the retention trust account.

Subsection (3) requires the trustee to repay all amounts withdrawn in contravention of the requirements in Section 36(1) of the Bill. This provision mirrors the maximum penalty of 300 penalty units, or 2-years imprisonment prescribed under section 31 of the BIF Act.

Section 36A outlines the trustee may release the retention amounts only by withdrawing from the retention trust account and depositing into the contracted party's account. This is consistent with BIF Act section 34A and the maximum penalty of 200 penalty units or 1 year's imprisonment mirrors this provision accordingly.

Subdivision 5 Ending retention trust

Section 37 provides that a retention trust is only dissolved when all amounts have been released from the trust account as per the contract requirements. This is consistent with the BIF Act section 37 but has been updated to reflect the new retention trust framework and terminology.

Section 37A applies a penalty where a retention trust account is closed prior to it being dissolved under section 37. An exemption exists if the account is closed due to transferring the account. The provision and associated penalty is consistent with BIF Act section 38 but has been updated to reflect the new retention trust framework and ability to transfer a trust account. This provision mirrors the maximum penalty of 500 penalty units, or 1 year's imprisonment prescribed under section 38 of the BIF Act.

Division 5 Information sharing

Section 40 provides if a retention trust is required under section 32, the contracting party must provide written information to the contracted party prior to withholding the retention amount. The information must include a statement that the retention trust will be used for withholding retention amounts under the contract, and any other information prescribed by regulation. This provision is consistent with BIF Act section 49 but no longer requires an approved form allowing flexibility for the trustee to meet its obligations and reflects the updated retention trust framework. Failure to comply with this provision incurs a maximum penalty of 200 penalty units or 1 year's imprisonment which is consistent with the penalty prescribed in section 49 of the BIF Act.

If the retention trust account has not been opened before the retention trust is required under section 32, the contracting party must provide the information within 5 business days after opening the account.

Section 40A requires the trustee to give the party from whom a retention amount was withheld, notice if there has been a deposit or withdrawal of funds related to them. The notice must be given within 5 business days after the deposit or withdrawal occurs. The withdrawal may be in relation to a payment made to the contracted party, another person for the correction of defects or omissions or the contracting party, as per the relevant contract. The intent of the provision is to give the beneficiary information about the transactions of the retention trust account as they relates to them. Providing this information to beneficiaries ensures transparency over the movement of monies and confidence to beneficiaries of the ongoing protections over amounts. This provision is

consistent with BIF Act section 51 but has been updated to reflect the new retention trust framework and Panel recommendation 19.

A maximum penalty of 100 penalty units applies for non-compliance with the notification requirement under this provision within the timeframe of 5 business days required. The maximum penalty of 100 penalty units is consistent with existing section 51 of the BIF Act.

It is necessary to assign a high penalty for failing to comply with the notification requirements given the importance of a beneficiary being informed of actions undertaken in relation to money that they have a beneficial interest in. However, a reasonable excuse defence has been provided to protect contractors from strict liability where there are mitigating circumstances for non-compliance. A reasonable excuse defence for not complying with the requirement to provide information to a beneficiary could be where the trustee is suddenly ill or suffers a serious illness. Where a trustee fails to understand their obligations or has relied on other individuals to meet their obligations, a reasonable excuse defence would not be available.

New section 40B allows for subcontractors to request certain information including a statement of balance for the retention trust, copy of the transactions affecting the retention trust account, trust records and supporting statements, as they relate to the beneficiary. This provision is a result of recommendation 13 from the Panel's report. Giving beneficiaries an avenue to request information ensures transparency over money as it relates to them and confidence the protections of the retention trust are being maintained.

This provision works in conjunction with section 40A to replace the requirement under section 51 of the BIF Act and for this reason, the same maximum penalty of 100 penalty units has been applied.

The trustee must comply within 10 business days of the request being given. A reasonable excuse provision has been provided for this provision to protect trustees from strict liability where there are mitigating circumstances for non-compliance. A reasonable excuse defence for not complying with the requirement could be where the trustee is suddenly ill or suffers a serious illness. Where a trustee fails to understand their obligations or has relied on other individuals to meet their obligations, a reasonable excuse defence would not be available.

Division 6 Compulsory training

New section 41 is a result of recommendation 7 made by the Panel that a person administering a retention trust account must receive training prior to opening a retention trust account. The training will be prescribed by regulation.

New subsection (2) specifies that if the trustee is not the person administering the account, they must nominate a person who is responsible for administering the retention trust account and advise the commissioner of the nomination. This nomination can be updated where the nominate person changes. This is required to support audit of compliance with the retention training and ensure the nominee is an appropriate person.

The obligation to ensure the prescribed training is undertaken rests with the trustee, whether they are the one undertaking the training (as per subsection (6)) or the

nominated person is (subsection (2)). The requirement to undertake the training will not arise until the training is prescribed by regulation.

The regulation may also prescribe criteria for applying for an extension of time to complete the training or an exemption. An exemption may be available where for example, the nominated person has already undergone similar training in trust account management.

Relevant penalties apply for not completing the training or not nominating a person to complete the training within the required timeframe. Subsection (5) applies 100 penalty units for not completing the training and subsection (6) applies 100 penalty units for not nominating a person to complete the training. This is consistent with the penalties under the *Work Health and Safety Act 2011* section 72 for failing to comply with an obligation to train health and safety representatives.

Division 7 Other matters

Section 43A replicates section 47 of the BIF Act and provides that a contracting party cannot assign their entitlement to an amount held in trust for a retention trust. Such an assignment is of no effect.

Part 4 Common provisions for project trusts and retention trusts

Division 1 Preliminary

New section 50 provides that the term “trust account” means a project trust account or retention trust account for the purposes of Part 4.

Division 2 Powers, obligations and restrictions for trustees

Section 51 is consistent with section 30 of the BIF Act. The section applies if there is an insufficient amount available in the trust account to pay an amount due to a beneficiary of the trust, meaning they have not ‘topped up’ the account prior to payments becoming due. The trustee must immediately deposit an amount equal to the shortfall in the trust account. Failing to do so incurs a maximum penalty of 100 penalty units or 1 year’s imprisonment which is consistent with section 30 of the BIF Act.

New subsection (3) requires the trustee to notify the commissioner within 5 business days of depositing an amount equal to the shortfall. This requirement is to indicate possible financial distress to the commissioner. Failure to notify the commissioner incurs a maximum penalty of 50 penalty units.

Section 51A is consistent with section 39 of the BIF Act but has been updated to reflect the new framework and terminology. It provides that an amount paid or required to be paid into a trust account cannot be used for the payment of the debt of a creditor of the trustee or attached or taken in execution under a court order or process for the benefit of a creditor of the trustee.

Section 51B is consistent with section 40 of the BIF Act but has been updated to reflect the new framework and terminology. It provides that a trustee for a project or retention trust must not invest the funds held in trust in any form of investment. It continues to

allow interest earned on a trust account. This provision mirrors the maximum penalty of 200 penalty units or 1 year's imprisonment prescribed under section 40 of the BIF Act.

Section 51C is consistent with section 43 of the BIF Act but has been updated to reflect the new framework and terminology. It provides that the trustee is not entitled to recover costs associated with administering a trust account or any fees payable from funds held in trust for any beneficiary or any other beneficiary of than the trustee.

Section 51D is consistent with section 44 of the BIF Act but has been updated to reflect the new framework and terminology. It provides that the trustee for a project or retention trust is entitled to receive all interest earned on amounts held in the trust account. The interest may be withdrawn once every 12 months or on closure of the trust, unless another amount is payable.

Section 51E is consistent with section 41 of the BIF Act but has been updated to reflect the new framework and terminology. It enables a trustee for a project or retention trust to engage an agent or employ an agent to act on behalf of the trustee. The provision does not limit the trustee's liability if an agent acts on their behalf.

Section 51F is consistent with section 42 of the BIF Act but has been updated to reflect the new framework and terminology. It allows a trustee to delegate its powers (other than the power to delegate) to a person resident in the State. The trustee must make the delegation in writing and must keep the written delegation for a period of seven years, in line with other trust record keeping requirements.

Subsection (3) does not exempt the trustee from its liability if a delegation is in place.

Section 51G is consistent with section 46 of the BIF Act but has been updated to reflect the new framework and terminology. It provides the trustee the right to apply to the Supreme Court for directions about an amount held in trust, the administration of the trust or the exercise of a power by the trustee.

Division 3 Trust records

Section 52 provides that the trustee must keep trust records, which builds on the existing requirements under section 45 of the BIF Act. The Panel recommended that trustees should keep detailed trust accounting records to support the integrity of the trust (recommendation 12 and 13). This provision mirrors the maximum penalty of 300 penalty units or 1 year's imprisonment prescribed under section 45 of the BIF Act.

New subsection (2) requires a trustee to keep an individual trust account ledger for the trust.

New subsection (3) provides that the trust account ledger must be capable of separating information for each of the beneficiaries of the trust. This provision will provide flexibility for trustees in meeting the obligation. Further details on the requirements of the ledger will be prescribed in regulation.

New subsection (6) provides that the trust records must accurately reflect the transactions of the trust account. The information that must be captured will be prescribed in regulation.

New subsection (7) requires a trustee to record transactions within 5 business days after the deposit or withdrawal is made.

New subsection (9) provides that if a computer system is used to store the trust records that there are minimum standards or requirements it must be capable of. These requirements will be prescribed by regulation.

New section 52A provides that the trustee must complete monthly bank reconciliations for a project and/or retention trust account. The bank reconciliation must be completed within 15 business days after the end of each month. The reconciliation process will draw attention to errors and anomalies in the trust accounts and will encourage proactive management of the accounts.

The requirements of the bank reconciliations will be prescribed by regulation. The maximum penalty prescribed is 50 penalty units. This is consistent with the penalty applied under section 51(3) of the Bill as the intent of both these provisions to provide early indication of financial distress is the same.

Division 4 Oversight powers

Subdivision 1 Powers exercised by the commissioner

New section 53 creates an obligation for the commissioner to maintain a register of the project trusts and retention trusts which trustees have notified them of. Trustees are required to notify the commissioner if a trust account is opened, as per the Panel's recommendation 14. Maintaining a register will ensure the information is collected and will assist compliance activities and provide transparency.

New subsection (2) provides that the commissioner may publish information about the project and retention trusts.

New section 53A provides the commissioner with the ability to require in writing particular information about a trust account to be supplied by a prescribed person or entity.

New subsection (2) provides a list of information that the commissioner may request however is not exhaustive and includes information the commissioner reasonably considers necessary to exercise its powers or to investigate compliance with the Act. This is consistent with the Panel's recommendation 9 and 15 to allow the QBCC adequate powers to monitor and enforce compliance.

New subsection (4) provides for a maximum penalty of 100 penalty units where an entity has not complied with the requirement to provide information within the required timeframe. The penalty is consistent with section 187 of the BIF Act for providing a false or misleading statement. As the intent of the provisions is considered consistent, the same penalty has been applied.

New section 53B provides the ability for the commission to issue directions about trust accounts. Recommendations 9 and 15 of the Panel were to ensure that the QBCC had adequate powers to monitor and enforce compliance and freeze a trust account.

New subsection (1) limits the use of directions to certain circumstances such as termination of a contract, insolvency, reasonable suspicion of non-compliance with the Act or QBCC licence suspension.

New subsection (2) allows the commissioner to issue a direction to stop an amount being withdrawn from a trust account and require a trustee to give the commissioner an account review report for a trust account.

The QBCC will not be able to issue directions about the payment of amounts in and out of the account without written agreement of an administrator or a court order.

The trustee's failure to comply with the direction within the period stated in the notice (subsection 5) could incur a maximum penalty of 100 penalty units. The penalty is consistent with section 187 of the BIF Act for providing a false or misleading statement. As the intent of the provisions is considered consistent, the same penalty has been applied.

New section 53C provides the commissioner with the ability to apply to the Supreme Court for directions. This incorporates and remakes sections 46 and 55A of the BIF Act in line with the new role of the commissioner. The directions may be about an amount held in trust and applying to the Supreme Court provides transparency of the QBCCs exercise of powers.

Subdivision 2 Special investigators

New section 53D provides the commissioner with the ability to appoint a special investigator to investigate a person's compliance with the requirements under the BIF Act for trust accounts.

New subsection (3) provides the action that a special investigator may take to support its function such as inspecting trust accounts and related records, perform accounting tasks to establish the state of a trust account or reporting to the commissioner on a trustee's compliance with the Act.

New subsections (4), (5), (6), (7), (8) and (9) provides for the procedural elements for the special investigator.

New section 53E provides that a person must not obstruct a special investigator or a person who is helping the special investigator. This will support the special investigator in performing their role. A maximum penalty of 100 penalty units will apply. The penalty is consistent with the existing offence for obstructing investigators under section 107A of the QBCC Act.

New section 53F provides that a person must not impersonate a special investigator. A maximum penalty of 40 penalty units will apply for non-compliance. The penalty is consistent with the existing offence for impersonating an investigator under section 107B of the QBCC Act.

Subdivision 3 Other matters

New section 53G provides for the protection of the commissioner, employees of the QBCC or agents of the QBCC from civil liability where exercising a power under this

division when acting in good faith and without negligence. The provision also provides protection to the special investigator as an agent of the commission appointed under section 53E.

Division 5 Exclusion of auditors

New section 54 provides the definitions for the division including accepted representations, show cause notice and show cause period.

New section 54A provides the ability for the commissioner to exclude persons from undertaking trust account reviews and preparing trust account review reports. Two grounds are provided for:

- the person gave the commissioner incorrect information about the compliance of a trust account with the Act
- the person failed to comply with the requirements of the Act about providing a trust account review.

New section 54B provides that prior to excluding a person from undertaking account reviews, the commissioner must issue a show cause notice to the person with the grounds and evidence for the proposed suspension.

New subsection (2) provides that the show cause notice must include the information stated in the provision.

New subsection (3) requires that the person be provided no less than 14 days to respond. It is considered that a minimum of 14 days is appropriate given the person may be appointed by other trustees to perform account review reports and a determination should be made quickly to reduce possible impact on other trustees.

New section 54C permits the person given the show cause notice to make representations within the show cause period set by the notice to the commissioner. The commissioner must consider the submissions.

New section 54D provides that the commissioner must not take any further action should they have accepted representations made in the show cause notice. The commissioner is also required to give the person written notice that no further action is to be taken.

New section 54E provides that the commissioner may exclude the person at the end of the show cause period if they believe that grounds still exist. To do so the commissioner must give the person an information notice. To ensure fairness, the notice is reviewable under section 86 of the QBCC Act. The exclusion will last for three years.

New section 54F provides that the commissioner may publish a list of persons excluded from undertaking review of trust accounts. This will assist trustees to ensure that they engage a person who is appropriately qualified to undertake an account review report.

Division 6 Financial institutions

New section 55 provides that the commissioner may approve the financial institutions at which trust accounts must be kept. This will ensure appropriate products that meet the requirements are available to trustees and to assist QBCC compliance.

New subsection (2) provides that the financial institution is only approved if there is an agreement between the commission and the financial institution about providing financial services for trust account.

New subsection (3) provides what matters the agreement may include such as a requirement to inform the commissioner of amounts held in trust accounts. A head of power allows for other matters to be prescribed where necessary.

New subsection (5) provides that the commissioner must publish the details of the approved financial institutions on the commission's website. This requirement will make it easy for trustees to select a financial institution which has been approved and meet their obligations.

New section 55A provides that a financial institution is not obligated to provide a supervisory role of trust accounts nor is it liable for any loss incurred in compliance with the Act. It also provides that a financial institution does not have any recourse or right against money in the trust account for a liability of the trustee owing to the financial institution.

New section 55B provides reporting and record production requirements for financial institutions. This will assist QBCC identify trustee's non-compliance early.

New subsection (1) includes a requirement that a financial institution must notify the QBCC as soon as they become aware that a trust account is overdrawn. The maximum penalty is 50 penalty units which is consistent with a similar requirement under section 282(1) of the *Legal Profession Act 2007*.

New subsection (2) prescribes that a financial institution must provide certain information to a special investigator if asked. The maximum penalty is 50 penalty units which is consistent with a similar requirement under section 282(4) of the *Legal Profession Act 2007*.

New subsection (6) prescribes that a trustee must provide certain information to a special investigator if asked. The maximum penalty is 50 penalty units which is consistent with the intent and penalties applied under section 55B(1) and section 55B(2) of the Bill.

New section 55C provides that the commissioner may issue a written direction to a financial institution requiring that an amount must not be withdrawn from a trust account without the commissioner's written approval. This is consistent with section 53B which allows a written direction to be made to the trustee. The direction only applies to withdrawing an amount from the trust account and cannot direct amounts to be paid out from the trust account. The maximum penalty is 50 penalty units which is consistent with the penalty prescribed in section 55B as these provisions have the same intent.

Division 7 Application of particular Acts

New section 56 is consistent with the BIF Act section 59 but has been updated to reflect the new framework and terminology.

New section 56A is consistent with the BIF Act section 60 but has been updated to reflect the new framework and terminology.

New section 56B is consistent with the BIF Act section 48 but has been updated to reflect the new framework and terminology.

Division 8 Auditing and reporting

New section 57 requires a trustee to engage an auditor to carry out a review of the trust account. A maximum penalty of 200 penalty units or 1 year's imprisonment applies for non-compliance. The penalty is consistent with a similar requirement under section 30(1) of the *Agents Financial Administration Act 2014*.

Subsections (2) and (3) provide that a regulation will prescribe when a review must be undertaken and the time period that a review must cover. For example, a regulation could prescribe that a review must be undertaken every 12 months and that the review would cover transactions that occurred from January to December inclusive.

Subsections (4) and (5) provide that the review must be carried out by a registered company auditor and must be complete within 40 business days.

Subsection (6) requires that the registered company auditor engaged must be independent of the trustee to provide integrity over the process.

Subsection (7) provides that a trustee is not required to engage an auditor to carry out a review of the trust account if:

- a retention amount was not held in the account during the review period and the trustee has given the commissioner a written statement within 10 business days of the end of the review period, stating this
- the regulation prescribes circumstances, those circumstances.

New section 57A provides for a trust account to be reviewed and a report prepared to certify that the accounts have been kept in accordance with the requirements of the Act. The provision provides what information must be included in the report and provides a head of power to prescribe information by regulation. This implements recommendations made by the Panel to ensure that mandatory external auditing of trust records be undertaken.

The account review report must include the information prescribed by subsection (3). This information will assist the QBCC in ascertaining whether the trustee has complied with the requirements in the BIF Act for trust accounts. The auditor is also able to include any other information that they consider relevant.

Subsection (5) provides the auditor must give the trustee an original signed account review report within 20 business days after completing the review.

New section 57B places a requirement on the trustee to give all trust records requested by the auditor, engaged to undertake a review of a trust account, as soon as practicable after their request. This will ensure that the auditor has all information available to them undertake an account review report as required by section 57A. A maximum penalty of 200 penalty units applies for non-compliance which is consistent with a similar requirement under section 38 of the *Agents Financial Administration Act 2014* however does not include imprisonment.

New section 57C requires the auditor to report serious breaches to the commissioner within 5 business days of forming the belief that the serious breach has occurred. A maximum penalty of 200 penalty units or 1 year's imprisonment applies for non-compliance with this provision.

Subsection (2) provides that the following circumstances constitute a serious breach:

- the auditor cannot report that the trust account has been kept in compliance with the Act
- the auditor finds an irregularity relating to a trust account
- the auditor suspects the trustee has not met the trustee's obligations under the Act
- the auditor suspects a contravention of this Act, prescribed by regulation has occurred

It is intended that in these circumstances, the commissioner receiving an early notification from the auditor will assist in early detection of any breaches of the Act. This will afford subcontractors the highest amount of protections.

It is intended that providing a head of power to prescribe additional breaches under regulation will provide flexibility and agility to the government should any additional behaviours arise that affect the operation of the trust account.

Failure to notify the commissioner of a breach invites a maximum penalty of 200 penalty units or 1 year's imprisonment which is consistent with the equivalent offence prescribed under section 37 of the *Agents Financial Administration Act 2014*.

New section 57D provides that the trustee must provide the account review report to the commissioner, within 10 business days of the trustee receiving the report from the auditor. A maximum penalty of 50 penalty units applies for non-compliance with this requirement which is consistent with the equivalent penalty under section 274 of the *Legal Profession Act 2007*.

Division 9 Other matters

New section 58 allows the commissioner to provide certain information to professional bodies where they suspect that an auditor has breached a condition or standard applying to the auditor. It is intended that the commissioner would use this power to report to the professional bodies where they consider the auditor to be in breach of a relevant professional standard or condition applying to the auditor. The information that is provided to professional bodies must be redacted so as the trustee or relevant trust account cannot be identified.

New section 58A applies liability to executive officers for offence committed by a corporation where the officer did not take reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

New subsection (2) prescribes what the court must have regard to when considering what 'reasonable steps' the officer has taken.

New subsection (5) identifies that sections 18(1), 19(2), 20A(1), 20A(2), 20B, 34(2), 36(1) and 36(3). These provisions relate to ensuring that money is held and deposited

into trust accounts appropriately as well as only withdrawn in certain circumstances. This provides the protections for subcontractor money.

New section 58B provides that a failure by the trustee to comply with its obligations under the Act does not limit or affect the validity of the trust. It also allows for an affected person to take action relating to a trust account even if the trustee has failed to comply with an obligation that would otherwise prohibit the affected person taken such action.

This new section is important to ensure that a beneficiary has trust over money of a that has been paid to the head contractor but has not been deposited into the trust account or where a trust account has not been set up in compliance with the Act requirements, a trust will still exist.

Clause 64 Amendment of s 64 (Definitions for chapter)

Clause 64 amends the definition of 'complex payment claim' to remove reference to the amount being exclusive of GST. This has been amended to reflect industry practice where it is common for a payment claim to include a claim for GST as well as for the value of the work undertaken. Additionally, the definition of progress payment does not provide for GST to be excluded.

As a result, the value of the payment claim is the total amount stated (i.e. it will include GST where it is claimed and exclude GST where it is not claimed).

Clause 65 Amendment of s 75 (Making payment claim)

Clause 65 implements recommendation 10 of the Special Joint Taskforce and recommendation 11 of the Panel by amending section 75 to provide that head contractors must provide a supporting statement with every payment claim.

New subsection (5B) creates a penalty for a claimant that is a head contractor failing to provide a supporting statement with a payment claim. A maximum penalty of 100 penalty units applies. However, where a head contractor fails to provide a supporting statement with a payment claim, the failure will not affect the validity of a payment claim. The penalty is consistent with existing offence under section 76 of the BIF Act for failing to give a payment schedule.

The supporting statement will declare the status of payments to the subcontractors, including if they have been paid or if they have not been paid in full. Where payment has not been made in full the supporting statement must include further information about the subcontract and reasons for not having been paid in full.

If a head contractor provides false and misleading information in a supporting statement, the commission will be able to prosecute the matter. Refer to clause 23 new section 200D.

Clause 66 Amendment of s 76 (Responding to payment claim)

Clause 66 creates an offence where a respondent pays less than the amount that was proposed to be paid under the scheduled provided. This is in line with the Panel's recommendation 4. A maximum penalty of 100 penalty units applies for non-compliance. The penalty is consistent with existing offence under section 76 of the BIF Act for failing to give a payment schedule.

Clause 67 Amendment of s 85 (Time for deciding adjudication application)

Clause 67 amends section 85 of the BIF Act clarify that the response date for (2)(b) is the last day on which the respondent could give an adjudication response under s 83 if it were permitted to give one. Where a respondent does not provide a payment schedule in response to a payment claim in compliance with section 76, they are prevented from providing an adjudication response.

Clause 68 Amendment of s 86 (Extending time for deciding adjudication application)

Clause 68 requires an adjudicator to notify the Adjudication registrar if the claimant and respondent have agreed to allow more time for the adjudicator to decide on an application. This will assist the Registrar in fulfilling its functions to collect statistical data.

Clause 69 Amendment of s 88 (Adjudicator's decision)

Clause 69 clarifies the existing requirement that an adjudicator must provide a copy of the decision and notice of the fees and expenses that have been paid by the claimant and respondent to the adjudication registrar at the same time that it is provided to the claimant and respondent. It is understood that there was misunderstanding about whether the fees and expenses to be provided to the registrar were the fees and charges left unpaid. This was often a value of zero, thereby not achieving the intent. The existing maximum penalty of 40 penalty units remains.

Clause 70 Replacement of s 90 (Respondent required to pay adjudicated amount)

Clause 70 provides for a new requirement that the respondent provide evidence to the registrar when they have paid the claimant. The notification must be made within 5 business days of making the payment. A maximum penalty of 20 penalty units applies for failing to notify the registrar, which is consistent with section 128 of the BIF Act.

This will assist the commission when determining whether payment has been made.

Clause 71 Amendment of s 95 (Adjudicator's fees)

Clause 71 amends the requirement for an adjudicator to charge reasonable fees to ensure that they are not entitled to be paid more than is reasonable having regard to the work done and expenses incurred.

Clause 72 Amendment of s 97 (Withdrawing from adjudication)

Clause 72 provides that where an adjudication application has been withdrawn under section 95, the claimant will now be required to also notify the Registrar. An adjudication application is considered withdrawn if the claimant chooses to withdraw it or if the respondent pays the full amount claimed in the payment claim that is being adjudicated. This will assist the Registrar in fulfilling their functions to collect statistical data.

Clause 73 Insertion of new ch 3, pt 4A

Clause 73 inserts new chapter 3, part 4A into the BIF Act. The new part gives the claimant in an adjudication, who may be a subcontractor or head contractor, the ability to serve a payment withholding request on the higher party in the contractual chain. The provisions implement recommendation 5(a), (b) and (c)(i) made by the BIF Panel.

The BIF Panel suggested that a payment withholding request would be a way to reduce the risk of non-payment of an adjudicated amount, incentivise payment and provide an alternative mechanism to the holding of disputed amounts in a disputed funds trust

account, as required the previous PBA requirements. The ability to make a payment withholding request is not restricted to contracts where there is a trust account—it can be used by any claimant for an adjudication.

The BIF Panel’s recommendation reflected the New South Wales model, which allows a payment withholding request to be given after an adjudication application is made. However, following industry consultation, the payment withholding request in the Bill is based on the model in Victoria, in that a payment withholding request may be given if the respondent does not pay adjudicated amount.

Part 4A Requiring higher party to withhold payment

New section 97A provides the definitions for part 4A.

Financier includes a financial institution or a person who in their ordinary course of business supplies finance for construction contracts. As ‘financial institution’ is not further defined within the Bill, the meaning within the *Acts Interpretation Act 1954* will apply. ‘Financier’ is intended to capture a person who is providing finance to a head contractor and not intended to capture a friend, family member or other acquaintance who has lent money to the head contractor in a personal capacity.

Head contractor is defined to mean the contracted party for a contract that is not also a subcontract of another contract.

Higher party in relation to an adjudicated amount means:

- (a) if the claimant for the amount is a subcontractor – the person from whom an amount is or becomes payable to the respondent under an arrangement with the respondent for related work or services; or
- (b) if the claimant for the amount is a head contractor – the person who is the financier for the related work or services.

This definition is intended to capture a person who is one tier higher in the contractual chain from the parties to the adjudication, i.e. the person that has a contract with the respondent to the adjudication, and who therefore has the ability to withhold money from payment. Where the claimant is a head contractor, this person will be financier or funder of the project. Unlike subcontractors’ charges, the claimant can only skip one tier, so when serving a withholding notice, there is no ‘leap frog’ ability.

Payment withholding request, is as defined in section 97B(2).

Related work or services, for an adjudicated amount means –

- (a) the construction work to which the adjudicated amount relates or;
- (b) the supply of related goods and services to which the adjudicated amount relates.

New Section 97B provides the circumstances under which a claimant may require a higher party to withhold sufficient money from money that is or becomes payable by the higher party to the respondent to satisfy the adjudicated amount. A claimant can make a withholding request where an adjudication decision has been made requiring the respondent to pay an amount to the claimant and the amount has not been paid in compliance with section 90.

A payment withholding request must be made using the approved form.

The claimant must also provide a copy of the payment withholding request to the respondent at the same time that it is provided to the higher party. Failing to provide a copy of this can incur a maximum penalty of 50 penalty units, which is consistent with section 36 of the BIF Act.

If the person who receives the payment withholding request is no longer the higher party for the adjudicated amount, they are not required to withhold money under the request. A person may no longer be the higher party for the contract where the contract between the higher party and the respondent has come to an end.

The person who received the payment withholding request must notify the claimant that they are no longer the higher party within 5 business days of receiving the request. A maximum penalty of 50 penalty units applies for non-compliance, which is consistent with a notification offence for section 36 of the BIF Act. The creation of an offence for a party who receives a payment withholding request that is no longer the higher party will ensure that the claimant is aware that they have served the notice on the wrong party or a higher party no longer exists. This will allow the claimant to pursue other methods of obtaining payment for the adjudicated amount.

New Section 97C places an obligation on the higher party to withhold payment to the respondent of an amount up to the adjudicated amount. This obligation only applies to the extent that an amount is payable to the respondent. For example, if the adjudicated amount is \$55,000 and the higher party only has \$40,000 payable to the respondent, then they are only obligated to withhold \$40,000. Alternatively, if the adjudicated amount is \$55,000 and the amount payable by the higher party to the respondent is \$120,000, then the higher party is only obligated to retain the \$55,000 and can pay the remainder to the respondent.

A maximum penalty of 50 penalty units applies for non-compliance with this requirement. A higher penalty was not used as there are other consequences for non-compliance, such as the higher party becoming jointly and severally liable for the adjudicated amount. The higher party's obligation to retain the adjudicated amount ends when the claimant is paid the adjudicated amount. This obligation may reduce incrementally if part payments of the adjudicated amount are paid to the claimant. For example, if payment withholding request is for \$50,000 and the respondent pays the claimant \$20,000, the obligation on the higher party to withhold amounts payable to the respondent reduces to \$30,000. The claimant must inform the higher party that they have been paid the adjudicated amount within 5 business days.

A maximum penalty of 50 penalty units applies for non-compliance, which is consistent with a notification offence for section 36 of the BIF Act.

New section 97D sets out the consequences for the higher party should they fail to comply with the withholding request and makes a payment to the respondent without retaining the adjudicated amount. In this instance, the higher party becomes jointly and severally liable with the respondent for the adjudicated amount, but only to the extent of the failure. For example, if the respondent fails to pay the adjudicated amount and the higher party made payment to the respondent after receiving the withholding notice, without retaining an amount, then the claimant may recover the adjudicated amount as a debt from the higher party. Should this occur, subsection 3 allows for the higher party to then recover this from the respondent.

New section 97E sets out the protections for a higher party who has received a payment withholding request. Where a higher party has withheld an amount from payment to a respondent, the respondent cannot take action against the higher party for failing to pay the full amount due. Additionally, where an amount has not been paid to the respondent over a period of time, this amount cannot be taken into account for the purpose of working out any period where money has gone unpaid. This may apply when determining interest on an unpaid amount to the respondent.

New section 97F places an obligation on the respondent to give the claimant information about the higher party to assist them in issuing a payment withholding request. The claimant can request that the claimant provide:

- the name of the higher party for the relevant adjudicated amount;
- the address of the higher party's place of business or if the higher party does not have a place of business, the higher party's place of resident;
- whether any money is, or will become, payable by the higher party to the respondent.

The respondent must comply with the requirement within 5 business days of receiving the request.

A maximum penalty of 20 penalty units applies for non-compliance, which is consistent with section 119 of the BIF Act for giving information to a subcontractor for a subcontractors' charge.

A respondent must not, in purported compliance with the requirement, give the claimant information that they know is false or misleading. Consistent with providing false and misleading information under section 187 of the BIF Act, a maximum penalty of 100 penalty units applies for non-compliance.

Section 97G creates a charge over the amount the subject of the payment withholding request. The charge created is in favour of the claimant for securing payment of the money to the claimant if the claimant becomes entitled to the amount. Subsection (6) provides that the charge is declared to be a statutory interest to which the *Personal Property Securities Act 2009*, section 73(2) applies.

This charge will cease to apply when:

- the respondent pays the claimant the adjudicated amount
- the adjudication decision is decided but the decision is set aside and the respondent pays into the court, as security, the unpaid portion of the adjudicated amount pending a final decision
- the adjudication certificate relating to the adjudicated amount is filed in court as a judgement debt, but the court dismisses the proceedings for enforcement.

Section 97H states that the ability to make a payment withholding request on a higher party does not limit any other action they may take to enforce the adjudicated amount.

Clause 74 Amendment of s 99 (Notice required before starting particular proceedings)

Clause 74 implements recommendation 20 of the Panel. The clause amends existing section 99 to extend the timeframe the claimant has to give the respondent a warning notice from 20 to 30 business days after the due date for the progress payment. This

provides a consistent timeframe with the time available to make an adjudication application under section 79.

Clause 75 Insertion of new ch 3, pt 6A

Clause 75 inserts new chapter 3, part 6A into the BIF Act. The new part gives a claimant for an adjudication application, who is a head contractor, the ability to have a charge registered over property where an adjudicated amount has not been paid. This implements recommendation 5(c)(ii) of the Panel.

The effect of a charge over property is that it provides an ability for the claimant to seek an order that the property be sold to satisfy the respondent's debt to the claimant. The charge over property is intended as a mechanism to encourage a respondent to pay following adjudication.

Both the payment withholding request (new chapter 3, part 4A) and the charge over property provide avenues for recovering unpaid money after an adjudication. However, part 6A applies to a claimant that is a head contractor only, unlike chapter 3, part 4A which is available to both head contractor and subcontractor claimants. Subcontractors have other mechanisms available to them that cannot be used by head contractors, such as subcontractors' charges under chapter 4 of the BIF Act.

Part 6A Charge over property

New section 100A provides the definitions for part 6A.

New section 100B sets out the parameters under which a claimant, who is a head contractor, may be able to request that a charge be registered over property. The ability for the claimant to register the charge is only available where the adjudication decision has been made requiring the respondent to pay an amount to the claimant and the amount owed has not been paid in accordance with section 90 of the BIF Act. In order to register the charge, the adjudication certificate must be filed as a judgement debt in a court in accordance with section 93 of the BIF Act.

The charge can only be registered against the property on which the construction work or related goods and services that is the subject of the adjudicated amount was carried out or were supplied. Additionally, the respondent, or a related entity of the respondent, must be the registered owner of the property as defined under the *Land Title Act 1991* (Land Title Act). 'Related entity' is defined in section 10A of the Bill.

In order to request the charge over the property, the claimant must lodge with the registrar of titles the required form along with the adjudication certification and a statutory declaration stating the lot on plan description of the property, that the adjudicated amount has not been paid and, where applicable, that the registered owner is a related entity for the respondent.

The registrar of titles is entitled to rely on the information contained in the statutory declaration to register the charge. This is appropriate as there will be limited independent means for the registrar to verify the information. New section 200C, inserted by clause 78 of the Bill, creates an offence for giving false or misleading information to an 'official', the definition of which includes the registrar of titles.

New section 100C provides that the charge will automatically expire after 24 months from registration unless the claimant applies for it to be extended. A court of competent

jurisdiction may extend the charge and subsection (4) requires the claimant to inform the registrar of titles of the extension. The charge will also expire in circumstances where the respondent no longer owes the adjudicated amount, including where the adjudication decision is set aside, the respondent pays the adjudicated amount into court as security pending a final decision, or the court dismisses proceedings for enforcement if the adjudicated certificate is filed as a judgement debt.

New section 100D obliges the claimant to request the release of the charge when it expires under 100C occurs or the claimant has received the adjudicated amount from the respondent. The claimant meets their obligation by requesting the registrar of titles to release the charge in the appropriate form.

A maximum penalty of 100 penalty units may apply should the claimant fail to meet this obligation as soon as practicable after the adjudicated amount is received or the charge expires.

Failing to meet this obligation is consistent with providing false and misleading information and a similar penalty to that of section 187 of the BIF Act is considered appropriate. Also, subsection (4) allows the registered owner to lodge a request to release the charge. The request must include a statutory declaration stating that the charge has expired and that the respondent has confirmed through a search of court records that no extension has been granted, or that the respondent has paid the adjudicated amount. On receipt of the request, the registrar of titles is compelled to release the charge. Section 200C also applies to a statutory declaration provided under this section.

New section 100E gives the registered owner the ability to request the charge be set aside through application to a court of competent jurisdiction. The only circumstances in which the court can order the charge be set aside is if the claimant has been paid the adjudicated amount or if it is determined the owner is not a related entity of the respondent. Prior to making the application, the claimant must be provided with a notice of the owner's intention to make the application.

New section 100F applies if a charge has been registered over property and allows the claimant to apply to the appropriate court for the property to be sold. Prior to this occurring, the claimant must provide the owner with written notice advising of their intent to make the application. Other parties who have sufficient interest may also become a party to the proceeding and contribute to the application. A party who also has sufficient interest may be another claimant with a charge registered over the property or a mortgagor.

New section 100G provides that the court may order the property to be sold if it is satisfied that the respondent has not paid the adjudicated amount to which the charge relates and it would be appropriate to make the order. Subsection (2) clarifies that the court may also decide to set aside the charge, or to appoint a person to act for the claimant for the sale. This subsection does not limit the orders the court may make.

New section 100H provides that an order for the sale of the land under new section 100G allows the land to be sold free of other encumbrances unless any have been preserved by the court and the order will allow the land to be sold regardless of any encumbrances or any other Act. 'Encumbrance' is defined under subsection (4) and

includes interests that are adverse to the interests of the owner, such as a mortgage, lien or charge affecting the property.

This section also prescribes the order of priority for the disbursement of funds from the sale. First priority is given to paying the sale costs, such as agent fees, and the claimant's costs in seeking the order for sale, following by paying amounts payable for registered encumbrances. Registered encumbrances are to be paid in order of their priority under the Land Title Act, which is usually determined by the time of creation or registration. It is not intended that the claimant applying for the sale of the land would have priority over other security holders. For example, the claimant's interest should not get priority over a mortgage if the mortgage was registered earlier than the claimant's charge.

Clause 76 Amendment of s 117 (No subcontractor's charge over money held in trust under a project bank account)

Clause 76 omits 'project bank account' and inserts 'project trust or retention trust'.

Clause 77 Amendment of s 149 (Registry)

Clause 77 amends section 149 of the BIF Act which provides for the adjudication registry. The provision allows registry staff to assist the registrar in performing their functions or exercise a power. An unintended consequence of the provision has prevented persons other than registry staff accepting adjudication application. This could result in a claimant missing their timeframe to make an application if no registry staff are available to accept the application. The amendment will ensure that receiving adjudication applications can also be undertaken by persons other than adjudication registry staff

Clause 78 Insertion of new ch 5, pt 3

Clause 78 inserts new chapter 5, part 3 Audits

Part 3 Audits

New Section 189 provides the commissioner with the ability to approve an audit program under which the commission may audit compliance with this Act. The ability to approve an audit program has been transferred from the *Queensland Building and Construction Commission Act 1991* and appropriately expanded. The program must be published on the QBCC's website. This will assist the QBCC in their role of enforcement and monitoring.

Section 189A provides the ability for the QBCC to by written notice request that a person provide access to documents to assist an audit under section 189. Consistent with existing offence QBCC Act 50C(4) for failing to supply information under an approved audit program, a maximum penalty of 100 penalty units will apply for non-compliance with the period stated in the written notice.

Section 189B declares that information provided as required under section 189A cannot be used as evidence in a proceeding to the extent it would incriminate the person. However, if the proceedings are about false and misleading information in that documents, this section does not apply.

Clause 79 Insertion of new s 198A

Clause 79 inserts new section 198A which provides for particular documents to be given to the commissioner or the registrar in the approved way. The approved way in which the information can be given will be published on the commission's website. This allows for flexibility in how information can be provided, for example in a form electronically or through an information portal.

Clause 80 Insertion of new ss 200C-200E

Clause 80 Inserts new sections 200C – 200E

New Section 200C creates an offence for providing the commissioner, the registrar of titles or a special investigator with false or misleading information in relation to the BIF Act. A maximum penalty of 100 penalty units will apply. This is consistent with the false and misleading penalty in section 187 of the BIF Act and corresponding penalties in the QBCC Act, refer to sections 108B and 108C. It is not intended that the offence would apply where the person has demonstrated that to the best of their ability how the document is false or misleading and the person can reasonably obtain the correct information.

New Section 200D creates an offence for providing false and misleading information in

- a notice of deposits or withdrawal given under section 23A or 40A
- a supporting statement under section 75

when giving it to another person.

A maximum penalty of 100 penalty units will apply. This is consistent with the false and misleading penalty in section 187 of the BIF Act and corresponding penalties in the QBCC Act, refer to sections 108B and 108C. This provision is important to ensure that the commission is able to prosecute false or misleading supporting statements. Industry has requested the ability for the QBCC to prosecute false and misleading offences as currently only Queensland Police can investigate and penalise suspected fraud under the Criminal Code.

New Section 200E provides for confidentiality of information that a person receives under the BIF Act in performing a function or exercising a power under the Act. It is drafted similar to section 110 of the QBCC Act to ensure that information is not misused. In line with section 110 of the QBCC Act, a maximum penalty of 100 penalty units will apply to a person who misuses information unless for specific reasons.

Clause 81 Amendment of s 201 (Regulation – making power)

Clause 81 omits s 201(2)(a)

Clause 82 Insertion of new ch 8A

Clause 82 inserts a new chapter 8A into the Act. The new part provides the transitional provisions for the implementation of the amendments to the Act.

**Chapter 8A Transitional provisions for the Building Industry Fairness
(Security of Payment) Amendment Act 2020**

New section 211A provides definitions for the new chapter.

New section 211B sets out whether a contract may be subject to the new or former requirements for establishing a project bank account. The section applies to contracts

where the tender process began, or the contract was signed, prior to the commencement of this amending Act. If the contract meets that criteria and was required to establish a project bank account under the former section 13 (Building contracts requiring a project bank account) then the requirement continues as if this amending Act did not come into effect. Section 15 (Amendment of building contract) also continues to apply and any amendments to a contract which would take the contract from not requiring a project bank account to requiring a project bank account would still apply.

For example, a contract entered into before the commencement of the amending Act which did not require a project bank account as it did not meet the criteria under former section 13 would be required to establish a project bank account, using the pre-commencement obligations and requirements if the contract is amended after the commencement date to meet the criteria under former sections 13 and 15.

However, while the obligations and requirements under the pre-amendment Act would apply generally, the new provisions for what needs to happen in circumstances where the contract is terminated, or the trustee becomes insolvent would apply.

New section 211C allows existing project bank accounts to transfer to the new framework within the first six months of the amendment Act commencing. The transfer to the new framework must be complete and all of the new framework requirements must be complied with.

All funds existing in the general trust account and retention trust must be transferred to the new project trust account and retention trust account. The requirement for opening the new project trust account and retention trust account will be in line with the amendment Act. Notification of the transfer must be provided to the appropriate parties, for example contracting parties, subcontractor beneficiaries and QBCC. As there is no disputed funds trust account under the new framework, if there are funds in the disputed funds trust then the accounts cannot be transferred to the new framework. Should the funds be transferred not in compliance with the requirements, there is a risk the funds will not be protected at a certain point in time and consistent with section 27 of the BIF Act a maximum penalty of 100 penalty units will apply.

New section 211D sets out whether a contract may be subject to having to meet the requirements of new Chapter 2 as the phases to capture contracts are implemented. This section clarifies that for future phases, those that commence from 1 July 2022, Chapter 2 applies to any contracts entered into after the relevant phased commencement date. For example, a private project valued at \$18 million with a contract entered into in March 2021 would not need to meet the requirements of Chapter 2 after 1 July 2021.

New section 211E 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

Clause 83 Replacement of ch 9, pt 1, divs 2 and 3

Clause 83 provides for the replacement of chapter 9, part 1, divisions 2 and 3 of the *Building Industry Fairness (Security of Payment) Act 2017*.

Division 2 Extended application of project trusts and retention trusts to local government and private sector

Section 214 amends section 12 of the Act to omit subsections (6) and (7). These subsections specify whether the existing or new framework applies where a tender process was used. It is not intended to have the project trust trigger operate based on tender date for the later framework phases, including the private sector, so these subsections are being omitted. Later phases will be based on date of entering the contract.

Section 215 amends section 14 of the Act to omit and replace subsection (1). The amendment expands the new framework to also apply to local government, the private sector and all state authorities. A contract continues to be eligible for a project trust if the contracting party is the State or a hospital and health service and the contract price is \$1 million or more. A contract will also be eligible for a project trust if the contracting party is a State authority (that is not a hospital and health service), local government or an individual or private entity and the contract price is \$10 million or more. This amendment is intended to commence on 1 July 2021 and represents Phase 2B of the new framework regime.

Note: Phase 2A is the commencement of the new PBA regime on 1 July 2020.

Division 3 Extended application of project trusts and retention trusts to particular contracts for \$3 million or more

Section 216 amends section 14 of the Act to omit the reference to '\$10 million' in subsection (1)(c)(ii) and replace it with '\$3 million'. The amendment expands the new framework so that a contract will also be eligible for a project trust if the contracting party is a State authority (that is not a hospital and health service), local government or an individual or private entity and the contract price is \$3 million or more. This amendment is intended to commence on 1 January 2022 and represents Phase 3 of the new PBA regime.

Division 4 Extended application of project trusts and retention trusts to most contracts

Section 217 amends section 14 of the Act to omit and replace subsections (1) and (2). The amendment expands the new framework so that a contract is eligible for a project trust if more than 50% of the contract price is for project trust work and the contract price is \$1 million or more. The different contract price triggers based on the type of contracting party, for example, a hospital and health service or private entity, are being omitted and the \$1 million trigger will apply to all contracting parties. This amendment is intended to commence on 1 July 2022 and represents Phase 4 of the new framework.

Section 218 amends section 32 of the Act which specifies when a retention trust is required. For Phases 2A, 2B and 3 of the new framework, a retention trust is only required for applicable contracts where the contracting party withholds the retention amount in the form of cash, and a project trust is required for the withholding contract.

This means that a requirement to establish a retention trust will not exist for lower level subcontractors, despite the fact they may withhold cash retention amounts. For Phase 4 of the new framework, retention trusts will be required all the way down the contractual chain for projects requiring a project trust, where the contracting party is withholding a cash retention amount. This amendment is intended to commence on 1 July 2022.

Clause 84 Amendment of sch 2 (Dictionary)

Clause 84 amends schedule 2 (Dictionary) of the Act to omit and insert various definitions. Most of these definitions have been inserted to assist interpretation of new chapter 2 (statutory trusts) of the Act.

Part 5 Amendment of Professional Engineers Act 2002

Clause 85 Act amended

Clause 85 provides that the Act amends the *Professional Engineers Act 2002*.

Clause 86 Amendment of s 11 (Fitness to practise as a registered professional engineer)

Clause 86 amends section 11 (Fitness to practise as a registered professional engineer) and seeks to align the requirements in the Act for determining a person's 'fitness to practice' as a registered professional engineer with the grounds for cancelling or suspending a registered professional engineer's registration.

Clause 87 Amendment of s 27A (Imposition of certain conditions on registration)

Clause 87 amends section 27A (Imposition of certain conditions on registration) to provide that the BPEQ can decide to impose a condition on registration following an investigation without the registered professional engineer's agreement.

Clause 88 Amendment of s 28 (Grounds for cancellation)

Clause 88 amends section 28 (Grounds for cancellation) and seeks to align the grounds of cancelling a registered professional engineer's registration with the 'fitness to practice' provisions.

Clause 89 Amendment of s 29 (Procedure for cancellation)

Clause 89 amends section 29 (Procedure for cancellation) and provides the BPEQ with the ability to issue a notice to a registered professional engineer requiring information to assist the BPEQ in making a decision to cancel their registration.

Clause 90 Amendment of s 29A (Immediate suspension of registration)

Clause 90 amends section 29A (Immediate suspension of registration) and seeks to align the requirements in the Act immediately suspending registration with grounds considered by the BPEQ in cancelling registration of a registered professional engineer.

Clause 91 Insertion of new s 31A

Clause 91 inserts a new section 31A (Proof of giving false and misleading statements and documents). This section clarifies that the existing offences of providing false and misleading registration information to the BPEQ also applies if an applicant provides false or misleading information to a third party in the registration process.

Clause 92 Insertion of s 32AA

Clause 92 inserts new section 32AA (Notification of prescribed changes) to require a registered professional engineer to notify the BPEQ about any changes in circumstances relevant to matters outlined in section 11.

A maximum penalty of 50 penalty units applies for non-compliance. This will enable the BPEQ to ensure a registered professional engineer is fit to practice. The maximum penalty is consistent with existing penalties for failing to notify the BPEQ about disciplinary action taken against a registered professional engineer in another state or country regarding their practice as a registered professional engineer under section 32A and failing to notify the BOAQ about an architect's inability to practice because of mental or physical health under section 32B.

Clause 93 Replacement of s 32A (Notification of disciplinary action by other bodies)

Clause 93 amends section 32A (Notification of disciplinary action by other bodies) to improve clarity and update drafting style.

The existing maximum penalty of 50 penalty units for failing to comply is retained.

Clause 94 Insertion of new pt 2B

Clause 94 inserts a new Part 2B (Audits of registered professional engineers).

Part 2B Audits of registered professional engineers

New section 35J (Approved audit programs) provides that the BPEQ may approve a program to audit 1 or more registered professional engineers. Subsection 2 outlines that the purpose of the program is to ensure that the registered professional engineer complies with a code of practice approved under section 108 of the Act or that a person complies with Part 7 of the Act. Subsection 3 provides that the program must state the (a) purpose of the program; (b) when the program starts and ends; (c) criteria used to select a registered professional engineer for the program; (d) who will carry out the program; and (e) any other matter relevant to carrying out the program.

New section 35K (Power to require production of documentation) provides for the BPEQ to require registered professional engineer to give a copy of, or access to, a document for the purposes of the audit, unless there is a reasonable excuse.

A maximum penalty of 100 penalty units applies for non-compliance. The higher penalty reflects seriousness of the breach, as providing documents during an audit is essential for the BPEQ to ensure compliance with the Act. The maximum penalty is also consistent with the existing penalty for obstruction in the exercise of a power unless there is a reasonable excuse under section 67.

Subsection 4 outlines that it is a reasonable excuse not to comply if complying might tend to incriminate the registered professional engineer or expose them to a penalty.

Clause 95 Amendment of s 50 (Issue of identity card)

Clause 95 amends section 50 (Issue of identity card) to improve clarity and update drafting style.

Clause 96 Amendment of s 51 (Production or display of identity card)

Clause 96 amends section 51 (Production or display of identity card) to clarify that an investigator does not exercise a power only because an investigator has entered a place under new section 62A(1)(b).

Clause 97 Replacement of s 55 (Power to require information or attendance)

Clause 97 amends section 55 (Power to require information or attendance) to improve clarity and update drafting style.

Clause 98 Amendment of s 56 (Offences)

Clause 98 amends section 56 (Offences) to improve clarity and update drafting style.

Clause 99 Insertion of new pt 3, divs 7A to 7C

Clause 99 inserts new Part 3, Divisions 7A to 7C.

Division 7A (Entry of places by investigator)

Subdivision 1 Power to enter

New section 62A (General power to enter places) provides for investigators to enter a place with consent, if it is a public place and the entry is made when the place is open to the public, or if the entry is authorised under a warrant.

Subdivision 2 Entry by consent

New section 62B (Application of subdivision) outlines that the subdivision applies if an investigator intends to ask for an occupier of a place to consent to the investigator or another investigator entering the place under section 62A(1)(a).

New section 62C (Incidental entry to ask for access) provides that an investigator may, without the occupier's consent or warrant, enter land around premises at the place to an extent that is reasonable to contact the occupier, or enter part of the place the investigator reasonably considers members of the public ordinarily are allowed to enter when they wish to contact an occupier of the place.

New section 62D (Matters investigator must tell occupier) provides that before asking for consent, the investigator explain certain matters to the occupier, including the purpose of entry, the powers intended to be exercised, that the occupier is not required to consent and consent may be given subject to conditions and may be withdrawn at any time.

New section 62E (Consent acknowledgement) enables the investigator to ask the occupier to sign an acknowledgement of consent. If this acknowledgement is signed, the investigator must immediately give a copy to the occupier. Subsection 4 states that if any issue arises in a proceeding about whether the occupier consented to the entry, and a signed acknowledgement is not produced in evidence, the onus of proof is on the person relying on the lawfulness of the entry to prove the occupier consented.

Subdivision 3 Entry under warrant

New section 62F (Application for warrant) outlines the process for an investigator to apply to a magistrate for a warrant for a place.

New section 62G (Issue of warrant) provides for the issue of warrant, including certain matters that the warrant must state.

New section 62H (Defect in relation to a warrant) provides that a warrant is not invalidated by a defect in the warrant or compliance with this subdivision, unless the defect affects the substance of the warrant in a material particular.

New section 62I (Entry procedure) outlines the process of entry. Subsection 2 requires the investigator, before entering the place, to do or make a reasonable attempt to identify themselves, give a copy of the warrant, explain the investigator is permitted by warrant to enter the place and give the person at the place an opportunity to allow the investigator immediate entry to the place without using force. Subsection 3 provides that the investigator need not comply with subsection 2 if the investigator believes on reasonable grounds that immediately entry is required to ensure the effective execution of the warrant is not frustrated.

Division 7B General powers of investigators after entering places

New section 62J (Application of division) provides that the powers under this division may be exercised if an investigator enters a place under new section 62A.

New section 62K (General powers of investigators after entering places) provides a number of general powers for investigators and that the investigator may take a necessary step to allow the exercise of a general power.

New section 62L (Power to require reasonable help) enables an investigator to make a requirement (called a help requirement) of an occupier of the place or a person at the place to give the investigator reasonable help to exercise a general power.

New section 62M (Offence to contravene help requirement) provides that a person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse. This will enable an investigator to effectively undertake investigations and ensure compliance with the Act.

A maximum penalty of 50 penalty units applies for non-compliance. This is consistent with the existing maximum penalty unit for failing to comply with giving information to an investigator or attend to answer questions under section 56.

Subsection 2 provides that self-incrimination is a reasonable excuse.

Division 7C Power to seize evidence

New section 62N (Seizing evidence at a public place that may be entered without consent or warrant) provides that, if an investigator enters a public place, the investigator may seize a thing at a public place if the investigator reasonably believes the thing is evidence of an offence against this Act.

New section 62O (Seizing evidence at a place that may only be entered with consent or warrant) provides for seizure of evidence when an investigator enters a place with consent by the occupier or under a warrant.

New section 62P (Power to secure a seized thing) outlines that an investigator may leave a seized thing at the place where it was seized and take reasonable action to restrict access to it or move the thing from the place of seizure.

New section 62Q (Offence to contravene a seizure requirement) establishes an offence if a person, whom the investigator reasonably believes is in control of the place or thing, does not comply with a request made by the investigator under new section 62P to restrict access to a seized thing and does not have a reasonable excuse. This will enable an investigator to ensure a seized thing is safe or will not be tampered with. The maximum penalty is consistent with similar offences in other legislation. For example, section 106F of the QBCC Act provides a maximum penalty of 50 penalty units for contravening a seizure requirement.

New section 62R (Offence to interfere) establishes an offence for a person to tamper with a seized thing if it is restricted under new section 62P without an investigator's approval or a reasonable excuse. This provision seeks to protect a seized thing for safety or evidentiary purposes. The maximum penalty is consistent with similar offences in other legislation. For example, section 195 of the Education Act provides a maximum penalty of 50 penalty units for tampering with seized things.

New section 62S (Receipt and information notice for seized thing) provides that an investigator must, as soon as practicable after seizing a thing, provide a receipt and information notice to an owner or person from whom the thing is seized.

New section 62T (Access to seized thing) provides an owner with access to a seized thing unless it is forfeited or returned.

New section 62U (Return of seized things) provides that if a seized thing is not forfeited, it must be returned to its owner at the end of 1 year or, if proceedings have begun, at the end of proceedings and any appeal.

New section 62V (Forfeiture of seized things) provides that a thing may be forfeited to the BPEQ after reasonable inquiries are made, reasonable efforts are made to locate the owner or if the BPEQ or an investigator reasonably believes it is necessary to keep the thing to prevent it being used to commit the offence for which it was seized.

New section 62W (Information notice about forfeiture decision) requires the BPEQ to give a person who owned a thing immediately before forfeiture an information notice about the decision.

New section 62X (When a thing becomes property of the board) provides that if a thing is forfeited to the BPEQ, it becomes property of the BPEQ.

New section 62Y (How property may be dealt with) allows the BPEQ to deal with the thing as the BPEQ considers appropriate.

Clause 100 Amendment of s 73 (Board's decision on investigation about registered professional engineer)

Clause 100 amends section 73 (Board's decision in investigation about registered professional engineer) to provide that the BPEQ may place a condition on a registered professional engineer's registration without first having to obtain the registered professional engineer's consent.

Clause 101 Amendment of s 80 (Functions of board)

Clause 101 amends section 80 (Functions of board) to provide that an additional function of the BPEQ is to approve a program to audit registered professional engineers.

Clause 102 Replacement of s 90 (Report about person's criminal history)

Clause 102 amends section 90 (Report about person's criminal history) to ensure that the chief executive may make inquiries and procure a criminal history check for all proposed board member appointments, including a registered professional engineer elected under the Act.

Clause 103 Amendment of s 102 (Keeping register)

Clause 103 amends section 102 (Keeping register) is amended to provide that the register maintained by the BPEQ of persons who are, or have been, registered professional engineers must record whether a person is a practising or non-practising registered professional engineer.

Clause 104 Amendment of s 122 (Review of particular decisions)

Clause 104 amends section 122 (Review of particular decisions) and provides that a person who has been given, or entitled to be given, an information notice about a decision by the BPEQ to forfeit a seized thing can apply to the tribunal for a review. A person whose registration is subject to a condition imposed by the BPEQ under section 27A(1) and section 73(2)(d) can also apply to the tribunal for a review.

Clause 105 Replacement of s 139 (Summary proceedings for offences)

Clause 105 amends section 139 (Summary proceedings for offences) to improve clarity and update drafting style.

Clause 106 Insertion of new s 142B

Clause 106 inserts a new section 142B (Statutory declarations to verify information required under the Act) to provide that if a person is required under the Act to give information to the BPEQ, that the BPEQ may ask the person to verify the information by statutory declaration.

Clause 107 Amendment of sch 2 (Dictionary)

Clause 107 amends Schedule 2 (Dictionary) and provides new definitions. The clause also omits words no longer required to be defined in the dictionary.

Part 6 Amendment of Queensland Building and Construction Commission Act 1991

Division 1 Preliminary

Clause 108 Act amended

Clause 108 states that this part amends the *Queensland Building and Construction Commission Act 1991*.

Division 2 Amendments commencing on assent

Clause 109 Insertion of new section 28C

Clause 109 inserts new section 28C of the QBCC Act which allows the commission to notify interstate or New Zealand Licensing authorities of the listed licensing changes. The commission must give a copy of the notice to the licensee. This provision seeks to improve information sharing between licensing authorities.

Clause 110 Amendment of s 30 (Classes of contractors' licences)

Clause 110 amends section 30 and removes subsection (4). The provisions of this subsection will be inserted as new section 30E to apply to all sections of Division 1 of Part 3 of the Act.

Clause 111 Insertion of new s 30E

Clause 111 inserts new section 30E and provides that a regulation may provide that a class of licence may no longer be applied for or issued. Additionally, the regulation may provide that a licence of that class may continue to be held and renewed by a person who held the licence immediately before the commencement of the regulation.

Clause 112 Amendment of s 31 (Entitlement to contractor's licence)

Clause 112 amends section 31 and provides that the QBCC may consider any cancellation, or suspension of an interstate or NZ licence in deciding whether a particular person is a fit and proper person to hold a contractor's licence in Queensland. This ensures that Queensland consumers are protected from licensees who have been identified in other jurisdictions as being unsuitable to hold a licence.

Clause 113 Amendment of s 32 (Entitlement to a nominee supervisor's licence)

Clause 113 amends section 32 and provides that the QBCC may consider any cancellation, or suspension of an interstate or NZ licence in deciding whether a particular person is a fit and proper person to hold a nominee supervisor's licence in Queensland. This ensures that Queensland consumers are protected from licensees who have been identified in other jurisdictions as being unsuitable to hold a licence.

Clause 114 Amendment of s 32AA (Entitlement to a site supervisor's licence)

Clause 114 amends s 32AA and provides that the QBCC may consider any cancellation, or suspension of an interstate or NZ licence in deciding whether a person is a fit and proper person to hold a site supervisor's licence in Queensland. This ensures that Queensland consumers are protected from licensees who have been identified in other jurisdictions as being unsuitable to hold a licence.

Clause 115 Omission of s32A (Exception for s30(4) licences)

Clause 115 omits existing section 32A as this is no longer needed due to the introduction of new section 30E which specifies that a continuing licence class may be specified by regulation for any type of licence.

Clause 116 Amendment of s 48 (Cancellation or suspension of licence)

Clause 116 amends section 48 and inserts new subsection (2). It provides that the QBCC may suspend or cancel a licence if the licensee has an interstate or NZ licence and the interstate or NZ licensing authority cancels or suspends the licence. This ensures that Queensland consumers are protected from licensees who have been identified in other jurisdictions as being unsuitable to hold a licence.

Clause 117 Insertion of new pt 3, div 9B

Clause 117 inserts a new division 9B under Part 3. It provides the requirements for a qualified accountant and details the matters the QBCC may consider in approving suitable accountants to be able to prepare MFR reports. Similarly, the division sets out considerations and processes that will allow the QBCC to refuse to approve an accountant or revoke an existing approval. Comprehensive and accurate MFR reports are the cornerstone of the QBCC's ability to protect consumers and industry from the effects of company collapses. Consequently, these provisions seek to ensure the accountants preparing such reports are independent and have not engaged in conduct that might diminish the effectiveness of the MFR framework.

Clause 118 Amendment of s 53A (Satisfying minimum financial requirements at renewal)

Clause 118 amends section 53A. It removes a redundant reference to the previous Board policy and clarifies the existing MFR requirements.

Clause 119 Insertion of new ss 53BA and 53BB

Clause 119 inserts new sections 53BA and 53BB that strengthen the MFR framework.

New section 53BA strengthens a requirement that is currently in the Queensland Building and Construction Commission Regulation (Minimum Financial Requirements) Regulation 2018. It provides that the penalty for failing to provide information to the QBCC under the MFR framework is to be increased to 200 penalty units. This higher penalty reflects the seriousness of a breach, as providing detailed financial information is essential to enable the QBCC to identify financial concerns and protect industry and consumers.

New section 53BB imposes additional responsibilities on executive officers of a licensed entity and those carrying on business in partnership with a licensee. Similar to the executive officer responsibilities in other safety-focused Acts, these persons will be required to take reasonable steps to promote their company's compliance with the MFR framework. This includes maintaining a knowledge and understanding of the MFR framework and ensuring that appropriate resources and processes are provided to promote compliance. This seeks to further protect consumers by ensuring that responsibility is shared by all key decision makers within a company and that each is held accountable for decisions made in their field of responsibility.

To reflect the seriousness of breaches of this provision, it is also proposed to prescribe new, escalating penalties under the QBCC Act for executive officers who fail to these responsibilities, culminating in a maximum penalty of imprisonment. These penalties are consistent with other similar offences in the QBCC Act. They also reflect the significant financial losses to industry and consumers that are often associated with company collapses and seek to provide a clear deterrent to non-compliance.

Clause 120 Amendment of s 56AG (Procedure if licensee is excluded company)

Clause 120 amends section 56AG(2)(d) which incorrectly refers to subsections (4) and (5), when only subsection (3) applies. The clause corrects this error.

Clause 121 Amendment and renumbering of s 72AA (Delaying or obstructing compliance with direction to rectify or remedy)

Clause 121 amends section 72AA and prescribes a penalty of 250 penalty units if a person, without reasonable excuse, delays or obstructs the rectification of defective or

incomplete building work or the remedy of consequential damage, as required by a direction to rectify or remedy. This penalty is consistent with the existing penalty for failing to comply with a direction to rectify and will ensure that the provision can be appropriately enforced by the QBCC.

Clause 122 Amendment of s 86 (Reviewable decisions)

Clause 122 amends section 86 and provides that the QBCC's decisions relating to approved accountants are reviewable. A person who is given notice of a reviewable decision may apply for internal review by the QBCC under section 86A or for external review by the tribunal under section 87.

Clause 123 Insertion of new s 109B

Clause 123 inserts new section 109B which provides that a licensee must notify the QBCC within 14 days if the licensee is granted an interstate or New Zealand licence, or if the licensee's interstate or New Zealand licence is suspended or cancelled in the approved form. It also provides a penalty of 20 penalty units for non-compliance to enable the QBCC to better enforce the provisions. This penalty is consistent with the existing penalty for failing to comply with the requirements to notify the QBCC of change of circumstances.

Clause 124 Amendment of s 116 (Regulations)

Clause 124 amends section 116 to clarify that a regulation may prescribe when information must be prepared or signed by a qualified accountant.

Clause 125 Amendment of sch 1 (Transitional and validating provisions)

Clause 125 inserts new schedule 1, part 17 which provides transitional provisions for the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*.

Part 17 Transitional and validation provisions for Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020

New section 79 provides that landscaping licensees performing relevant work before the commencement of the Queensland Building and Construction Commission (Structural Landscaping Licences) Amendment Regulation 2019 shall be taken to have an appropriate licence and are protected from prosecution under the QBCC Act. This clarifies that these licensees, who may now legally perform work on tennis or other sporting court, were not expected to hold a builder licence to complete this work.

New section 80 states that for deciding whether a person is a fit and proper person or whether to suspend or cancel a licence, sections 31, 32, 32AA and 48(2) apply in relation to the suspension or cancellation of an interstate or New Zealand licence only if the suspension or cancellation happens after the commencement. It also states that the QBCC is required to give a notice under section 28C for an event mentioned in section 28C(1) only if the event happens after the commencement.

New section 81 provides that if, before the commencement, the QBCC decided not to approve a person as a qualified accountant for the Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018, as soon as practicable after the commencement, the QBCC must give the person an

exclusion notice for the decision. The exclusion notice is taken to have been given to the person on the day the person was given notice of the decision that the person was not approved as a qualified accountant.

Section 82 provides a transitional regulation-making power provision. It states that a transitional regulation may make provision of a saving or transitional nature about any matter for which it is necessary to make provision to allow or to facilitate the doing of anything to achieve the transition from the pre-amended Act to the amended Act; and for which this Bill does not provide or sufficiently provide. It also provides that this section and any transitional regulation expire 2 years after the commencement.

Clause 126 Amendment of sch 2 (Dictionary)

Clause 126 amends the dictionary to insert definitions of terms used in the Bill.

Division 3 Amendments commencing on 1 July 2020

Clause 127 Amendment of s 50A (Approved audit program)

Clause 127 omits the reference to the *Building Industry Fairness (Security of Payment) Act 2017* as the powers to for an approved audit program has been moved s 50A to section 189 of the *Building Industry Fairness (Security of Payment) Act 2017*.

Clause 128 Amendment of s 50CA (Who is a *qualified accountant*)

Clause 128 amends new section 50CA on 1 July 2020 in line with the commencement of the amendments to the BIF Act. The provision relies on the definition of “related entity” in the BIF Act which will be moved to section 10A from 1 July 2020.

Clause 129 Amendment of s 67AZB (Limit on demerit points from single audit)

Existing section 67AZB of the QBCC Act applies if a licensee is convicted of demerit offences discovered by the QBCC as a result of a written notice given to a licensee under an approved audit program under the QBCC Act. From 1 July 2020 the BIF Act will also prescribe an approved audit program that a licensee will be required to comply with. This amendment ensures that an approved audit program under the BIF Act will also be an approved audit program for this section.

Clause 130 Amendment of s67NB (Failure to pay retention amount)

Clause 130 amends existing offence under section 67NB for a failure by a contracting party to release a retention amount to the contracted party in accordance with the relevant building contract. A contracting party may withhold retention amounts from progress payments to the contracted party to secure the performance of a contract. Alternatively, the contracted party may lodge with the contracted party another form of security, for example, a bank guarantee or interest-bearing deposit. To provide protections for more contracted parties, the amendment expands the application of the offence to other forms of security, in addition to a retention amount. This means that contracted parties who fail to release security can be held to account.

Clause 131 Amendment of s 67U (Void payment provision in construction management trade contract or subcontract)

This clause amends section 67U to align the definition of business day for construction management trade contracts and subcontracts to align with the definition in the BIF Act of business day. This will provide clarity for industry when preparing contracts for building work. Currently industry is required to apply two different definitions of business day depending on the term that is used. This is confusing and unnecessary and can

have unintended consequences. The BIF Act definition of business day excludes Saturday, Sunday, public holidays and the traditional construction industry 'shut down period' of 22 December to 10 January.

Clause 132 Amendment of s 67W (Void payment provision in commercial building contract)

This clause amends section 67W to align the definition of business day for commercial building contracts to align with the definition in the BIF Act of business day. This will provide clarity for industry when preparing contracts for building work. Currently industry is required to apply two different definitions of business day depending on the term that is used. This is confusing and unnecessary and can have unintended consequences. The BIF Act definition of business day excludes Saturday, Sunday, public holidays and the traditional construction industry 'shut down period' of 22 December to 10 January.

Clause 133 Amendment of s 86 (Reviewable decisions)

Clause 133 amends section 86 of the QBCC Act to provide that a decision under new section 54E of the BIF Act by the commissioner to exclude an auditor from undertaking trust account reviews and preparing account review reports for a trust account.

Division 4 Amendments commencing by proclamation

Clause 134 Amendment of s 32AA (Entitlement to a site supervisor's licence)

Clause 134 amends s 32AA and provides that an excluded individual or permanently excluded individual is not entitled to hold a site supervisor's licence. This recognises the influential nature of a site-supervisor and ensures that those who are excluded under the QBCC Act for bankruptcy or involvement in a company collapse are prevented from holding further positions of influence. Please note, a transitional provision (under clause 137) is also relevant to this amendment.

Clause 135 Amendment of s 42E (Avoidance of contractual obligations causing significant financial loss)

Clause 135 amends section 42E to remove reference to a person who 'avoids complying with' a contract. It will remain an offence if a person, without reasonable excuse, causes another party to a building contractor to suffer a significant financial loss because of the person's deliberate noncompliance with the contract.

The amendment recognises that there will be few situations where some avoids complying with the contract where that outcome did not also involve a failure to comply. Removing this wording simplifies and clarifies the operation of section 42E, which will enhance the QBCC's chances of a successful prosecution.

Successful prosecution of a breach of section 42E depends on proof, beyond reasonable doubt, of absence of a 'reasonable excuse' for failure to perform a contractual obligation. To this end, clause 117 also inserts a note referencing section 76 of the Justices Act 1886. It is generally accepted that the effect of section 76 is that there is a legal burden on the defendant to prove the existence of a reasonable excuse, on the balance of probabilities. The inclusion of this note highlights the intention that for section 42E, the onus of proving any exemption, exception, proviso or condition depending upon new or additional facts is on the defendant.

Clause 136 Amendment of s 48 (Cancellation or suspension of licence)

Clause 136 provides for a consequential amendment that accommodates the additional subsection inserted by the amendment to 32AA.

Clause 137 Amendment of s 50C (Supply of financial records and other documents under approved audit program or for other reason)

Clause 137 provides for a consequential amendment that accommodates the renumbered subsections of section 48.

Clause 138 Amendment of s 53B (False or misleading documents about minimum financial requirements)

Subclauses (1) to (4) remove references to false or misleading 'documents', as existing references to false or misleading 'information' would include a document.

Subclause (5) inserts an offence where a licensee knowingly gives someone, other than the QBCC, MFR information that is false or misleading and the information is subsequently given to the QBCC in compliance, or purported compliance with the Act. MFR information is defined as information relating to the licensee's satisfaction of the MFR.

This offence will allow the QBCC to hold a licensee to account in cases where, for example, an accountant unwittingly passes on false or misleading information that originated from a licensee. Section 53B of the Act provides an existing penalty of 100 penalty units or 2 years imprisonment.

Clause 139 Amendment of s 56AB (Operation of pt 3A)

Clause 139 amends section 56AB and omits exclusion of site supervisor licence from the operation of Part 3A. This ensures that excluded individuals are not entitled to a site supervisor licence in Queensland.

Clause 140 Insertion of new pt 3A, div 4

Existing part 3A is designed to remove individuals who have demonstrated their incapacity to manage finances from the building industry. It applies to excluded individuals as defined under section 56AC, being an individual who becomes bankrupt or is involved in a construction company that is insolvent or wound up. Division 3 sets out the procedure for licence exclusion and cancellation if the QBCC considers a licensee is an excluded individual for a relevant event.

The new provisions inserted by this clause extends the application of part 3A to excluded individuals who are not licensees. The clause implements Taskforce recommendation 9 which sought to promote transparency about a person's previous commercial dealings, to assist consumers and contractors to make informed decisions about whether to conduct business with certain individuals.

New section 56AI establishes a head of power for the publication of relevant details about excluded individuals who are not licensees. 56AI(2) defines the relevant details as the:

- the individual's full name and business address. However, subsection (4) provides that if the individual's business address is the same as the individual's residential address (which can be the case for smaller operators), the QBCC may only publish the suburb or locality for the business.

- any other name by which the individual is, or has been, known by. Some industry participants have been known to use aliases to avoid QBCC oversight
- the relevant event for which the individual is excluded i.e. the bankruptcy or company insolvency
- the date the exclusion took effect i.e. the date of the relevant event.

Of course, the QBCC would only be required to publish those details within its knowledge. For example, the QBCC may not be aware of names by which the individual has been known.

The QBCC may only publish the details of an excluded individual if all periods for applying for a review of the decision or making an appeal against a decision made on the review have ended, and any review or appeal is finally decided or not proceeded with. relevant review or appeal have ended. Further, the information may not be published for longer than 10 years.

If the QBCC considers an unlicensed individual is an excluded individual, it may give the individual written notice of the fact. New section 56AJ sets out the show cause procedure. The notice must state the reasons why the QBCC considers the individual to be an excluded individual, the individual's right of reply, and the ability for the QBCC to publish the individual's details. An individual who is given a show cause notice may give the QBCC a written submission within 28 days to show why the individual is not an excluded individual for the event.

New section 56AK allows the QBCC to publish an individual's relevant details if, after the show cause process, it considers the individual is an excluded individual. The QBCC must give the individual notice of the decision.

Clause 141 Amendment of s 57 (Operation of pt 3B)

Clause 141 amends section 57 and omits exclusion of site supervisor licence from operation of Part 3B. This ensures that permanently excluded individuals are not entitled to a site supervisor licence in Queensland.

Clause 142 Amendment of s 58 (Meaning of *permanently excluded individual*)

Existing section 58 defines a permanently excluded individual is an individual who has twice been an excluded individual for a relevant event and who has been given written notice by the QBCC for each relevant event.

Clause 142 amends section 58(2)(b)(i) to provide that a second or subsequent notice given to an unlicensed individual about being an excluded individual for a relevant event must state the effect of section 61A. Section 61A allows the QBCC to publish the details of a permanently excluded individual who is not a licensee. This information is relevant for inclusion in a second notice, as an individual who is twice excluded may be considered a permanently excluded individual.

Clause 143 Insertion of new pt 3B, div 3

Clause 143 inserts new part 3B, division 3 of the QBCC Act which consists of section 61A. Section 61A provides that the QBCC may publish relevant details for an individual if the individual is not a licensee and is a permanently excluded individual. The relevant details are defined in the same way as under new section 56AI.

Clause 144 Amendment of s 62 (Operation of pt 3C)

Clause 144 amends section 62 to ensure that convicted company officers are not entitled to a site supervisor licence in Queensland.

Clause 145 Amendment of s 67AV (Operation of pt 3E)

Clause 145 amends section 67AV to ensure that disqualified individuals are not entitled to a site supervisor licence in Queensland.

Clause 146 Amendment of s 86 (Reviewable decisions)

Clause 146 provides that decisions that an individual is an excluded individual and to publish the individual's relevant details are reviewable.

Clause 147 Amendment of s 111 (Prosecutions for offences)

Clause 147 increases by one year the timeframes under section 111 in which a prosecution for an offence against the Act may be started. That is, to within three years after the alleged date of commission of the offence or within two years after the offence comes to the knowledge of the QBCC, whichever is the later.

Clause 148 Amendment of new sch 1, pt 17 ss 83 and 84 *Clause 148* inserts new schedule 1, part 17 which provides transitional provisions for the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*.

New section 83 clarifies that Parts 3A, 3B, 3C and 3E apply to a site supervisor only in relation to a relevant event that happens after the commencement. It also provides that the ability to publish the relevant details of an excluded or permanently excluded individual under new Part 3A, division 4 of applies regardless of whether the event leading to the exclusion happened before or after commencement. Part 3B, division 3 applies in relation to an individual, other than a site supervisor, who is a permanently excluded individual, even if the individual became a permanently excluded individual before the commencement.

Section 84 provides that for offences committed prior to commencement, the previous prosecution timeframes under section 111 will continue to apply.

Clause 149 Amendment of sch 2 (Dictionary)

Clause 149 amends the dictionary to insert definitions of terms used in the Bill.

Part 7 Amendment of Retirement Villages Act 1999

Clause 150 Acts amended

Clause 150 provides that this part amends the *Retirement Villages Act 1999*.

Clause 151 Insertion of new s 41K

Clause 151 inserts new section 41K into the *Retirement Villages Act 1999* to provide that a person who has been given a QCAT information by the chief executive in relation to a transition plan may apply, as provided under the *Queensland Civil and Administrative Tribunal Act 2009*, to the Queensland Civil and Administrative Tribunal for a review of the decision.

Part 8 Repeal

Clause 152 Repeal

Clause 152 repeals the *Retirement Villages (Transitional) Regulation 2019* as this has been superseded by the amendment to the *Retirement Villages Act 1999* in part 7.

Part 9 Minor and consequential amendments

Clause 153 Acts amended

Clause 153 Provides for schedule 1 which is the amendment of other Acts.

Schedule 1 Acts amended

Part 1 Amendments commencing on assent

This part details the amendments that commence on assent which include amendments to the *Architects Act 2002* and *Professional Engineers Act 2002*.

Part 2 Amendments commencing by proclamation

This part details the amendments to the *Building Act 1975* and *Queensland Building and Construction Commission Act 1991* that commence by proclamation.

The part also provides for the commencement by proclamation of consequential amendments to the *Fire and Emergency Services Act 1990*, *Planning Act 2016*, *Private Health Facilities Act 1999* and *Public Health (Infection Control for Personal Appearance Services) Act 2003*.