QUEENSLAND BUILDING SERVICES AUTHORITY AMENDMENT BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the legislation

The legislation is designed to remedy deficiencies that have arisen in administration of the *Queensland Building Services Authority Act 1991* and in building industry regulation generally.

The goal of industry regulation is to provide for the maximum operation of market forces consistent with protection of consumers, contractors, suppliers and other industry participants from unconscionable practices and injustice arising from their relative market knowledge and power.

In establishing regulatory mechanisms, the legislation also attempts to allocate operational costs to the building sector and among participants, so as to avoid costs being borne by taxpayers generally.

Reasons for the Bill

The Bill arises from a process of review of existing regulatory arrangements that has been ongoing for some years. It represents the first stage of legislative implementation of the outcomes of this review process.

The Bill simultaneously—

- remedies what are perceived as deficiencies in the overall structure of industry regulation;
- explicitly recognises the structure of contractual relationships in the building industry;
- deals with problems arising from contractual relationships among industry participants;
- defines vague or poorly understood concepts and relations

operating in the industry so as to minimise litigation;

- removes injustices through the creation of rights in certain instances;
- addresses anomalies in functions and powers of the regulatory authority; and
- establishes the basis for a more equitably sourced and in the long term sound financial underpinning for the regulatory apparatus.

Consistency with fundamental legislative principles

There are a number of areas of possible inconsistency with fundamental legislative principles as set out in the *Legislative Standards Act 1991* (the 'LSA'). These arise primarily from administrative necessity in implementation of the policy intent of the legislation. Detailed comments are set out below.

Possible conflict 1

Clause 14 delegates the power to establish financial requirements to the board, through publication of policies. This may be held to infringe the fundamental legislative principle relating to the delegation of administrative power (s4(3)(c) of the LSA although, in reality, this probably is the delegation of a legislative power.

Comment 1

This is an appropriate case for the delegation of administrative power given:

- familiarity of contractors with this arrangement;
- the detailed financial nature of the requirements; and
- the need to be able to amend the requirements promptly to deal with emerging fact circumstances (for example, the board has previously amended its policy relating to financial requirements for licensing to allow licensing of subsidiaries where the directors did not fully control the operation of the company and therefore, were unwilling to sign director's guarantees).

Equally, members of the board are appropriate persons to hold the delegated power for establishing financial requirements in that:

- they are independent of the authority;
- are representative of the industry being regulated; and
- policies of the board are published in the gazette.

Possible conflict 2

Clause 23, which allows the authority to impose immediate suspension of a licence, probably infringes the fundamental legislative principle relating to consistency with the principles of natural justice (s4(3)(b) of the LSA) given that contractors have no right to state their case prior to the action being taken.

Comment 2

The infringement appears justified given the circumstances in which the power may be exercised. The precondition in this instance is a reasonable belief that there is a real likelihood of serious harm to various persons if the action is not taken. The extensive rights of representation and review available to affected parties concerning the exercise of this power also mitigate the conflict.

Possible conflict 3

Clause 24, which empowers the authority to conduct random audits of licensees and to require licensees to produce financial information, may infringe the fundamental legislative principle relating to making rights and obligations contingent on the exercise of administrative power (s4(3)(a) of the LSA).

Comment 3

The power is adequately defined and hedged to prevent any arbitrary exercise of power. A decision to audit someone does not have significant adverse impact upon that person unless subsequent action is taken against their licence. Safeguards are set up in the legislation to prevent excessive or onerous auditing. It is arguable that the decision to conduct an audit is not therefore reviewable by the tribunal, as it has no definable adverse impact. Any action taken in consequence of a random audit is, however, subject to full review before the tribunal.

Possible conflict 4

Clause 26, which sets up a process to exclude bankrupts and persons making use of bankruptcy laws from holding licences or influencing

licensee companies for a five-year period, may infringe the fundamental legislative principle in relation to obligations being dependent on administrative power (s4(3)(a) of the LSA). It is also arguable at first sight that this clause infringes the fundamental legislative principle relating to reversal of the onus of proof (s4(3)(d) of the LSA).

Comment 4

The powers are adequately defined (being in some cases, largely objective) and are subject to appropriate review.

The onus of proof issue is not applicable, as this is an administrative and not a criminal proceeding.

Possible conflict 5

Clause 35, which holds directors of companies personally liable for amounts owing to the authority under the Act, may be inconsistent with principles of natural justice (and therefore s4(3)(b) of the LSA). The inconsistency arises because a director or another executive officer may be held liable for a debt without being first made aware that the debt is arising (by, for example, payment of an insurance claim).

Comment 5

This provision does no more than give statutory clothing to a power already available to the authority by litigating at common law under the terms of guarantees and indemnities it holds. The impact of this provision is ameliorated by the fact that the debtor can challenge the validity of the debt in subsequent recovery proceedings. Further, the debtor may, in some cases, be afforded an opportunity to rectify work (and therefore minimise personal liability) where such action is considered appropriate.

Possible conflict 6

Clause 35, which indemnifies the general manager from actions arising from warnings made under s18(2) of the Act infringes the fundamental legislative principle of conferring immunity from proceeding, that is, a defamation proceeding (s4(3)(h) of the LSA).

Comment 6

Warnings under s18(2)(f) of the Act are almost certain to be defamatory, since they advise the public not to have dealings with a building contractor on account of such matters as incompetence or financial malfeasance. These warnings protect the public and minimise the harm caused by rogue operators continuing in the market. The immunity is necessary to allow the function to be exercised effectively in the significant public interest of consumer protection. A similar provision exists for the Commissioner of Consumer Affairs under s109 of the *Fair Trading Act 1989*.

Estimated Cost for Government Implementation

The Bill envisages changes to the statutory insurance scheme to provide for operational requirements of the authority as industry regulator. The estimated cost for prudent administration is $5.5m in a full year. These costs will be paid by consumers through the statutory insurance scheme.

Consultation

The Bill is based on extensive consultation with industry stakeholders and other interested parties over a period of some years. Groups consulted include the Queensland Master Builders Association and the Housing Industry Association (representing builders); the Building Industry Specialist Contractors' Association and the Master Plumbers Association (representing subcontractors); the Construction Industry Group of the Australian Council of Trade Unions – Queensland (representing employees), and the Queensland Law Society.

NOTES ON PROVISIONS

Clause 1 sets the short title of the Act as the *Queensland Building Services Authority Amendment Act 1999.*

Clause 2 that the Act can be commenced by proclamation.

Clause 3 provides that the Act will amend the *Queensland Building Services Authority Act 1991*. References to sections derive from that Act.

Clause 4 amends s4 (Definitions).

The omission and replacement of words in the preamble of s4 corresponds to contemporary drafting style and does not affect the intention of the existing provision. The definitions added are necessary to provide a basis for terms added to the Act by new provisions.

"completed building inspection" relates to an area being added to the definition of "building work" in this section.

"executive officer" relates to a number of provisions affecting the liability of persons involved in the control of companies under the Act.

"field work" relates to an area being added to the definition of "building work" in this section.

"fire protection system" relates to an area being added to the definition of "building work" in this section.

"site classification" relates to an area being added to the definition of "building work" in this section.

"site testing" relates to an area being added to the definition of "building work" in this section.

Clause 4(3) adds to the definition of "building work" contained in the existing Act a number of new areas, incorporating the definitions added by clause 4(2). The effects of adding these areas to the definition are to require the licensing of fire protection, soil testing and completed building inspection (such as pre-purchase inspection) practitioners, and to regulate these activities under the Act. In each case, inclusion within the regulatory ambit of the legislation arises from representations by industry. Consumers will also benefit from access to the protections and dispute resolution procedures made

available under the Act for these growing areas of the industry.

Clause 5 inserts new ss4B and 4C.

S4B provides that the State and as far as is possible the Commonwealth are bound by the Act, except as otherwise provided. This provision removes all doubt, inter alia, that contractors for the State and Commonwealth must provide insurance cover under the statutory insurance scheme for domestic dwellings they construct. Since insurance cover runs with the building, this will provide consumers, subsequent purchasers of dwellings constructed by the State and Commonwealth will enjoy appropriate defects and subsidence cover. Binding of the State and Commonwealth will also ensure that contractors for public sector construction operate under the same regulatory regime as contractors in the private sector. Construction carried out by the State or the Commonwealth (i.e. using State or Commonwealth labour and not private contractors) will remain outside the ambit of the Act.

Neither the statutory insurance scheme (Part 5) nor the authority's power to direct the rectification of building work (Part 6) appropriately apply to inspections of completed buildings. New s4C removes this area of building work from the ambit of those provisions.

Clause 6 amends s9 (Role of board)

The origins of the regulatory regime imposed by the Act lie largely in the devastating losses sustained by subcontractors under former provisions. The inclusion of a specific function for the board to monitor security of payment to subcontractors recognises that avoidance of potential injustices in this area is a significant object of the regulatory regime.

Clause 7 replaces s10 (Composition of board) and inserts a new s10A (Duration of appointment of members)

The new provisions inserted by this clause change the board to make it smaller (reduction from 9 voting members to 7 voting members and 1 non-voting member) while retaining the same overall balance of industry, professional and consumer representation as the previous board. The former requirements for certain industry organisations to submit lists of nominees are omitted as being inconsistent with appropriate executive discretion. The total number of licensee representatives is reduced from 5 to 3. 10(1)(a) provides that, of the 3

licensees, at least one must be a builder and one a subcontractor. A representative of building and construction unions is added. In order to enhance communication between the authority and the Minister, a non-voting public service representative is also added. The chairperson is to be appointed from among the seven ordinary members, unlike the former provision where the chairperson was appointed in addition to the other members.

S10A, in line with contemporary drafting style, moves coverage of technical issues concerning appointment to a separate section. The maximum duration of appointment remains at 3 years and the mechanism of appointment and determination of remuneration remains through the Governor in council The automatic vacancy provisions set by s10A(3) are also varied in line with contemporary drafting style. The inclusion (s10A(3)(b))of a provision that an automatic vacancy occurs if a member becomes an employee or contractor of the authority is an appropriate safeguard and in line with contemporary public sector practice.

Clause 8 amends s12 (Proceedings at meetings)

This clause is consequential on the changes to the composition of the board wrought by clause 7. It reduces the quorum for board meetings from 5 members to 4 members and accounts for the position of the non-voting public service member in provisions governing voting.

Clause 9 replaces s15 (Fees and allowances)

This clause, while it has the effect of omitting existing s15 and substituting a new provision, varies from the former provision only in clarifying the requirement that members of committees established by the board are only eligible for remuneration if they are also members of the board. This limits the scope for the board to incur financial liabilities without otherwise limiting its ability to establish committees and order its affairs.

Clause 10 amends s18 (Role of general manager)

This clause inserts a new provision in the list of matters under s18(2) for which the general manager is responsible. This is a new subsection 18(2)(ea) requiring the general manager to undertake strategic planning so as to enable the authority to hold sufficient assets and reserves to deal with the cyclical demands placed upon the authority's services by industry activity. This appropriately makes explicit in the principal

legislation requirements imposed implicitly elsewhere.

The omission of 18(2)(h)(ii) arises from false expectations on the part of some consumers that the authority is able to, or should, provide a legal advice service. The remaining provisions provide adequate scope for consumer advice. Projected legislation governing domestic building contracts will further clarify this issue.

Clause 11 inserts a new part2, division 5 (Insurance manager)

This clause inserts a new division establishing and making consequent provisions for a statutory position of insurance manager to exist within the authority. The purpose of the statutory position is to provide the board with an independent channel of advice concerning the administration of the insurance scheme. This is achieved while retaining the advantageous features of existing corporate governance allowing the general manager to deploy regulatory and insurance powers to optimal effect in dealing with defective and incomplete building work. S21 makes it explicit that the statutory insurance manager is to be appointed by the authority along normal arrangements concerning authority employees. S22 establishes the limited independence of the position under the overall authority of the general manager, with s22(2) providing that only in the provision of advice to the board as requested by the board is the insurance manager to be independent of the general manager's control.

Clause 12 amends s25 (General Statutory Fund)

The insertion of a new s25(2)(c) as provided by this clause allows for the financial scheme established under clause 13.

Clause 13 amends s26 (Insurance Fund)

This clause enables funds to be raised for the operations of the authority under the General Statutory Fund by collection through the statutory insurance scheme. Under former arrangements in s26(3) (omitted by this clause), funds raised by insurance premiums could only be used for paying claims and for the administration of the scheme itself. The new s26(3) provisions allow, in addition, some funds to be raised through premiums to be transferred to the General Statutory Fund. This reflects the principle that beneficiaries of a service should contribute to the cost of a service.

The maximum amount transferable under this arrangement in any period of time is to be set by a regulation the head of power for which is given by new s26(4). It is intended that a regulation under this subsection would normally detail the amount raised from the scheme to be transferred for the forthcoming fiscal year.

S26(5) allows the drawing down of funds for the purposes of the authority's operations, without limiting the number or amounts of tranches. The flexibility inherent in this arrangement will facilitate the effective management of the two funds so as to deal with cyclical conditions applying throughout the year.

S26(6) imposes a requirement for the premium rate as set by regulation under this section to have regard to the amount to be transferred.

Clause 14 amends s31 (Entitlement to contractor's licence)

Subclause (1) alters s31(1)(c) – where the licensee is an individual – and s31(2)(c) – where the licensee is a company – to provide that the financial requirements to be met by a licensee are defined by a policy of the board rather than by regulation. This reflects in the principal legislation the actual position at present, where the regulation delegates setting of financial requirements to board policy. It is necessary to have financial requirements set by board policy to allow the authority greater flexibility in determining appropriate levels and ratios of assets and turnover, allowing the regulatory apparatus to respond quickly to changed economic circumstances and building technology.

Subclause (2) replaces s31(2)(b) with a new provision designed to ensure that a nominated supervisor must have a licence requiring skills appropriate for the work being supervised. The need for this amendment arose because holders or house building or general building licences are necessarily entitled to supervise all types of building work. Many of these contractors do not have the necessary experience or competency to carry out individual trade work however the Act currently enables these persons to be nominated supervisors for companies carrying out trade work. The amendment will require such persons to demonstrate that they possess the appropriate skill base before they will be entitled to be the nominated supervisor for a company carrying out trade work..

Clause 15 amends s33 (Application for licence)

The existing s33 implicitly limits the authority to information supplied by the applicant in obtaining information for use in assessing a licence application. The new s33(3) inserted by this clause explicitly allows the authority to obtain information from extrinsic sources, such as credit bureaus, referee checks and site inspections. This provision thus gives legislative sanction to sound regulatory practice, aimed at ensuring appropriate financial requirements and competencies are achieved for entry to the industry as a licensed contractor.

Clause 16 amends s35 (Imposition of conditions etc. on grant of licence)

Under existing provisions, the requirement for a licensee to continue to meet financial requirements in order to trade under the licence following the initial grant of a licence is insufficiently clearly established. The aim of new s35(2)(a) is to **confirm** that a licensee must meet financial requirements for licensing at all times during the currency of the licence, while new s35(2)(b) requires that variations in the licensee's assets and turnover must be notified to the authority in accordance with the financial requirements for licensing.

Clause 17 amends s36 (Subsequent imposition of conditions etc.)

During the course of dealings with licensees, it may become apparent to the authority that that a licensee who, while competent in a general sense, demonstrates a lack of competence in one particular area of the building work performed under the licence. The section enables the authority, in circumstances where it is not appropriate to suspend or cancel the licence, to require the person to undertake a course in the specific topic which the licensee has demonstrated a lack of understanding. The new subsection 36(3A) inserted by this clause explicitly empowers the authority to impose a condition that the licensee complete an appropriate course remedying the skill or competency deficiency.

Clause 18 inserts a new s38A (Receipt of fee does not revive licence)

The authority has received various submissions from solicitors following cancellation or suspension of licences seeking to overturn the effect of the action on the basis that it has subsequently accepted an annual licence fee from a cancelled or suspended licensee. The new s38A puts it beyond all doubt that the acceptance and receipting of a licence fee does not of itself revive a cancelled or suspended licence

where the licence has been suspended for reasons other than an unpaid fee.

Clause 19 amends s39 (Register)

This clause inserts new provisions to establish enhanced information resources for consumers contemplating entering into a contract for building work. In so doing, it is expected that the new provisions will activate market mechanisms as an additional sanction against substandard building work or unconscionable trading practices. The licence register is a public document that will be available for inspection at authority offices, through telephone inquiries or through the internet.

New s39(3) requires that the register also contain information on each licensee about directions to rectify building work issued by the authority, details of any disciplinary orders against the licensee made by the tribunal, and convictions for offences under the Act.

S39(4), (5) and (6) safeguard licensees against the possibility that directions to rectify, orders in the tribunal and convictions respectively may be overturned on a review application by the tribunal or subsequent appeal to a court by restricting the placing of notations on the register until statutory periods to apply for review or to appeal have expired, or where a review application is lodged but not proceeded with.

S39(7) further safeguards licensee reputations by requiring that notes made in the register under the new s39(3) must be removed after 5 years.

Subclause (3) removes the requirement for licensees to notify the authority of changes in particulars – such as address – in writing.

Subclause (4) inserts a new subsection allowing the authority to determine appropriate methods for advising changes in particulars, providing flexibility to adapt to technological change and to relieve licensees of unnecessary regulatory burden.

Clause 20 amends s42 (Unlawful carrying out of building work)

Until the 1998 decision of the Court of Appeal in *Zullo Enterprises & Ors v Sutton* [1998] QCA 417 (15 December 1998), it was thought that s42, which makes the carrying out or undertaking to carry out of building work unlawful, did not prevent unlicensed contractors

recovering their costs under the common law of contract. The *Zullo* decision held that unlicensed contractors were prevented from recovering anything at all, and held the prospect that unlicensed contractors could be successfully sued for recovery of any moneys paid for prior performance. This potentially allows considerable injustice, such as deliberate recruiting of subcontractors from interstate and legally escaping from any obligation to pay for work performed. Unlicensed contracting will, of course, remain an offence committed by the contractor, but the principle that a builder or owner should not be able to enrich themselves through signing on unlicensed contractors is enshrined in this clause.

This clause amends s42(3) and inserts a new subsection 42(4) to provide an unlicensed contractor with a limited statutory right to recover money which would otherwise be unavailable because of the *Zullo* decision. The new provisions will allow an unlicensed contractor to claim reasonable recovery of moneys actually expended for the supply of materials and labour, other than the contractor's own labour and profit. Existing subsections 42(4) to (6) are renumbered.

The new provision in s42(4)(iii) also prevents an unlicensed contractor unreasonably incurring costs and claiming for recovery under this provision.

S42(4)(c) prevents an unlicensed contractor recovering any more under this provision than the contract price.

S42(4)(d) is designed to attack any scheme entered into by the unlicensed contractor, for example employing the contractor's child or the charging of a management fee by a company of which the contractor is a beneficial shareholder, to use this new provision to gain personal profit from unlicensed contracting.

S42(8) is an unrelated provision, having the effect of removing any doubt that landscape architects, who are not part of the licensing scheme, may continue to ply their trade even though the work they do may in some way be characterised as building work.

Clause 21 amends s46 (Notification on certificate of title).

This clause corrects a deficiency in the Act that prevented the authority from placing a notification on a certificate of title regarding owner-builder work where a permit had not been obtained. The most typical situation this remedies is where the owner-builder is forced to

approach the authority for a permit so that the relevant local authority can approve the work that was illegally carried out. Under the new s46(2), the authority may notify the registrar of titles in respect of work for which a permit should have been, but was not, obtained. The purpose of the notification on the certificate of title is to give prospective purchasers a warning that the building work to which the owner-builder permit relates is not covered by the statutory insurance scheme administered by the authority.

Clause 22 amends s48 (Cancellation of licence)

This clause is consequential on the new provisions regarding financial requirements imposed by this bill in amending s35 (clause 16), and in establishing the new regime of persons excluded from holding licences on grounds of financial misbehaviour in new part 3A (clause 27). The clause also corrects an error preventing the authority from acting to suspend or cancel a licence for a breach of a condition imposed at the time the licence was granted. Subclause (1) deletes s48(d), which is rendered redundant by the deemed conditions established by clause 16. Subclause (2) adds contravention of conditions imposed by s35 (upon grant of licence) to the contravention of conditions imposed by s36 (subsequent to grant of licence) as grounds for cancellation of the licence.

Clause 23 replaces s49A

The existing s49A provided for immediate cancellation of a license by the authority on the sole ground that there was a "serious likelihood that real harm may happen to consumers". In practice, this was found to be overly draconian and so difficult to enforce. The clause inserts new procedures for the immediate suspension of a licence and for the automatic lifting of that suspension after 10 days if the authority takes no further action.

S49A(1) extends the serious harm test to other licensees and their employees, as well as consumers and suppliers.

S49A(2) requires immediate suspension action to be effected by written notice and sets out the requirements of the notice, including reasons for action, an invitation for written representations regarding lifting, review rights, and a description of the automatic lapsing provision.

S49A(3) provides for automatic lapsing after 10 days unless the authority gives notice of intention to suspend or cancel under s49, it gives such notice but the licence is not suspended or cancelled within 3 months, or it suspends or cancels the licence under s48.

S49A(4) provides that the 3 month period in s49A(3)(b) can be extended by the authority, but only if the authority forms the opinion that such extension is in the interests of the licensee.

S49A(5) provides that the extensions provided in s49A(4) must be of periods of one month each.

Clause 24 inserts new part 3, division 9A (Monitoring continued satisfaction of financial requirements)

This clause provides the legislative mechanism to check ongoing compliance with licensing financial requirements through audits of licensees. It is neither desirable nor administratively possible to conduct an audit of every licensee each year. The costs to licensees of compliance are also a factor, as is the need to ensure that audits are conducted on the basis of objective criteria so as to avoid any inference being drawn that individual licensees are being victimised. It must also be possible, however, for the authority to act on information received where it has reason to believe that a licensee may be in financial trouble.

The scheme proposed by the clause requires the Minister to approve an audit program (s50A(1)). The program must contain information about the purpose, scope and time frame under which it will be carried out, and the criteria to be used for selection of audit subjects (s50A(2)). Licensees selected for audit on the basis of the program may not be audited more than once in any period of two years (s50A(3)).

It is important that the audit program both be objective and be seen to be objective. Accordingly, s50B provides that the authority must publish details of the audit program in the gazette prior to its inception. S50B(1) requires the publication to be done between 14 and 28 days prior to the program start. S50B(2) provides that, as a minimum, the notice must be published in the gazette, but also allows publication in other organs, such as trade magazines. S50B(3) states the minimum contents of the notice to be published. This is similar to the audit program requirements in s50A(2), but includes the additional requirements that the notice state how subjects are to be advised of

their selection (s50B(3)(f), and the obligations of an audit subject as set out in this division.

S50C sets out how an audit is to be conducted and the obligations of the licensee who is the subject of an audit. S50C(1) allows the selection of audit subjects through the approved audit program or because of information received by the authority.

The authority is then required (s50C(2)) to give written notice to the audit subject, stating the financial records required for the audit. These records are required to be only those reasonably necessary for the conduct of the audit.

Licensees are required to comply with the notice within 21 days (s50C(4)). Failure to comply is an offence carrying a maximum penalty of 100 penalty units. Failure to comply is also a disciplinary matter, since s50C(5) provides that failure to comply is taken to have been a breach of licence conditions.

Clause 25 replaces s51

Deficiencies in the operation of the Act have emerged in that some licensees and unlicensed contractors have openly engaged in 'licence lending'. Such schemes involve arrangements where a building contractor will, for a fee, purport to be the contractor for building work. The consumer will have a contract with the licensee, and the license card will be used to imprint the contract and uplift plans from the relevant local government. In fact, however, the licensee takes no part in performance of the contract, which is undertaken by unlicensed contractors. These practices clearly weaken the legislative regime and are blatant schemes to avoid the intention of the Act. This clause is designed to define the various practices associated with 'licence lending' as offences, and to set penalties for those offences, as well as to catch persons misrepresenting themselves as licensees in line with the former s51.

S51 attacks practices where a licensee allows an unlicensed contractor to make use of the licence.

S51(1) defines the acts of the licensee in such an arrangement as offences, setting differential penalties for the first and subsequent offences.

S51(2) defines the acts of the unlicensed contractor in pretending to be a licensee as offences, again with differential penalties for the first and subsequent offences.

S51(3) defines the acts of a licensee who uses another licensee's licence – for example, to perform building work of a class for which the defaulting licensee is not licensed – as offences, with a similar range of penalties.

S51A(1) creates a more general offence for licensees – that of helping another person to carry out unlicensed contracting where the offender knows (or ought to know) that the other person is committing the offence of unlicensed contracting. A similar range of penalties is provided.

S51A(2) reinforces the requirement that a licensee must use their own name and licence number when contracting for building work, by making it an offence to use another licensee's name or number. To avoid an offence being committed where an inadvertent breach has occurred – for example, where 2 numbers are transposed in error – there is provision for a reasonable excuse to be provided. Again, a similar range of penalties is provided.

S51A(3) clarifies the intention that s42's expanded definition of when building work is carried out applies to this section.

Clause 26 inserts new ss53A and 53B

These sections impose a requirement on licensees to demonstrate their compliance with financial requirements by provision of financial information supported by an accountant's certification at the time of the annual licence renewal.

S53A(1) provides that the authority must not renew a licence unless the required information is provided. The content of information required is to be in a form approved by the board and provided within time limits prescribed by regulation. S53A(2) provides that the form approved by the board may require information to be provided by an accountant.

S53A(3) to (5) provide a process for suspension and cancellation of a licence where the required information is not provided. These provisions mirror those in s38 when the annual licence fee is not paid.

S53B(1) creates the offence of providing false and misleading information about a licensee's financial position. The offence carries a maximum penalty of 100 penalty units or 2 years imprisonment. This provision mirrors s1308 of the *Corporations Law*. S53B(2) provides s53B(1) does not apply where the affected person informs the authority how the information is false or misleading. S53B(3) establishes an evidentiary test in respect of the offence.

Clause 27 inserts a new Part 3A – Excluded and Permitted Individuals and Permitted Companies.

A major deficiency with the existing regulatory structure has been the ability of defaulting contractors to restructure their corporate structure to re-emerge as a 'phoenix' company following cancellation of a licence. This new part is designed to remove individuals who have demonstrated their incapacity to manage finances from the building industry for a 5-year period.

S56AA establishes the conceptual framework for operation of the provisions, introducing the definitions of "excluded" companies and individuals, "influential" persons, "permitted" individuals, and "relevant" events. The definitions of "influential person" for a company and "permitted individual" are set out in detail. The concept of "influential person" excludes directors, but includes individuals who are in a position to control or substantially influence the conduct of a company's affairs. Although this "influential person" definition is premised on an individual, where an individual is in the requisite position of control or substantial influence, the fact that the control is exercised through a company structure would not obscure the individual's identity as an "influential person". The concept of "permitted individual" is tied to a "relevant event" in the individual's financial history. This means that an individual can be "permitted" for one event and "excluded" for another event contemporaneously.

S56AB establishes that this new Part operates despite anything in Part 3 – Licensing.

S56AC sets up the concept of how individuals and companies become defined as "excluded individuals" and "excluded companies" in terms of relevant events. S56AC(1) establishes the concept for individuals, on the basis that the relevant event relates to their own financial circumstances. In this case, the relevant event happens when they take

advantage of the laws of bankruptcy or become bankrupt. S56AC(2) similarly establishes the concept for an individual where the relevant event arises from their role in a company, tying the relevant event to the appointment of a provisional liquidator, liquidator, administrator or controller, or winding up for the benefit of creditors. S56AC(3) establishes that an individual is an excluded individual in respect of a relevant event if the requirements set out in subsection (1) are met. S56AC(4) does the same thing in respect of subsection (2). S56AC(5) and (6) establish that an excluded individual's status as an excluded individual is tied to a single relevant event. S56AC(7) defines an "excluded company" as one having an excluded individual as a director, secretary or influential person for the company.

S56AD sets out the process whereby an excluded individual may be categorised as a "permitted individual". This provision exists to allow individuals who have undergone a bankruptcy event through absolutely no fault of their own to continue to operate in the building industry. Excluded individuals may apply to the authority to be categorised as permitted individuals (s56AD(1)), but may do so only once in respect of any particular relevant event (s56AD(2)), so as to prevent vexatious application. The application must set out the reasons for categorisation (s56AD(3)). Because both companies and individuals may have an interest in the application, s56AD(4) establishes that companies are parties to any application where the company's status may be at issue. The authority is required to give its decision on the matter within 28 days or a longer period agreed between the authority and the individual (s56AD(5)). S56AD(6) provides that failure to give a decision in time is deemed to be a refusal and may be the subject of a review to the tribunal. S56AD(7) allows the authority to confirm refusal at any time.

The sole ground for categorisation as a permitted individual is set out in s56AD(8), namely that the applicant can demonstrate that all reasonable steps were taken to avoid the occurrence of the facts giving rise to the relevant event. This ground is intended to restrict classification as a permitted person to instances where the applicant has been the victim of fraud or defalcation by, for example, a partner or spouse. S56AD(9) provides that once an individual is categorised as a permitted individual in respect of a relevant event, the individual is not an excluded person in respect of the relevant event.

S56AE forbids the authority from issuing a licence to an excluded person.

S56AF sets up the procedure to be followed when an existing licensee is found to be an excluded individual. Where the authority forms an opinion that an individual is an excluded individual (s56AF(1)), it is required to issue the licensee with a notice (s56AF(2)) setting out the reasons why the authority has formed this opinion, the licensee's rights to apply to be categorised as a permitted person, and the circumstances under which the licence is to be cancelled. The licence must be cancelled if the licensee does not apply for categorisation or if categorisation is refused (s56AF(3)). S56AF(4) establishes that this procedure is distinct from the procedure for cancellation of licence set out in s49.

S56AG establishes the procedure to be followed if the excluded licensee is a company (s56AG(1)). Because the exclusion principle operates on companies only by virtue of directors or influential persons being themselves excluded, the procedure requires either that the excluded persons responsible for the status of the company cease their involvement with the company, or that the individuals concerned are categorised as permitted persons. There is no procedure for suspension, as such action may be onerous in the case of a company which is financially sound despite the existence of an influential person who is an excluded person. The relevant notice and cancellation procedures are set out in s56AG (2) to (5). S56AG(6) establishes that this procedure is distinct from the procedure for cancellation of licence set out in s49.

S56AH provides that the formation of an opinion by the authority that a person is an excluded person or a company is an excluded company is a decision reviewable by the tribunal. Although there is no limitation of the matters the tribunal may examine in such a review, the scheme of new Part 3A is intended to allow merit review only of the question of whether an individual is an influential person (in the case of a company). The criteria for becoming an excluded person in respect of an individual are essentially objective and not subject to interpretation. Time periods mentioned in procedures – for example for suspension and cancellations – are taken to stop upon lodgement of a review application and to re-commence upon the review application being determined (s56AH(2)). Such applications do not, however, impact

on the validity of action already taken, for example the suspension of a licence.

Clause 28 inserts a new Part 4A – Building Contracts other than Domestic Building Contracts. This new Part provides regulatory recognition of building industry practice whereby there is a chain of contracts governing performance of building work. The part relieves subcontractors of some unconscionable contract provisions and deems desirable provisions into some contracts. The Part only applies to contracts other than domestic building contracts because of different conditions in the house-building industry and the regulatory environment provided by Part 4 of the Act.

S67A establishes the definitions used in the new Part. Of particular significance are the definitions of "contracted party" and "contracting party", where the "contracting party" is the person for whom work is to be carried out and the "contracted party" is the person carrying out the work under the contract. Also significant are the definitions of "valuable instrument", meaning any of a number of defined convertible financial instruments used in the building industry, and "security", meaning either an amount of money or a valuable instrument.

S67B(1) defines "construction management trade contract" as a form of contract where the contracting party is a principal and directly contracts a number of building contractors (rather than contracting a builder who subcontracts with the contractors). This is significant because contractors who might but for such arrangements be classed as subcontractors are also brought into the scope of the Part. Where the holder of a general building licence is the contracted party, such contracts are specifically excluded from this definition. S67B(2) removes doubt that a construction management trade contract includes a contract entered into by an agent of the principal.

S67C defines "retention amount", and s67D "subcontract" for the operation of the part. Both definitions correspond to common usage in the building industry.

S67E removes doubt that this Part only makes void any conditions of contract expressly made void by this Part, and that it applies to all contracts, even if in entering into the contract an offence is committed or the contract is entered into outside Queensland. The Part also has effect despite anything contained in a building contract. Contractual

provisions that conflict with the provisions of this Part are invalid to the extent of the inconsistency.

S67F allows the authority to publish suggested forms for building contracts. This is already an authority function for domestic building contracts.

S67G sets out a general requirement that building contracts be in writing and the formal minimum requirements for the contents of a building contract. These include such matters as the scope of works, completion time, the amount to be paid, or method of calculating payment, agreements regarding retentions and securities, licence details of the contracted party, and the address of works (s67G(4). Entering into unwritten building contracts is an offence. The time at which the offence is committed varies according to the reasonable cost of the building work. Where the reasonable cost of the work is more than $10,000, the offence occurs when work commences without a written contract, and if it is less than $10,000, the offence occurs upon completion of the building work (s67G(1)). A range of penalties is provided for the first and subsequent offences. S67G(2) is a similar provision, relating to work which is initially valued at less than $10,000, but comes to be worth more during the carrying out of the work. In these circumstances, the offence occurs when building work is carried out in the absence of a written contract after the work exceeds $10,000. S67G(3) clarifies that an offence under this section is committed by both parties, and that it is also an offence for a written contract not to comply with the content requirements of s67G(4). S67G(5) removes application of the section to a principal.

S67G(6) provides that no offence is committed under this section if the work is required to be undertaken urgently and it is not reasonably practical to enter into a written contract. This will allow, for example, emergency works in remote regions to be undertaken without the need for written contracts, as is set out in an example.

S67H similarly requires that contract variations be put into writing and sets out the minimum requirements for inclusion in written contract variations, and makes breach of these requirements an offence. A similar range of penalties is provided as in s67G. Again, principals are excluded from these requirements (s67H(4)) and it is provided that no offence occurs where urgency and practicality dictate otherwise (s67H(6)). Provision is also made for deletion of the requirement to

include method of calculation of the cost of variations if the contract already provides such a method (s67H(5)).

S67I deals with the common practice in the building industry where the contracting party may direct the performance of work without the agreement of the contracted party. S67I(2) allows such directions to be initially given other than in writing unless otherwise provided under the contract. S67I(3) qualifies s67I(2) by providing that the contracted party may ask for the direction to be given in writing and is not in breach of the contract in not complying with a direction not given in writing until it is given in writing. S67I(4) establishes an offence for contracting parties not putting a direction in writing within 3 business days after it was given. A range of penalties is provided for the first and subsequent offences. S67(I)(5) confirms that a direction under this section includes a direction for a variation of the building contract.

S67J limits the scope of set-offs available to contracting parties. Set-offs are where amounts payable to contractors are reduced to take account of, for example, site clean-up costs incurred by the contracting party. Set-off provisions are often used in contracts in respect of retention amounts held during the warranty liability period, which may endure for some years. This section requires such set-offs to be claimable from the contracted party only if timely notice (28 days) is provided to the contracted party. The section recognises that in some instances, the right to set-off may be known well before the amount of set-off is known. For example, cracks appear in a wall during the warranty retention period. This would trigger the section's requirement (within 28 days) to provide the contracted party with a notice. When engineering investigations define the scope of work and tenders are called, a second notice is required to be sent within 3 business days of the amount being known. This will prevent set-offs being effected when the trail has gone cold and the contracted party is in no position to dispute alleged facts. It should be noted that this provision does not prevent a contracting party who has lost the right to set-off from subsequently recovering moneys duly owing.

S67K(1) and (2) limits total of the retention amounts and securities held by the principal to 5 percent of the contract price, subject to the other conditions set out in the section. S67K(3) provides that the requirement does not apply where the security is obtained for something which has been paid for by the contracting party, but not yet

installed. For example, such a security may be held in respect of an expensive piece of diagnostic equipment until such time as it is installed in accordance with the contract. S67K(4) allows parties to contract out of the retention amount limit imposed by this section if such provisions are expressed and initialled by all parties.

S67L limits retention amounts for subcontracts to 5 percent other than for the circumstance covered by s67K(3).

S67M limits deductions on amounts payable to a contracted party to 10 percent of the relevant amount.

S67N limits retention amounts held for the warranty period following practical completion to 2.5 percent of the total contract price. This limit does not cover minor works under the contract that remain outstanding at the time of practical completion.

S67O sets up procedures whereby a contracted party may suspend work under a building contract if the contracting party fails to pay amounts due and payable under the contract, or determined by a court or the tribunal. Under these conditions, the contracted party may give the contracting party at least a week's written notice of intention to suspend work (ss67R(2) and (3)). A further written notice must be given to the contracting party upon expiry of the notice period, after which the contracted party may suspend work immediately (s67R(4)) and is not in breach of the contract in so doing (s67R(5)). Suspension of work under this section does not affect the contracted party's other rights under the contract (s67R(5). If the amount owing is paid at any time during the suspension of work, the contracted party is required to resume work under the contract within one week, unless otherwise agreed (ss67R(6) and (7)).

S67P provides that a penalty rate of interest is payable on late progress payments or any portion thereof, so as to remove incentives to contracting parties to delay payment. The penalty rate is set at the 90-day bill rate published by the Reserve Bank, plus 10 percent, calculated daily. Parties are permitted to contract for higher rates.

S67Q makes void all 'pay if paid' or 'pay when paid' clauses in building contracts.

S67R defines the operation of division 3 of this part (s67S, T and U) to construction management trade contracts and subcontracts.

S67S allows contracted parties to lodge a valuable instrument rather than cash where the contract requires lodgement of a security. The section also provides that such securities must be valuable instruments from a security provider approved by regulation. Where a security provider ceases to be an approved security provider, the contracted party must replace the instrument with another instrument from an approved security provider.

S67T allows contracted parties to substitute valuable instruments, defined similarly to the provisions of s67s, for cash held by contracting parties as retention amounts or securities (or both). The two sections s67s and s67T will benefit building contractors by relieving them of the burden of tying up large cash amounts.

S67U provides for maximum progress payment intervals unless the parties expressly provide shorter intervals. The section sets the maximum progress payment interval at one month (s67U(3)), and requires that payment be made in respect of the progress payment within 35 days following lodgement of claim for payment by the contracted party (s67U(7)). Despite this, there is provision for parties to contract out of any of these implied conditions, provided that in doing so the condition is explained in the contract; the contract expressly provides that it is not subject to the condition; and the relevant provision in the contract is initialled by both contracting parties (s67U(9)). S67U(10) removes doubt that the section does not affect the operation of the *Subcontractors' Charges Act 1974*, or the right of the contracting party to claim set-offs.

S67V applies only to construction management trade contracts. This section provides additional protection for contractors who are normally subcontractors entering into construction management trade contracts. In such contracts, although they are indistinguishable in most respects from ordinary subcontracts, the contractual relationship is direct between the developer and the building contractor. Developers are simply private persons and are not required to meet the financial requirements imposed by the Act. S67V requires construction management trade contracts to contain an explicit, initialled warning in a form approved by the board about the possible dangers for the contracted party inherent in a contract of this type. An offence is established, namely failure to provide the prescribed warning.

67W applies to building contracts other than construction management trade contracts or subcontracts. This section contains very similar provisions to s67U, but limits the period of payment following lodgement of claim to 21 days, unlike the 35 day period set by s67U. This difference recognises the differing circumstances faced by principals and others lower down the contractual chain, who must wait for cheque clearance, for example. Unlike s67U, the parties may contract for a longer period as a normal contract provision. Again, there is provision for parties to contract out of any of these implied conditions, provided that in doing so either

- the condition is explained in the contract; the contract expressly provides that it is not subject to the condition; and the relevant provision in the contract is initialled by both contracting parties; or
- the contracted party is provided with a separate notice before the contract is entered into explaining the conditions that vary from the requirements of this section.

This second procedure allows for public tender processes where there is no single contract document.

Clause 29 increases the maximum penalty payable for the offence of failure to pay a premium under the statutory home warranty insurance scheme from 20 to 40 penalty units.

Clause 30 amends s69 to reflect practical administration of the statutory home warranty insurance scheme. The section requires the policy of insurance to accompany the certificate. Previously the certificate of insurance was to set out the terms of the policy (regulation 24(2)). In practice this is not feasible as the policy of insurance forms a separate policy booklet..

S69(5) requires consumers to abide by the terms of the insurance policy.

Clause 31 amends s72 to clarify the factors the authority may take into account in using its powers to direct rectification or completion of building work.

S72(1) is amended to delete the word “reasonable” from the requirement that the authority state a reasonable period during which defective work must be rectified when issuing a direction. This is consequential on the amended s72(3).

S72(2) defines factors the authority may take into account to include all relevant circumstances, including warranties – i.e. relevant factors are not limited to the terms of the contract alone. It is also provided that the period stated in the direction must only be less than 28 days where substantial losses will be caused in the absence of a direction, or where there is significant personal or public health, safety or environmental hazard (s72(3).

S72(14) is inserted to provide that the authority is not required to issue a direction to rectify where to do so would be unfair. An example, where there are substantial outstanding amounts owing to the contractor under the contract, is provided of such circumstances.

Clause 32 amends s74 to incorporate into the legislation sound financial management procedures used to administer the statutory insurance scheme concerning work carried out under a claim on the scheme. The new provisions require the calling of tenders (s74(1) and (2)) and set out the administration of the panel of licensed contractors from whom tenders may be sought (s74(4) and (5)). The amendments will not prevent owners from being permitted to call tenders on behalf of the authority where this is in the interests of efficient resolution of a matter (s74(6)).

Clause 33 is a consequential amendment flowing from the amendment of s31 by clause 14.

Clause 34 inserts a new s109A removing beyond doubt the question that service is effected by service at the address of the licensee on the register.

Clause 35 inserts 3 new sections – 111A, 111B and 111C.

S111A is designed to assist the authority in meeting evidentiary requirements when prosecuting or otherwise attempting to penalise a person for a breach of a requirement of the Act. The section enables the authority to establish a person had a particular state of mind if it can prove that the person's representative had that state of mind.

S111A(1) specifies that the evidentiary provision applies in proceedings for offences and disciplinary proceedings.

S111A(2) states that in any such proceeding, if it is necessary to prove a person had a certain state of mind, it is enough to prove the person's representative, acting within the representatives actual or apparent authority, had that state of mind.

S111A(3) provides that the person is liable for the act or omission of the person's representative unless the person (not the representative) can prove that the person could not reasonably have prevented the act or omission.

S111A(4) defines "representative" to include executive officers, employees or agents of a company, and employees or agents of an individual.

S111B provides that an executive officer commits an offence if the company commits an offence, namely the offence of failing to ensure the company complies with the Act. The overall aim of this section is to make directors and other executive officers of a company personally responsible for the acts of the company, thereby preventing them from escaping personal liability by hiding behind a company structure.

S111B(1) imposes a duty on executive officers to ensure that their company complies with this Act.

S111B(2) provides that an offence by a company is taken to have been committed by the company's executive officers, with penalties to apply as for commission of the relevant offence by an individual.

S111B(3) allows evidence that a company commits an offence under the Act to be used as evidence that each and every executive officer committed the offence.

S111B(4) provides a defence for executive officers in regard to this section, namely that the executive officer exercised reasonable diligence, or was not in a position to influence the relevant conduct of the company.

S111C provides that directors of a company are personally liable for the debts of the company owed to the Authority for offences, disciplinary actions or insurance claims. The aim of this provision is to replace the Deeds of Guarantee and Indemnity currently required by the Authority from all directors of a company who is licensed.

S111C(1) provides that the section applies to debts incurred by a company for offences committed if the debt is not paid by the time required in the court's order.

S111C(2) similarly extends the operation of this section to orders made by the tribunal under s101(4).

S111C(3) extends the operation of this section to debts owing to the authority under the statutory insurance scheme.

S111C(4) personally attaches the debt incurred by the company in subsection (1) to all directors of the company at the time the offence was committed and the time the penalty was imposed.

S111C(5) personally attaches the debt incurred by the company in subsection (2) to all directors of the company at the time the act or omission which results in disciplinary action occurred and the time the penalty was imposed.

S111C(6) personally attaches the debt incurred by the company in subsection (3) to all directors of the company at the time the building work was performed, and the time the claim was paid by the Authority.

S111C(7) provides that the section applies regardless of the status of the company.

S111C(8) attaches all liabilities under this section that may apply to 2 or more persons to all such persons jointly and severally.

Clause 36 inserts a new s114 (Protection)

S114(1) and (2) are the standard indemnities for public officials – in this case the general manager and employees of the authority – acting in accordance with their functions.

S114(3), (4) and (5) provide that the State, the authority and the general manager do not incur any liability for a publication Act (ie. comments that may otherwise be considered defamatory) as a result of a warning given to the public under s.18(2)(f).

Clause 37 provides transitional arrangements. The sole substantive provision is an amendment to s13 noting that the members of the existing board go out of office upon commencement of this section.

Clause 38 provides for the establishment of a dictionary under Schedule 2 and is consequential on Clause 4.