

# Plumbing and Drainage Bill 2018

## Explanatory Notes

### FOR

**Amendments to be moved during consideration in detail by The Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport**

#### **1 Short title**

The short title of the Bill is the Plumbing and Drainage Bill 2018 (the Bill).

#### **2 Policy objectives and the reasons for them**

The Bill was introduced into the Parliament on 15 February 2018. It provides for the repeal of the *Plumbing and Drainage Act 2002* ('PD Act 2002') and the introduction of a new Act, entitled the *Plumbing and Drainage Act 2018* ('PD Act 2018'). The PD Act 2018 establishes a new legislative framework for plumbing and drainage in Queensland.

The Bill also includes amendments of other Acts.

#### ***Amendments of plumbing and drainage provisions in Bill***

A key objective of the Bill is to establish a contemporary, streamlined and flexible legislative framework for plumbing and drainage that is clear and simple for the end user, will ensure both public health and the environment are protected, and will meet industry and community expectations over the next decade.

The proposed amendments are intended to align the timeframes for the Commissioner of the Queensland Building and Construction Commission (the Commissioner) to decide an application for a licence with similar timeframes in other parts of the Bill; ensure public sector entities can continue to issue permits for plumbing and drainage work; and give effect to an election commitment regarding the status of holders of particular licences under the *Queensland Building and Construction Commission Act 1991* (QBCC Act) who, acting on a commitment from the former LNP government, did not renew their licences under the PDA 2002.

#### ***Amendments of Building Industry Fairness (Security of Payment) Act 2017***

The *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) received Royal Assent on 10 November 2017. A main purpose of the BIF Act is to help ensure people working in the State's building and construction industry are paid for the work that they do. The BIF Act aims to improve the security of payment for subcontractors in the industry by providing for effective, efficient and fair processes for securing payment and requiring project bank accounts (PBAs) to be used for particular building contracts.

As part of the department's implementation activities for PBAs on government building projects with a contract value between \$1M and \$10M (inc GST), which included targeted information sessions for industry participants, feedback was received on the BIF Act.

The proposed amendments are intended to address industry feedback received, to ensure industry participants understand their obligations under the Act and the policy objectives of the Act can be achieved.

### ***Amendments of Queensland Building and Construction Commission Act 1991***

The *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* (NCBP Act) received Royal Assent on 31 August 2017 and commenced on 1 November 2017.

The NCBP Act amended the QBCC Act and established obligations on the building product supply chain (designers, manufacturers, importers, suppliers and installers) to ensure a building product is not a non-conforming building product.

The proposed amendments put it beyond doubt that the chain of responsibility is intended to apply to builders and those procuring the services of other contractors or tradespeople to install a building product.

The role of architects and engineers is also critical in addressing incorporation of non-conforming building products in to our built environment. The proposed amendments are intended to include architects and engineers in the chain of responsibility for a building product, when they specify a building product as part of a building's design.

Finally, minor amendments are proposed to improve the operation of the QBCC Act. This includes clarifying certain amendments made by the BIF Act, by providing consistent terminology for investigators appointed under the QBCC Act and changes to ensure the proper operation of the demerit points framework. Amendments are also proposed to clarify the way the definitions of 'domestic building work' and 'residential construction work' are intended to be applied.

The proposed amendments are intended to address industry feedback received and ensure the policy objectives of the Act can be achieved.

## **3 Achievement of policy objectives**

### ***Amendments of plumbing and drainage provisions in Bill***

The proposed amendments achieve the policy objectives by:

- amending particular provisions dealing with applications for licences to reduce the time allowed for the Commissioner to deal with an application for a licence;
- amending the definition *permit*, to ensure a public sector entity can continue to give permits for permit work, notifiable work, or both, to be undertaken by or for the public sector entity, after the Bill commences; and

- giving effect to a 2017 election commitment by ensuring tradespersons who held particular licences under the QBCC Act, in any period from 10 November 2014 to the commencement of the PD Act 2018, are taken to have held associated occupational licences under the PD Act 2002 during that period.

### ***Amendments of Building Industry Fairness (Security of Payment) Act 2017***

The proposed amendments achieve the policy objectives by:

- clarifying Chapter 2 of the BIF Act to ensure obligations imposed are clear and industry can readily comply with them;
- incorporating provisions of the *Building Industry Fairness (Security of Payment) (Transitional) Regulation 2018* ('BIF Transitional Regulation') into the BIF Act;
- refining the timeframe for providing a payment schedule in section 76 (Chapter 3) of the BIF Act (Responding to payment claim) to address unintended consequences; and
- clarifying provisions of Chapter 5 of the BIF Act in relation to collection of information by the Registry regarding adjudications and their mandatory training.

### ***Amendments of Queensland Building and Construction Commission Act 1991***

The proposed amendments achieve the policy objectives by:

- including architects and engineers in the chain of responsibility for building products when they specify a building product as part of a building's design; and
- inserting definitions of 'install' and 'installer', in relation to a building product; and
- addressing some drafting issues in relation to the definition of 'demerit points'; and
- correcting some minor drafting issues by replacing references to 'inspector' with references to 'investigator'; and
- clarifying that the definitions of 'domestic building work' and 'residential construction work' apply to the whole of the QBCC Act.

## **4 Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the objectives.

## **5 Estimated cost for government implementation**

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

## **6 Consistency with fundamental legislative principles**

While the provisions of the Bill are generally consistent with the standards required to be met under the *Legislative Standards Act 1992*, potential breaches of fundamental legislative principles (FLPs) are addressed below.

Amendment 12 inserts a new clause 173A in part 8 of the Bill. It is proposed that clause 173A will commence on the commencement of the PD Act 2018. However, the provision has a retrospective effect in that validates a policy decision of the former LNP government that allowed relevant licensees to benefit from only being required to pay for and hold one licence rather than two.

It is considered the provision's retrospective effect is justified as it will not adversely affect rights and liberties of individuals or impose obligations retrospectively. Rather it will benefit individual licensees.

Amendment 15 inserts clause 193G into the QBCC Act, which clarifies any actions taken by a person exercising powers as an investigator between 10 November 2017 and the commencement of clause 193G were validly done, as though their appointment before 10 November 2017 had continued under section 77 of the QBCC Act, as intended.

It is considered that the appointees concerned would have been validly appointed before 10 November 2017. Also, they would have acted within the powers of their appointment after that day as they would have assumed that their appointments were validly continued under section 77. Similarly, individuals affected by the actions of the appointees would have assumed the appointees were validly appointed and were acting lawfully at the relevant time and would, therefore, have responded accordingly.

Clause 193G is a validating provision with retrospective effect. It is considered this is justified as it will not have a significant adverse impact on the rights of individuals and will validate an established administration of laws regulating the building industry.

## **7 Consultation**

The amendments of the plumbing and drainage provisions have been informed by industry stakeholder feedback on the Bill, including through submissions to the Transport and Public Works Committee and at the public hearing of the Committee.

The amendments of the BIF Act and QBCC Act have been informed by industry stakeholder feedback through the Queensland Ministerial Construction Council and a dedicated Subcommittee of that Council. Members of the Council and Subcommittee generally agree the proposed amendments should be progressed.

## **8 Consistency with legislation of other jurisdictions**

The proposed amendments of the Bill's plumbing and drainage provisions are broadly consistent with legislation regulating plumbing and drainage in other jurisdictions.

The amendments of the BIF Act introduce clarifications of the policy intention for existing provisions. These provisions have a similar policy intention to security of payment legislation in other jurisdictions, which is to provide an efficient and cost-effective alternative to court proceedings for disputes in relation to construction projects.

The proposed amendments of the QBCC Act generally introduce minor clarifications, which are broadly consistent with legislation in force in other jurisdictions.

## Notes on provisions

### **Amendment 1 - Clause 2 (Commencement)**

Amendment 1 amends clause 2(1) of the Bill, which deals with the commencement of the new Act.

Clause 2(1) currently provides the Act commences on a day to be fixed by proclamation.

As a result of the amendment, all provisions of the Act will commence on a day to be fixed by proclamation, except:

- part 9, division 1A, other than section 176F(2);
- sections 192A to 192K, 193A to 193G and 196(3) to (6); and
- schedule 2, as it relates to minor amendments of the BIF Act.

The provisions that will not commence on proclamation will commence on the day the Act receives Royal Assent.

### ***Amendments of plumbing and drainage provisions in Bill***

#### **Amendment 2 - Clause 17 (Inquiry about applicant)**

Clause 17 of the Bill allows the Commissioner to investigate an applicant for a licence including, whether or not the applicant has been convicted of an offence against the Act or the repealed Act. The investigation is intended to inform the Commissioner's decision in relation to the licence application.

Clause 17 allows the Commissioner to initiate the investigation by giving a notice to the applicant within 40 business days after the Commissioner receives the application. On receipt of the notice, the applicant must give the Commissioner further information the Commissioner reasonably requires, to decide the application.

Amendment 2 amends clause 17 by reducing the time allowed for the Commissioner to write to the applicant seeking the further information, from 40 to 20 business days.

The reduction in time is considered appropriate because the period of 20 business days will allow the Commissioner sufficient time in which to write to the applicant seeking further information required to decide whether to grant the licence to applicant.

Amendments 2 to 5 together substantially reduce the time allowed, under the Bill, for the Commissioner to decide an application for a licence. In doing so, the amendments address feedback from industry about the time currently allowed for the Commissioner to decide such an application.

#### **Amendment 3 - Clause 18 (Extending decision period for application)**

Clause 18 of the Bill allows the Commissioner to extend the time allowed for the Commissioner to decide an application for a licence beyond the standard time allowed for deciding the application, because of the complexity of the application.

The clause allows the Commissioner to extend the time allowed, by writing to the applicant to let the applicant know that because of the complexity of the issues that must be considered in deciding the application, the period for deciding the application is extended by 40 days.

In addition to clause 18 allowing the Commissioner to unilaterally extend the time for deciding the application, the clause allows the Commissioner and the applicant to agree in writing on another day by which the application must be decided.

Amendment 3 amends clause 18 by reducing the period for which the Commissioner may unilaterally extend the time for deciding the application, from 40 to 20 business days. The reduction in time is considered appropriate because despite the reduction, the Commissioner will have sufficient time in which to deal with even the most complex issues relating to an application.

Amendments 2 to 5 substantially reduce the time for the Commissioner to decide an application for a licence. In doing so, the amendments address industry feedback about the time currently allowed for the Commissioner to decide such an application.

#### **Amendment 4 - Clause 18 (Extending decision period for application)**

Amendment 4 replaces the reference to 40 business days with 20 business days, which aligns with and the rationale is consistent with Amendment 3.

Clause 18 of the Bill allows the Commissioner to extend the time allowed for the Commissioner to decide an application for a licence beyond the standard time for deciding the application, because of the complexity of the application. Under clause 18, the standard time allowed for the Commissioner to decide an application is 40 business days after the Commissioner receives:

- any further information sought under section 17(2)(a); or
- the results of any examination the applicant was required to undergo under section 17(2)(b); or
- in any other case, the application.

Amendment 4 amends clause 18 by reducing the period mentioned above, from 40 business days to 20 business days. The reduction in time is considered appropriate because despite the reduction, the Commissioner will have sufficient time in which to decide an application, particularly given that the Commissioner may extend the standard time allowed to decide an application by 20 business days if the application is particularly complex.

Amendments 2 to 5 together substantially reduce the time allowed, under the Bill, for the Commissioner to decide an application for a licence. In doing so, the amendments address feedback expressed by industry about the time currently allowed for the Commissioner to decide such an application.

### **Amendment 5 - Clause 19 (Deciding application)**

Clause 19 of the Bill requires the Commissioner to consider and decide an application for a licence. It provides that if, at the end of the decision period for the application, the Commissioner has failed to decide the application, the failure is taken to be a decision to refuse to grant a licence. Under the clause, the 'decision period' for an application is essentially, either:

- the standard time for deciding an application, which is 40 business days after the Commissioner receives:
  - any further information sought under section 17(2)(a); or
  - the results of any examination the applicant was required to undergo under section 17(2)(b); or
  - in any other case, the application; or
- an extended period for deciding the application, or a day agreed between the Commissioner and the applicant, under clause 18.

Amendment 5 amends clause 19 by reducing the standard time allowed for deciding an application, from 40 business days to 20 business days. In doing so, the amendment aligns clause 19 with clause 18, as amended by amendment 4.

Amendments 2 to 5 together substantially reduce the time allowed, under the Bill, for the Commissioner to decide an application for a licence. In doing so, the amendments address feedback expressed by industry about the time currently allowed for the Commissioner to decide such an application.

### **Amendment 6 - Clause 65 (Installing things as part of plumbing or drainage work)**

Amendment 6 corrects a minor drafting error by effectively inserting the word 'sewage' in the definition of the term 'secondary on-site sewage treatment plant' which is used in clause 65(1)(b) and (c).

### **Amendment 7 - Clause 81 (Who is a *relevant person* for notifiable work)**

Amendment 7 is a consequential amendment. It is required because the definition *public sector entity* currently in clause 81(2) of the Bill is to be relocated to Schedule 1 (dictionary), by amendments 8 and 18. Also, the definition 'distributor-retailer', which is also in clause 81(2), is to be incorporated into the definition public sector entity. The definition public sector entity is to be relocated to the dictionary as it is needed for the definition 'permit', as amended by amendment 17, as well as for clause 81.

**Amendment 8 - Clause 81 (Who is a *relevant person* for notifiable work)**

Amendment 8 is a consequential amendment that removes clause 81(2) of the Bill. It is required as the definition *public sector entity* currently in clause 81(2) is to be relocated to Schedule 1 (dictionary) (see amendment 18). Also, the definition ‘distributor-retailer’, which is also in clause 81(2), is to be incorporated into the definition ‘public sector entity’. The definition ‘public sector entity’ is to be relocated to the dictionary as it is needed for the definition ‘permit’, as amended by amendment 17, as well as for clause 81.

**Amendment 9 - Clause 83 (Action after notifiable work is finished)**

Amendment 9 replaces the reference to section 81(1)(c) and refers to section 81(c). The clause is consequential resulting from the removal of clause 81(2) by amendment 8.

**Amendment 10 - After clause 157**

Amendment 10 amends the heading for part 8 of the Bill to refer to ‘validation’. This is a consequential amendment required to accommodate the insertion of new clause 173A into part 8 of the Bill, by amendment 12. New clause 173A is a validation provision.

**Amendment 11 - After clause 158**

Amendment 11 amends the heading for part 8, division 2 of the Bill so it includes a reference to ‘validation’. Amendment 11 is a consequential amendment that is required to accommodate the insertion of new clause 173A into part 8, division 2, by amendment 12. New clause 173A is a validation provision.

**Amendment 12 - After clause 173**

Amendment 12 inserts a new clause 173A into part 8 of the Bill. Clause 173A is a validation provision with retrospective effect. On 10 November 2014, the *Professional Engineers and Other Legislation Amendment Act 2014* transferred functions for licensing, compliance and disciplinary action relating to plumbers and drainers, from the former Plumbing Industry Council to the QBCC.

When the functions were transferred, the policy intention was that a tradesperson who held a licence under the QBCC Act authorising plumbing or drainage work (a ‘relevant licence’), from 10 November 2014 onwards, would not be required to also hold an associated occupational licence under the PD Act 2002. This was despite the requirement under the PD Act 2002 for such a tradesperson to hold an associated occupational licence for the work. The purpose of the exemption was that the relevant licensees would benefit from only being required to pay for one licence rather than two. However, legislative amendments implementing this exemption were not made.

This amendment effectively provides that a tradesperson who held a relevant licence but did not hold an associated occupational licence during the period from 10 November 2014 to the day when the PD Act 2018 commences, will be taken to have held the associated occupational licence while they held the relevant licence. The relevant licences include contractor’s licences, nominee supervisor’s licences and site supervisor’s licences that authorise work that includes plumbing or drainage work.

## ***Amendments of Building Industry Fairness (Security of Payment) Act 2017***

### **Amendment 13 - Insertion of new pt 9, div 1A**

The amendment inserts a new part 9, division 1A into the Bill, that amends the BIF Act.

#### **176A Act amended**

Clause 176A provides that division 1A amends the *Building Industry Fairness (Security of Payment) Act 2017*. The drafting note brings attention to the additional amendments of the BIF Act in schedule 2 of the Bill.

#### **176B Amendment of s 2 (Commencement)**

The commencement provisions in the BIF Act include amendments of transitional provisions included later in amendment 13. Chapter 8, part 1A 'Provisions for transitional arrangements before repeal' contains new sections 201A, 201B and 201C. New sections 201A and 201B contain transitional provisions for references in Chapter 2 of the Act to matters in the *Building and Construction Industry Payments Act 2004* (BCIP Act) or *Subcontractors' Charges Act 1974* before the repeal of those Acts.

New section 201C provides for the repeal of the BIF Transitional Regulation, which commenced on 1 March 2018. The transitional regulation is due to expire on 1 March 2019. Relevant content of the transitional regulation will be incorporated into the Act by the amendments in the Bill. The transitional provisions in Chapter 8, part 1A of the Act will commence on assent of the PD Act 2018.

#### **176C Amendment of s 8 (Definitions for chapter)**

Section 25, as amended by clause 176I, provides that if opening an account at a financial institution in relation to a PBA, the head contractor must ensure the account's name includes the word 'trust'. Currently, the definitions 'disputed funds account' and 'retention account' in section 8 do not include the word 'trust'. The amending clause 176C inserts the word 'trust' before the word 'account', in each of those definitions, changing the titles of the definitions to 'disputed funds trust account' and 'retention trust account' respectively. In doing so, the amendments ensure the definitions are consistent with the requirement in section 25.

#### **176D Amendment of s 9 (What is a project bank account)**

Clause 176D amends section 9 by replacing the word 'under' with the phrase 'in connection with' when referring to amounts a subcontractor is entitled to be paid by reference to its subcontract. The phrase 'in connection with' has a broader meaning and is used to clarify the intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4.

In addition, the clause clarifies section 9(4)(b) by ensuring the reference to all amounts the subcontractor is entitled to be paid in connection with its subcontract includes an amount that is the subject of a payment dispute as well as a retention amount.

#### **176E Insertion of new s 10A**

Clause 176E inserts new section 10A, which clarifies when an amount is liable to be paid by a head contractor to a subcontractor beneficiary. Feedback received from industry stakeholders indicated the reference in existing section 31(1)(a) to the phrase 'liable to pay', might be interpreted to refer to when a payment to a subcontractor beneficiary is due, rather than when the liability to pay was incurred.

The intention is for the liability to be incurred at the earlier time, such as when the head contractor has given the subcontractor beneficiary a payment schedule or payment certificate for the amount. If the head contractor interpreted the reference to mean when the amount is due, the head contractor might believe it was allowed to pay itself and then 'top up' the trust account days or weeks later just before an amount is due to be paid to a subcontractor beneficiary, instead of the money remaining protected in a trust account until payment is made to the subcontractor beneficiary.

There are a number of references in the Act to the phrases 'liable to pay' and 'liable to be paid'. New section 10A is intended to clarify the meaning of those phrases. It clarifies that the head contractor for a PBA is liable to pay an amount to a subcontractor beneficiary in a range of circumstances, including when the head contractor has given the subcontractor beneficiary a payment schedule for the amount.

There are instances where 'entitled to be paid' is deliberately retained, such as in section 9 and the definition 'contract price'. The amount a person is 'entitled to be paid' under a contract includes present and future amounts. The phrase 'in connection with', used in new section 10A, has a broad meaning and is used to clarify the intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4.

### **176F Amendment of s 11 (Who is a supplier)**

Clause 176F clarifies the meaning of the term 'supplier' for Chapter 2 in response to industry feedback. Existing section 11(1) provides that a subcontractor is a supplier if, under their subcontract, the subcontractor is only required to supply goods or services without also carrying out building work. 'Building work' is defined in section 8.

#### *Clause 176F(1)*

Existing section 11(2) creates exceptions for subsection (1). Clause 176F(1) replaces those exceptions with a new exception: one that excludes from the meaning of 'supplier', a subcontractor who is required, under a stated Act, to hold a licence or other authority to lawfully supply the goods or services.

#### *Clause 176F(2)*

One of the Acts referred to in clause 176F(1) is the *Plumbing and Drainage Act 2002*. The Bill replaces that Act with the *Plumbing and Drainage Act 2018*. Clause 176F(2) replaces the reference in new section 11(2) to the *Plumbing and Drainage Act 2002* with a reference to the *Plumbing and Drainage Act 2018*. Clause 176F(2) is intended to take effect on the commencement of the *Plumbing and Drainage Act 2018*.

*Clause 176F(3)*

Existing section 11(3) defines the term 'head contract' for existing section 11(2). As the replacement section 11(2) to be inserted by clause 176F(2) does not include that term, the definition *head contract* is not required.

**176G Amendment of s 19 (Who is a related entity)**

Section 19 of the Act defines who is a 'related entity' in relation to another person for the purposes of Chapter 2. Clause 176G clarifies the definition *related entity* by expanding the definition *family*, so it includes the aunt and uncle of a person or of the person's spouse. It will also include a grandchild of the person or of the person's spouse.

**176H Amendment of s 23 (Head contractor must establish project bank account)**

Section 25, as amended by clause 176I, provides that if opening an account at a financial institution in relation to a PBA, the head contractor must ensure the account's name includes the word 'trust'. Clauses 176H(1) and (2) are consequential amendments that align the titles of the accounts mentioned in section 23(1)(b) and (c) with the new titles for the accounts introduced by an amendment of section 8 (see clause 176C).

**176I Amendment of s 25 (Name of trust account)**

Clause 176I clarifies that, if opening an account at a financial institution in relation to a PBA, the head contractor must ensure the account's name includes the word 'trust', not the words 'trust account'. The word 'account' is not required.

**176J Amendment of s 26 (Notice of trust account's opening, closing or name change)**

Section 23 requires the head contractor for a building contract to establish a PBA and Section 26 sets out notice requirements in relation to a head contractor opening a trust account in relation to a PBA, or changing the name of, or closing such a trust account.

Existing section 26(2) requires the head contractor give the principal written notice of opening a trust account within 10 business days after opening it. Section 23 gives the head contractor 20 business days to open a PBA. Consequently, up to 30 business days could elapse before the principal could deposit an amount into a trust account for the PBA. Industry feedback indicated often a payment is required to be made under a building contract sooner than 30 business days after the head contractor enters into the first subcontract for the building contract, and it is desirable for all payments be made into the PBA. Accordingly, clause 176J(2) amends section 26(2) to reduce the notice timeframe from 10 business days to 5 business days.

Clause 176J(1) replaces the requirement in section 26(2) for the head contractor to give the principal written notice with a requirement for the head contractor to give the principal notice in the approved form. For the meaning of 'approved form', see section 198. The requirement for the approved form will assist head contractors in providing the correct information to the principal.

Clause 176J(3) is a consequential amendment resulting from clause 176J(1). It ensures that the approved form, rather than the written notice, is required to state the details mentioned in existing section 26(3). Clause 176J(4) removes existing section 26(3)(a) as it is not necessary. Clause 176J(5) renumbers section 26(3)(b) to (e) to take account of the removal of paragraph (a) by clause 176J(4).

**176K Amendment of s 27 (All payments from principal to be deposited in project bank account)**

Section 27 sets out the amounts the principal must deposit into the general trust account for the PBA. These are the amounts payable by the principal to the head contractor under the head contract. Clause 176K clarifies section 27(1) so it better reflects the policy intent for the section. The clause will ensure that, in addition to the amounts already required to be paid into the general trust account under section 27, the principal must deposit into the trust account other amounts owing to the head contractor as listed.

The phrases 'in relation to' and 'relating to' have a broader meaning than the term 'under' and are used to convey the intention to include amounts payable to the head contractor because of a circumstance related to the building contract (head contract) which may be outside the terms of the head contract.

The requirement to deposit an adjudication amount is currently set out in the BIF Transitional Regulation, section 4. As the transitional regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be included in the Act.

The transitional provisions in Chapter 8, part 1A will apply prior to commencement of Chapter 3 of the Act and until the repeal of the BCIP Act, so that an adjudication is one under the BCIP Act.

**176L Amendment of s 28 (Limited purposes for which money may be deposited into project bank account)**

Section 28 is intended to limit the purposes for which money may be deposited into a trust account for a PBA. Clauses 176L(1) and (2) clarify that the amount to be deposited into the trust account is for the PBA and deposits must only be for the stipulated purposes of paying the head contractor an amount the principal must deposit under section 27(2) or paying a subcontractor beneficiary an amount the head contractor *is liable to pay in connection with* the subcontract.

A number of references in the Act to the phrase 'entitled to be paid' have been replaced by the phrase 'liable to be paid'. The circumstances in which a head contractor is liable to pay a subcontractor beneficiary are set out in new section 10A. Also references in the Act to the term 'under' a subcontract, have been replaced by the phrase 'in connection with' the subcontract.

The phrase 'in connection with' has a broader meaning and is used to clarify the intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4.

**176M Amendment of s 29 (All payments to subcontractor beneficiaries to be paid from project bank account)**

Section 29 is intended to ensure all payments made by a head contractor to a subcontractor beneficiary are paid only from a trust account for a PBA. Section 29(1) currently provides that the section applies if a subcontractor beneficiary is *entitled to be paid* an amount *under its subcontract*.

A number of references in the Act to the phrase 'entitled to be paid' have been replaced by the phrase 'liable to be paid'. The circumstances in which a head contractor is liable to pay a subcontractor beneficiary are set out in new section 10A.

A number of references in the Act to the term 'under' a subcontract have been replaced by the phrase 'in connection with' the subcontract. The phrase 'in connection with' has a broader meaning. The intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4 is clarified.

Clause 176M clarifies that the section applies if a head contractor is *liable to pay* the subcontractor beneficiary an amount *in connection with* its subcontract with the head contractor.

This change aligns section 29 with section 10A, to ensure section 29 requires a head contractor to pay any amount that the head contractor is liable to pay the subcontractor beneficiary in any circumstances mentioned in section 10A that are relevant, from a trust account for the relevant PBA.

**176N Amendment of s 30 (Head contractor to cover shortfalls)**

Section 30 provides that if there is an insufficient amount in a trust account to pay an amount that is due to be paid to a subcontractor beneficiary from the account, the head contractor must deposit into the trust account an amount equal to the shortfall.

Under the existing section 30, the head contractor was only required to deposit the amount equal to the shortfall when the head contractor became aware of the shortfall. The intention is that the head contractor is required to ensure the shortfall amount is deposited into the trust account in time to ensure beneficiaries are paid the full amount they are due to be paid.

Clause 176N amends section 30 to ensure the head contractor immediately deposits into the trust account an amount equal to the shortfall when an amount is due to be paid to a subcontractor beneficiary. This change will align section 30 with the intent to ensure beneficiaries are paid the full amount they are due to be paid.

Section 30 intentionally uses the phrase 'due to be paid' rather than 'liable to be paid' as it is intended that the obligation on the head contractor to pay an amount into the PBA will only occur when there is an insufficient amount available in a trust account to pay an amount when it is due to be paid to the subcontractor beneficiary.

**176O Amendment of s 31 (Limited purposes for which money may be withdrawn from project bank account)**

Section 31 is intended to limit the purposes for which a head contractor may withdraw money from a trust account for a PBA. Currently, under section 31(1)(a), the head contractor is allowed to withdraw an amount from a trust account to pay a subcontractor beneficiary an amount that the head contractor is liable to pay the subcontractor under a subcontract for the building contract. The phrase 'liable to pay' is now defined in new section 10A.

The clause replaces the word 'under' in relation to a subcontract with the broader term 'in connection with' and in doing so aligns section 31(1)(a) with section 10A(1). The phrase 'in connection with' has a broader meaning and is used to clarify the intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4.

**176P Amendment of s 32 (Order of priority)**

Section 32 currently prevents a head contractor from withdrawing an amount from a trust account for a PBA to pay itself, or make another payment prescribed by regulation, if the withdrawal would result in insufficient funds being available in the trust fund to pay all amounts *due to be paid* to the subcontractor beneficiaries at the time of the withdrawal.

Clause 176P(1) aligns the language used in section 32(1) with the language used in other provisions that deal with a head contractor's liability to pay subcontractor beneficiaries. The circumstances in which a head contractor is liable to pay a subcontractor beneficiary are set out in new section 10A.

Clause 176P(1) will ensure that the restriction in section 32(1)(a) applies from when a debt is incurred, rather than due. Clause 176P(1) will prevent head contractors from withdrawing an amount from a trust account for a PBA if there is a liability to pay the amount to a subcontractor beneficiary and the withdrawal leaves an insufficient amount in the trust account to meet the liability.

Clause 176P(2) is a consequential amendment to ensure that the title of the account mentioned in section 32(1)(b) includes the word 'trust' and aligns with the requirement under section 25 and amended definition under section 8.

Clause 176P(3) is a clarification amendment replacing 'adjudication under this Act' with 'adjudication under Chapter 3, part 4'.

**176Q Amendment of s 33 (Insufficient amounts available for payments)**

Existing section 33 deals with circumstances where insufficient amounts are available to pay two or more subcontractor beneficiaries amounts due to be paid to them at the same time. A failure by the head contractor to pay an amount due in these circumstances is a breach of other provisions of the Act (for example, section 30) and may be an event of insolvency. Section 33 provides for pro rata payments to subcontractor beneficiaries if there is an amount in the applicable trust account of the PBA, but that amount is insufficient to pay all subcontractor beneficiaries all amounts liable to be paid.

The amendments to section 33 clarify that where some subcontractor beneficiaries have an amount the head contractor is 'liable to pay' to them, and others have an amount 'due', in circumstances where the head contractor has not complied with section 30 to top up the PBA in time for payments to be made when due, all subcontractor beneficiaries who have an amount the head contractor is 'liable to pay' to them are captured by section 33(2). Those subcontractor beneficiaries will receive a proportionate payment from the relevant trust account of the PBA.

Clauses 176Q(1), (2) and (3) align the language used in section 33 with the language used in other provisions that deal with a head contractor's liability to pay subcontractor beneficiaries. The circumstances in which a head contractor is liable to pay a subcontractor beneficiary are set out in new section 10A.

Accordingly, where there is a liability to pay two or more subcontractors and there are insufficient funds in the trust account of the PBA (because of a failure by the head contractor to 'top up' the PBA as required by section 30, which is an offence), the subcontractor beneficiaries will be paid on a pro rata basis. Clause 176Q(4) has been redrafted to ensure that 'due to be paid' is replaced with 'liable to pay'. This will clarify that nothing will relieve the head contractor of its liability to pay each claimant.

### **176R Amendment of s 34 (Dealing with retention amounts)**

Section 34 requires a retention amount for a subcontract with a subcontractor beneficiary to be held in a particular trust account and restricts the purposes for which amounts may be withdrawn from that account.

Clause 176R(1) is a consequential amendment that aligns the title of the account mentioned in section 34(1) with the new title for such an account introduced by an amendment of section 8 (see clause 176C) to comply with section 25.

Clause 176R(2) replaces section 34(2) and (3) with new sections 34(2) to (5). Aspects of the unamended version of section 34(2) have been included in new section 34A in a modified form.

Clause 176R(2) clarifies that if a PBA is only required to be established after a retention amount is withheld, the head contractor must ensure any part of the retention amount that remains withheld for more than 5 business days after the PBA is established, is deposited and held in the retention trust account for the PBA.

New section 34(3) ensures that if the head contractor deposits a retention amount into the retention trust account under new section 34(2), the head contractor is required to notify the subcontractor beneficiary from whom the amount was withheld from payment that the head contractor has done so.

New section 34(4) requires the notice required to be given under new section 34(4) to be given to the subcontractor beneficiary as soon as practicable after the deposit is made and to state the amount deposited and when the deposit was made.

New section 34(5) requires a head contractor who deposits a retention amount into a retention trust account to ensure the retention amount is identifiable as an amount belonging to the subcontractor beneficiary from whom the amount was withheld.

**176S Insertion of new s 34A**

The clause inserts in Chapter 2, division 5, a new section 34A. New section 34A restricts the circumstances where the head contractor may withdraw retention amounts from the retention trust account for a PBA. As with existing section 34, new section 34A allows the head contractor to withdraw retention amounts held in the retention trust account to pay the subcontractor beneficiary from whom the amount was withheld.

New section 34A(1)(b) prohibits the head contractor from paying itself an amount from the retention trust account before the defects liability period under the relevant subcontract ends. The payment to the head contractor must also be to correct defects in the subcontracted work or otherwise secure the performance of the subcontract and be made under the relevant subcontract.

New section 34A(1)(d) allows the head contractor to withdraw retention amounts held in the retention trust account to pay another subcontractor beneficiary who is engaged to correct defects or omissions in the originally subcontracted work, provided the head contractor would have an entitlement to pay itself the amount under the original subcontract to which the retention amount relates.

**176T Insertion of new s 34B**

The clause inserts in Chapter 2, part 3, division 6, a new section 34B. This new section 34B defines the terms 'appeal' and 'dispute resolution process' for division 6.

**176U Amendment of s 35 (When payment dispute occurs)**

Section 35 provides two separate triggers for a payment dispute. Under existing section 35(1), a payment dispute occurs when the amount in a payment instruction is less than the amount in a payment schedule. Due to concerns a dispute payment may not occur if the head contractor fails to make a payment instruction by the due date for payment, new section 35(1)(c) clarifies that circumstance constitutes a 'payment dispute'.

Under existing section 35(2), a payment dispute occurs when the head contractor fails to give a payment schedule to the subcontractor beneficiary. The provision is being amended to clarify that a payment dispute will only arise where the head contractor fails to give a payment schedule and also fails to prepare a payment instruction to pay the full amount claimed in the payment claim.

This does not detract from the obligation in section 76 of the Act to issue a payment schedule by the required timeframe or pay the full claimed amount by the due date.

**176V Amendment of s 36 (Dealing with amounts if payment dispute occurs)**

Section 36 requires the head contractor to transfer an amount to the disputed funds account if a payment dispute occurs. Clause 176V(1) aligns the heading for section 36 with the policy intention for the provision.

Clause 176V(2) is a consequential amendment that aligns the title of the account mentioned in section 36(1) with the new title for such an account introduced by an amendment of section 8 (see clause 176C) to comply with section 25.

Clause 176V(3) replaces existing sections 36(3) to (10) with new sections 36 (3) to (7).

New section 36(3) clarifies that the head contractor need not transfer the amount to the disputed funds account to the extent that the disputed amount is more than the contract price for the relevant subcontract and is the subject of a payment dispute where the head contractor failed to issue a payment schedule for the amount.

Clause 176V(4) defines the term 'contract price' for a subcontract, incorporating section 8(1) of the BIF Transitional Regulation.

Clause 176V(5) clarifies that the amount captured by the definition *contract price*, for a subcontract, includes the goods and services tax payable, incorporating section 8(2) of the BIF Transitional Regulation.

Clause 176V(6) requires the head contractor to give the relevant subcontractor beneficiary written notice of when the head contractor transferred an amount under new subsection 36(1), immediately after transferring the amount. Clause 176V(7) defines the term 'transfer' for section 36.

### **176W Insertion of new ss 36A – 36C**

New sections 36A to 36C contain provisions relating to the matters in existing section 36 (4) to (10) and the matters contained in sections 6 to 10 of the BIF Transitional Regulation. As the transitional regulation will expire by 1 March 2019 or earlier if repealed, the requirements need to be included in the Act.

New section 36A requires amounts deposited into the disputed funds trust account to be identifiable against the relevant subcontractor beneficiary.

New section 36B provides that the head contractor may only withdraw an amount from the disputed funds trust account to pay the relevant subcontractor beneficiary, or the head contractor in accordance with the outcome of a dispute resolution process. There is also an ability for a regulation to prescribe additional circumstances.

For a payment to the head contractor in accordance with the outcome of a dispute resolution process, if the outcome of the process may be appealed, the withdrawal must not be made until the conclusion of the period within which an appeal may be commenced or, if an appeal is commenced, the conclusion of the appeal.

New section 36C applies if the head contractor transfers or deposits an amount into the disputed funds trust account because of a payment dispute involving a subcontractor beneficiary and the amount remains in the account after the 'relevant day'.

The new section requires the head contractor to return the amount to the trust account it originated from, or if the head contractor deposited the amount in the disputed funds trust account, return the amount to itself, as soon as practicable after the 'relevant day'. Such an amount may be the full amount transferred or deposited or may be an amount that remains in the account after payments have been made under section 36B.

Under new section 36C(3), 'relevant day' means:

- (a) the end of the dispute resolution process where the outcome cannot be appealed;
- (b) where a dispute resolution process outcome can be appealed, the last day by which the appeal may be commenced, or if an appeal is commenced, the day the appeal is decided; or
- (c) if there is no dispute resolution process outcome, 60 days after notice of transfer was given to the subcontractor beneficiary under new subsection 36(7).

**176X Amendment of s 37 (Ending project bank account)**

Clause 176X incorporates section 11 of the BIF Transitional Regulation and clarifies section 37 to ensure it better reflects the policy intent for the section. As the transitional regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be included in the Act.

The purpose of the amendment is to ensure that a PBA cannot be closed if money is being held in a retention account in relation to a subcontract. For example, a contractor may engage a subcontractor to carry out building work and withhold a retention amount in relation to that part of the subcontract and then continue to engage the same contractor to carry out a long-term maintenance subcontract. The PBA cannot be closed while the retention amount is still held in the retention trust account in respect of that subcontractor beneficiary. Clause 176X also aligns the language used in the note in section 37(1) with language used in other provisions that deal with a head contractor's 'liability to pay' subcontractor beneficiaries 'in connection with' a subcontract.

The circumstances in which a head contractor is liable to pay a subcontractor beneficiary are set out in new section 10A. The phrase 'in connection with' has a broad meaning and clarifies the intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4.

**176Y Amendment of s 39 (Amounts in project bank account unavailable for head contractor's debts)**

Clause 176Y amends the definition *creditor* in section 39(3). The amendment will ensure that the language used in the definition aligns with the language used in other provisions that deal with a head contractor's liability to pay subcontractor beneficiaries. The phrase 'entitled to be paid' is replaced with 'liable to pay'. The circumstances in which a head contractor is liable to pay a subcontractor beneficiary are set out in new section 10A.

The term 'under' is replaced with the phrase 'in connection with'. The phrase 'in connection with' has a broader meaning and is used to clarify the intention to include amounts payable to the subcontractor because of a circumstance related to the subcontract which may be outside the terms of the subcontract, for example an adjudication under Chapter 3, part 4.

**176Z Amendment of s 50 (Principal to be given information about subcontracts)**

Section 50 is intended to ensure that the principal is provided with information about subcontracts entered into by the head contractor for a building contract. Section 50 currently requires certain prescribed information to be provided to the head contractor within 5 business days of a subcontract being entered into. The prescribed information includes the name and account details for each subcontractor beneficiary.

It is currently not clear when notices are required in the circumstance where a PBA must be established some time after one or more subcontracts have been entered into (for example, where a building contract is amended and the building contract becomes a PBA contract).

The amendment addresses this issue by clarifying that in those circumstances, the head contractor must provide the prescribed information within 5 business days after the PBA is required to be established.

**176ZA Amendment of s 52 (Principal to inform Commissioner of discrepancies)**

The purpose of the amendment is to align the wording of section 52(1) with section 51(2) to ensure the head contractor gives the principal a copy of *the information contained in* a payment instruction, under section 52(1). This issue is currently addressed by section 12 of the BIF Transitional Regulation. As the transitional regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be included in the Act.

**176ZB Insertion of new ch 2, pt5, div 1, hdg**

Clause 176ZB inserts the heading 'Division 1 Interpretation' before section 53.

**176ZC Insertion of new ch 2, pt5, div 2, hdg**

Clause 176ZC inserts the heading 'Division 2 Principal may step in as trustee' before section 54.

**176ZD Amendment of s 54 (Right of principal to step in as trustee)**

Section 54 sets out circumstances where the principal may step into the role of trustee of a PBA. The provision requires that prior to undertaking this action the principal must provide the head contractor with written notice, but does not provide any format for the notice to be provided in. Given the seriousness of this step, it is considered appropriate for the notice to be provided in an approved form.

Section 13 of the BIF Transitional Regulation addresses this issue by providing that a notice from a principal must be in the approved form. As the transitional regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be included in the Act. The proposed amendment reflects section 13 of the transitional regulation by replacing the words 'written notice' in subsection (2) with the words 'notice, in the approved form'.

**176ZE Insertion of new ch 2, pt 5, div 3, hdg**

Clause 176ZE inserts the heading 'Division 3 Principal as trustee' after section 54.

**176ZF Insertion of new s 54A**

Clause 176ZF inserts new section 54A 'Application of division' to clarify the division applies if a principal elects to step in as trustee and is appointed as trustee for a PBA under section 54. New section 54A replaces existing section 55(1).

**176ZG Amendment of s 55 (Information to be given to principal as trustee)**

Clause 176ZG(1) is a consequential amendment required as a result of the insertion of new section 54A which replaces existing section 55(1).

Clause 176ZG(2) clarifies that the references to 'as soon as practicable' in section 55(2) and (3) are intended to be references to 'as soon as practicable after the principal is appointed trustee'.

Clause 176ZG(3) ensures that, in addition to the information the head contractor is required to give the principal stepping in as trustee under existing section 55(2), the head contractor must give the principal a copy of the records of transactions that were required to be kept under section 45(1). This information will assist the principal in carrying out its role as trustee.

This issue is currently addressed in the BIF Transitional Regulation, section 17(2). As the transitional regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be included in the Act.

Clause 176ZG(4) is a consequential amendment to renumber the subsections as a result of amendments made.

**176ZH Insertion of new s 55A**

Clause 176ZH inserts new section 55A 'Right of principal to apply to Supreme Court for directions'. Currently, the Act specifically provides that a head contractor can apply to the Supreme Court for directions about an amount held under a PBA, the administration of a PBA, or the exercise of a head contractor's powers.

As the principal effectively steps into the shoes of the head contractor when it becomes the trustee for a PBA it is necessary to provide it with all of the powers of the head contractor, including the ability to obtain directions from the Supreme Court. To achieve this purpose a new section 55A will be inserted. This provision is based on section 18 of the BIF Transitional Regulation.

As the Transitional Regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be placed in the Act.

### **176ZI Amendment of s 56 (Principal as trustee)**

Section 56 sets out the requirements that are placed on the principal if they are appointed as trustee of a PBA under section 54. Clause 176ZI omits section 56(1). This subsection is no longer required as the content of existing subsection 56(1) is stated at the beginning of the division in new section 54A as inserted by clause 176ZF.

Clause 176ZI(2) clarifies that the payments that can be made by the principal as trustee are those it may make rather than those it is required to make. This enables the principal to make a payment if permitted to do so, rather than only if required to do so. Clause 176ZI(3) is a consequential amendment that is required because of the omission of section 56(1).

### **176ZJ Amendment of s 57 (Protection from civil liability)**

Clause 176ZJ is a consequential amendment to remove wording that is no longer required as a result of clause 176ZF.

### **176ZK Replacement of s 76 (Responding to payment claim)**

The purpose of section 76 is to ensure that claimants issuing a payment claim receive early notice about whether and how much a respondent intends to pay. The provision has been amended to reduce the timeframe within which the payment schedule must be provided to the claimant. It also clarifies when a respondent is not required to give a payment schedule. The amended provision was drafted following feedback from industry stakeholders regarding the timeframes of the previous provision.

By reducing the timeframe to provide a payment schedule to a maximum of 15 business days (or earlier if the relevant contract so provides), the claimant will know what it will be paid at an earlier time. The opportunity to proceed to adjudication will also arise sooner where a payment schedule amount is disputed. Respondents who pay in full by the due date for payment are excused from the obligation to provide a payment schedule, reducing the administrative burden for those payers.

Respondents who do not issue a payment schedule within the required timeframe and do not pay in full and on time commit an offence under the Act.

### **176ZL Amendment of s 88 (Adjudicator's decision)**

Clause 176ZL provides that an adjudicator, in giving a copy of its decision to the registrar, must also give the registrar notice of the fees and expenses charged by the adjudicator for the decision. The registry currently collects information in relation to adjudication fees charged, on the approved form in which adjudication decisions must be provided under section 102 of the BCIP Act.

### **176ZM Amendment of s 165 (Conditions of registration)**

Clause 176ZM amends section 165 which provides the conditions of registration as an adjudicator. The amendment provides that a regulation may prescribe mandatory training to be completed by adjudicators. Such mandatory training may include training about the difference between processes under the Act and the equivalent processes under the (to be repealed) BCIP Act, or amendments of the Act.

### **176ZN Amendment of s 185 (Adjudicator must give information to registrar)**

Section 185 provides information that an adjudicator must give to the Registrar. It provides that the information must be provided in writing. Clause 176ZN amends section 185 to require adjudicators to provide information to the Registrar in the approved form rather than in writing. This provides the ability for specific requirements in relation to the information to be prescribed and assists in the collection of the required information.

### **176ZO Replacement of s 190 (Who may prosecute)**

Clause 176ZO clarifies the timeframes for when prosecution of an offence under the BIF Act may commence.

Subsection (1) provides that a prosecution for an offence against the BIF Act may be started within 1 year after the offence comes to the knowledge of the complainant (QBCC), but no later than 2 years after the offence is committed.

Subsection (2) provides that a statement in a complaint for an offence against the BIF Act that the matter of the complaint came to the complainant's knowledge on a stated day is evidence that the matter came to the complainant's knowledge on that day.

This clause incorporates section 20 of the BIF Transitional Regulation. As the transitional regulation will expire by 1 March 2019 or earlier if repealed, this requirement needs to be included in the Act.

### **176ZP Insertion of new ch 8, pt 1A**

Clause 176ZP inserts a new part 1A into Chapter 8. This part contains transitional provisions required prior to the commencement of Chapters 3 and 4. New section 201A provides clarification that prior to the repeal of the BCIP Act (which will occur on commencement of Chapter 3 (Progress payments), a reference in Chapter 2 (Project bank accounts) to payment claims, payment schedules, progress payments or adjudication is taken to be a reference to the matter under the BCIP Act.

New section 201B provides that there is no entitlement to a subcontractor's charge to the extent it relates to money held in trust under a project bank account. New section 201B clarifies that prior to the repeal of the *Subcontractors' Charges Act 1974* (which will occur on commencement of Chapter 4 (Subcontractors' charges)), a subcontractor's charge is that within the meaning of section 3 of the *Subcontractors' Charges Act 1974*.

New section 201C provides for the repeal of the BIF Transitional Regulation 2018. The required content of the transitional regulation will be incorporated into the Act by amendments in the Bill.

The transitional regulation expires by 1 March 2019 unless repealed earlier.

It is intended that the amendments of the Act incorporating the required content from the transitional regulation will commence at the same time as the repeal of the transitional regulation.

**176ZQ Insertion of new s 205A**

New section 205A is a transitional provision. The existing section 205 of the Act provides that the (to be repealed) BCIP Act continues to apply to 'unfinished matters' for a payment claim after the commencement of Chapter 3 of the BIF Act and repeal of the BCIP Act. New section 205A provides for references in the Act to terms used both in the Act and in the (to be repealed) BCIP Act also include a reference to the same type of matter under the repealed BCIP Act, as preserved under section 205.

**176ZR Amendment of s 209 (Unfinished matters for existing subcontractors' charges to be dealt with under the repealed Act)**

Section 209 of the Act provides that the (to be repealed) *Subcontractors' Charges Act 1974* continues to apply to 'unfinished matters' for a notice of claim of charge for a subcontractor's charge after the commencement of Chapter 4 of the Act and repeal of the *Subcontractors' Charges Act 1974*.

Section 117 of the Act provides that there is no entitlement to a subcontractor's charge to the extent it relates to money held in trust under a project bank account. The amendment of section 209 provides that a reference in section 117 to a subcontractor's charge includes a reference to a subcontractor's charge under the repealed Act, as preserved under section 209(2).

**176ZS Amendment of s 211 (Transitional regulation-making power)**

Existing section 211 is a transitional regulation-making power.

Section 211, apart from subsections (1)(a)(ii) and (5) commenced by proclamation on 1 March 2018. Subsection 211(1)(a)(i) enables a transitional regulation in relation to PBAs to be made. A transitional regulation was made on 1 March 2018 in relation to matters concerning PBAs.

Subsection 211(1)(a)(ii), not yet commenced as at the commencement of this amendment, enables a transitional regulation to be made in relation to the transition from the operation of a repealed Act to the operation of the BIF Act. Subsection 211(5), not yet commenced as at the commencement of this amendment, defines 'repealed Act' as the repealed BCIP Act or the repealed *Subcontractors' Charges Act 1974*.

Subsection 211(4) provides that section 211 and any transitional regulation will expire 1 year after the day of commencement.

Chapter 3 (Progress payments) and Chapter 4 (Subcontractors' charges) did not commence on 1 March 2018.

The amendment of section 211 enables a transitional regulation to be made in relation to the transition from the operation of a repealed Act to the operation of this Act and if so made, to expire one year after the commencement of subsection 211(1)(a)(ii). The amendment also provides for the expiry of section 211, 1 year after the day of commencement of subsection (1)(a)(ii).

### **176ZT Amendment of s307 (Amendment of sch 2 (Dictionary))**

Clause 176ZT amends section 307 to retain the definition of 'demerit matter' in schedule 2 (Dictionary) of the QBCC Act.

### **176ZU Amendment of sch 2 (Dictionary)**

Clause 176ZU inserts definitions of 'appeal' and 'dispute resolution process', for Chapter 2, part 3. Clause 176ZU also effectively inserts 'trust' in the titles of the definitions of 'disputed funds account' and 'retention account' for Chapter 2. In doing so, the clause aligns the two definitions with sections 8, 23 and 25, as amended by clauses 176C, 176H, 176I.

## ***Amendments of Queensland Building and Construction Commission Act 1991***

### **Amendment 14 - Insertion of new clauses 192A-192K**

#### **192A Omission of s67AZAA (When demerit points allocated for direction to rectify or remedy)**

Clause 192A omits section 67AZAA from the QBCC Act as it is considered no longer necessary. Section 67AZAA was originally included in the BIF Act to give effect to the policy intention that demerit points would apply for receiving a direction to rectify or remedy building work. Prior to the BIF Bill being passed, it was determined that demerit points would only apply for a failure to comply with a direction. However, section 67AZAA was not omitted when this policy change occurred. Similar provisions already exist in the QBCC Act for allocating demerit points for demerit offences and judgement debts.

#### **192B Amendment of s 74AA (Definitions for part)**

Section 74AA includes definitions for Part 6AA 'Building products'. Clause 192B inserts a definition of 'install' and 'installer' to put it beyond doubt that the chain of responsibility for a building product is intended to apply to builders and those procuring the services of other contractors or tradespeople to install a building product. This would include not only head contractors, but also higher contractors who instruct, or provide those physically installing the building product, with a list or advice, on the products to be installed.

Clause 192B also inserts a definition of 'responsible person', in relation to a building product, in section 74AA. The term 'responsible person' is currently defined in section 74AW(4) for that section. However, as other sections in Part 6AA also refer to the term, it is necessary for the definition of the term to be relocated to section 74AA.

The definition responsible person has been modified so it no longer refers a person who installed the product in the building but refers to any person involved in the installation of the product. The definition responsible person has also been expanded to include an architect or engineer who, in designing a building, specified that a product be associated with the building.

**192C Amendment of s 74AE (Who is a person in the chain of responsibility for a building product)**

This clause expands the range of persons in the chain of responsibility for a building product. It provides that an architect or engineer who, in designing a building, specifies that a product be associated with the building, is included in the chain of responsibility. Architects and engineers play an important role in ensuring any building products used in a building, including in a building's design, are safe and fit for their intended use.

**192D Amendment of s 74AG (Additional duty relating to accompanying information)**

This clause amends existing section 74AG to provide an additional duty for an architect or engineer who specifies that a building product be associated with a building. As a result, as far as reasonably practicable, when the architect or engineer gives their design to another person, the design must be accompanied by information that has been prescribed by regulation. The term 'required information' for a building product, is already defined as information about a product that communicates certain information, including the suitability and any instructions about the intended use of the product.

**192E Amendment of s 74AH (Additional duties relating to recalls)**

This clause amends existing section 74AH to provide additional duties for an architect or engineer to comply with in relation to recalls for building products. Architects and engineers who specify building products are expected to be aware of any recalls affecting those products. Architects and engineers will be responsible for ensuring they do not specify in a design for a building, that a building product be associated with the building, if the product is the subject of a recall order.

Where a recall order has been made for a product that an architect or engineer has previously specified, the architect or engineer must notify any person to whom they gave the design of the recall order, and either amend the design or identify an alternative product. These actions must occur at the expense of the architect or engineer.

**192F Amendment of s 74AW (Minister may make recall order)**

Clause 192B inserts the definition of 'responsible person', in relation to a building product, in section 74AA, which sets out the definitions for Part 6AA. Therefore, the definition of the term in section 74AW(4) is no longer required.

**192G Amendment of s 74AZ (Nature of recall order)**

Section 74AZ provides that a recall order must state the reasons for the recall of the building product from use and what each responsible person to whom the order applies must do to recall the building product.

Clause 192G amends section 74AZ so it includes, as an example of the action required to be taken in relation to the recall, the action an architect or engineer must take to ensure any specification of a product included in a design of theirs is removed from the design. Specific examples of such actions provided include amending the design and notifying persons to whom the design has been given about alternative products.

**192H Amendment of s 74AZA (Supplier or installer must help responsible person)**

Section 74AZA requires a supplier or installer of a building product to help a responsible person to whom a recall order for the product applies, if the responsible person asks them for help with the recall. Clause 192H expands section 74AZA so it requires an architect or engineer who, in designing a building, specifies the building product, to give the responsible person- reasonable help relating to the recall order, if requested.

**192I Amendment of s 74AZC (Minister may publish warning statement)**

Clause 192B inserts the definition of 'responsible person', in relation to a building product, in section 74AA, which sets out the definitions for Part 6AA. Clause 192I is a consequential amendment that results from that insertion.

**192J Amendment of s 74A (Commission may investigate grounds for taking disciplinary action)**

This clause is one of a number of clauses in the Bill that replace references in the Act to 'inspector' with references to 'investigator'. Together, these clauses will ensure consistent terminology is used throughout the Act.

**192K Amendment of s 74C (Proper grounds for taking disciplinary action against person not a licensee)**

This clause is one of a number of clauses in the Bill that replace references in the Act to 'inspector' with references to 'investigator'. Together, these clauses will ensure consistent terminology is used throughout the Act.

**Amendment 15 - Insertion of new clauses 193A–193G**

**193A Amendment of s 86 (Reviewable decisions)**

This clause is one of a number of clauses in the Bill that replace references in the Act to 'inspector' with references to 'investigator'. Together, these clauses will ensure consistent terminology is used throughout the Act.

**193B Amendment of s 87A (No stay by QCAT of particular decisions)**

This clause is one of a number of clauses in the Bill that replace references in the Act to 'inspector' with references to 'investigator'. Together, these clauses will ensure consistent terminology is used throughout the Act.

**193C Amendment of s 92 (Tribunal may conduct public examination)**

This clause is one of a number of clauses in the Bill that replace references in the Act to 'inspector' with references to 'investigator'. Together, these clauses will ensure consistent terminology is used throughout the Act.

**193D Amendment of s 95 (Expedited hearing of domestic building disputes or reviews)**

This clause is one of a number of clauses in the Bill that replace references in the Act to 'inspector' with references to 'investigator'. Together, these clauses will ensure consistent terminology is used throughout the Act.

**193E Amendment of s 99 (Licensee register)**

Section 99(3)(d) of the QBCC Act allows the licensee register maintained by the QBCC to include a note of each time a licensee is convicted of an offence against the QBCC Act and the provision of that Act contravened. The QBCC also administers the BIF Act which contains offences. Clause 193E expands section 99(3)(d) so it also allows the licensee register to include a note of each time a licensee is convicted of an offence against the BIF Act and the provision of that Act contravened.

**193F Amendment of sch 1 (Transitional and validating provisions)**

Section 77 of schedule 1 refers to investigators as inspectors and to section 104 rather than 104B. (When the provisions dealing with investigators were consolidated into the QBCC Act, section 104 was renumbered as section 104B but this was not reflected in section 77.) Existing appointments under the Building Act 1975 and PDA 2002 referred to in section 77(2) and (3) refer to 'investigator'. Section 77 is therefore being amended to correct the terminology and the cross-references to section 104B.

**193G Amendment of sch 1 (Transitional and validating provisions)**

Clause 193G clarifies that anything done by an investigator between 10 November 2017 and the commencement of this clause was validly done, as though their previous appointment had continued.

This validating provision applies retrospectively, but it does not have a significant adverse impact on the rights of individuals.

Section 77 of schedule 1 refers to investigators as inspectors and to section 104 rather than 104B. (When the provisions dealing with investigators were consolidated into the QBCC Act, section 104 was renumbered as section 104B but not reflected in section 77). Section 77 is therefore being amended to correct the terminology and cross-references to section 104B (see clause 193F). Clause 193G is a corresponding validating provision that ensures that anything done by the holder of a relevant appointment (as an investigator) between 10 November 2017 (when section 77 commenced) and the commencement of this section is taken to have been validly done. The validating provision does not alter existing appointments of investigators under the QBCC Act or their powers.

**Amendment 16 - Clause 196 (Amendment of sch 2 (Dictionary))**

Clause 196 amends the definitions in schedule 2 of 'domestic building work' and 'residential construction work' to clarify that they apply to the whole of the QBCC Act. The amendments remedy unintended consequences resulting from earlier amendments and clarify the original policy intent for the definitions.

Clause 196 also replaces a redundant definition of 'demerit points' in the schedule with a

new definition of the term that refers to section 67AQ. In addition, the clause inserts in the dictionary a definition of the terms 'install' and 'installer', for Part 6AA 'Building products'. Further, the clause inserts a definition of 'responsible person'.

The term 'responsible person' is currently defined under section 74AW(4), for that section alone. However, as other sections in Part 6AA also refer to the term, it is necessary for the definition of the term to be relocated to section 74AA. The definition of the term inserted in the dictionary refers to definition relocated to section 74AA. The definition *responsible person* has been expanded to include an architect or engineer who, in designing a building, specifies that a product be associated with the building.

The term 'install and installer' is a new definition in Part 6AA inserted by clause 192B into section 74AA. This definition is to clarify the intention that the chain of responsibility for a building product is intended to apply to builders and those procuring the services of other contractors or tradespeople to install a building product.

## ***Amendments of plumbing and drainage provisions in Bill***

### **Amendment 17 - Schedule 1 (Dictionary)**

Amendment 17 replaces the definition of 'permit' currently in the dictionary for the PD Act 2018, with a new definition *permit*. The new definition clarifies that a permit may be issued by either a local government or a public sector entity. A public sector entity may issue a permit only for plumbing or drainage work to be carried out by or for the public sector entity, whereas a local government may issue a permit for any plumbing or drainage work to be carried out in its local government area.

### **Amendment 18 - Schedule 1 (Dictionary)**

Amendments 8 and 18 together relocate the definition 'public sector entity' that is currently in clause 81(2) of the Bill, to the dictionary and revise the definition so it incorporates the definition *distributor-retailer*, which is also currently in clause 81(2). The definition *public sector entity* is required to be relocated to the dictionary because it is needed for the definition *permit*, as amended by amendment 17, as well as for clause 81.

## ***Other minor amendments***

### **Amendment 19 - Schedule 2 (Acts amended)**

Amendment 19 corrects the use of the apostrophe in particular phrases relating to subcontractors appearing in various provisions in the BIF Act. In particular, the amendment replaces references to 'subcontractor's charges' with 'subcontractors' charges', references to 'subcontractor's charges' with 'subcontractor's charge' and references to 'subcontractors' charge' with 'subcontractor's charge'.

### **Amendment - 20 - Long title**

This amendment amends the long title of the PD Act 2018 to include the BIF Act.