



# Building Industry Fairness (Security of Payment) Act 2017

Current as at 1 July 2021

**Warning—Some provisions of this legislation are not in operation. These provisions are italicised. For details, see the List of legislation in the Legislative history.**

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Queensland

# Building Industry Fairness (Security of Payment) Act 2017

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# Building Industry Fairness (Security of Payment) Act 2017

**An Act to provide for the security of payment in the building and construction industry by providing for effective, efficient, and fair processes for securing payment**

## Chapter 1 Preliminary

### Part 1 Introduction

#### 1 Short title

This Act may be cited as the *Building Industry Fairness (Security of Payment) Act 2017*.

#### 2 Commencement

- (1) Chapter 9, part 1, divisions 1 to 4 commence on a day to be fixed by proclamation.
- (2) The *Acts Interpretation Act 1954*, section 15DA does not apply to chapter 9, part 1, divisions 1 to 4.

*Note—*

The *Acts Interpretation Act 1954*, section 15DA, provides for the automatic commencement of certain Acts 1 year after they are assented to.

### **3 The main purpose of Act**

- (1) The main purpose of this Act is to help people working in the building and construction industry in being paid for the work they do.
- (2) The main purpose of this Act is to be achieved primarily by—
  - (a) requiring the use of statutory trusts for particular contracts related to the building and construction industry; and
  - (b) granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments; and
  - (c) establishing a procedure for—
    - (i) making payment claims; and
    - (ii) responding to payment claims; and
    - (iii) the adjudication of disputed payment claims; and
    - (iv) the recovery of amounts claimed; and
  - (d) enabling the use of a statutory charge in favour of subcontractors for payment of the work they do.

## **Part 2 Application and operation of Act**

### **4 Act binds all persons**

This Act binds all persons, including the State, and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States.

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## Part 3 Interpretation

### 5 Definitions

The dictionary in schedule 2 defines particular words used in this Act.

### 6 Subcontracts, subcontractors and subcontracted work

- (1) A contract is a *subcontract* for another contract if—
- (a) performance of the contract contributes to the performance of the other contract because the work, required to be carried out under the contract, will form all or part of the work required to be carried out under the other contract; and
  - (b) the contribution mentioned in paragraph (a) is not merely coincidence.

*Example for paragraph (b)—*

the purchase of tools from a retail store

- (2) To remove any doubt, it is declared that—
- (a) the contribution mentioned in subsection (1)(a) may be indirect because the contract contributes to the performance of 1 or more other subcontracts in order to contribute to the other contract; and

*Note—*

A subcontract that contributes directly to a contract would have 1 entity that is both a party to the subcontract and a party to the contract.

- (b) a contract may be a subcontract for another contract regardless of whether any party to the contract is also a party to the other contract.
- (3) If the party to a contract, who is required to carry out work under the contract, subcontracts all or part of the work—

- (a) the resulting subcontract is a subcontract for the contract; and
  - (b) the person required to carry out the work under the subcontract is a **subcontractor** for the contract; and
  - (c) the work required to be carried out under the subcontract is the **subcontracted work** for the contract.
- (4) The categories of subcontracts are first tier subcontracts, second tier subcontracts, third tier subcontracts and so on.
- (5) A subcontract is a **first tier subcontract** for a contract if—
- (a) performance of the subcontract contributes directly to the performance of the contract; and
  - (b) 1 person is both a party to the subcontract and a party to the contract.
- (6) A subcontract is a **second tier subcontract** for a contract if—
- (a) performance of the subcontract contributes to the performance of the contract only by also contributing to the performance of another subcontract for the contract; and
  - (b) no party to the subcontract is also a party to the contract; and
  - (c) 1 person is both a party to the subcontract and a party to the other subcontract.
- (7) A subcontract is a **higher subcontract** for another subcontract if—
- (a) performance of the other subcontract contributes to the performance of the subcontract because the work, required to be carried out under the other subcontract, will form all or part of the work required to be carried out under the subcontract; and
  - (b) both subcontracts are subcontracts for the same contract.

*Example—*

A first tier subcontract would be a higher subcontract for a third tier subcontract if the work required to be carried out under the third tier

subcontract will form all or part of the work required to be carried out under the first tier subcontract.

## Chapter 2 Statutory trusts

### Part 1 Preliminary

#### 7 Purpose of chapter

The main purpose of this chapter is to ensure that funds paid to the contracted party for particular contracts are held in a trust to protect the interests of subcontractors.

#### 8 Definitions for chapter

In this chapter—

*approved financial institution* means a financial institution approved by the commissioner under section 55.

*building* means a fixed structure that is wholly or partly enclosed by walls or is roofed.

*contract administration*, in relation to project trust work wholly or partly designed by a person, includes the following—

- (a) preparing tender documentation and calling and selecting tenders;
- (b) preparing, or helping the person's clients with the preparation of, contracts;
- (c) preparing additional documentation for the person's clients or building contractors;
- (d) arranging and conducting on-site meetings and inspections;

- (e) arranging progress payments;
- (f) arranging for certificates, including certificates from a local government, to be issued;
- (g) providing advice and help to the person's clients including during the maintenance period allowed under a contract.

***contracted party***, for a contract, means the party to the contract who is required to perform work under the contract, whether by—

- (a) carrying out the work personally; or
- (b) directly or indirectly causing the work to be carried out.

***contracted work***, for a contract, means the work required to be carried out under the contract.

***contracting party***, for a contract, means the party to the contract for whom the contracted work is to be carried out.

***contract price*** see section 9.

***hospital and health service*** means a Hospital and Health Service established under the *Hospital and Health Boards Act 2011*, section 17.

***mechanical services work*** see the *Queensland Building and Construction Commission Act 1991*, schedule 2.

***project trust work*** see section 8A.

***protected work*** see section 8B.

***State authority***—

- (a) means—
  - (i) an agency, authority, commission, corporation, instrumentality, office, or other entity, established under an Act or by authority of the State for a public or State purpose; or
  - (ii) a corporation that is—

- (A) owned or controlled by the State, a local government or an entity mentioned in subparagraph (i); and
- (B) prescribed by regulation to be a State authority; or
- (iii) a subsidiary of a corporation mentioned in subparagraph (ii); or
- (iv) a part of an entity mentioned in subparagraphs (i) to (iii); or
- (v) a hospital and health service; but
- (b) does not include an entity prescribed by regulation not to be a State authority.

*trust records* see section 52(1).

*variation*, of a contract, means an addition to, or an omission from, the contracted work.

## **8A Meaning of *project trust work***

- (1) *Project trust work* means any of the following work—
- (a) the erection or construction of a building;
  - (b) the renovation, alteration, extension, improvement or repair of a building;
  - (c) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage in connection with a building;
  - (d) any site work (including the construction of retaining structures) related to work of a kind mentioned in paragraph (a), (b) or (c);
  - (e) the preparation of plans or specifications for the performance of any other work mentioned in this subsection;

- (f) contract administration if carried out by a person for the construction of a building wholly or partly designed by the person;
- (g) fire protection work within the meaning of the *Queensland Building and Construction Commission Act 1991*, schedule 2;
- (h) site testing within the meaning of the *Queensland Building and Construction Commission Act 1991*, schedule 2 and classification carried out in preparation for the erection or construction of a building on the site;
- (i) the carrying out of a building inspection;
- (j) the inspection or investigation of a building, and the provision of advice or a report, for the following—
  - (i) termite management systems for the building;
  - (ii) termite infestation in the building;
- (k) work performed by an architect under the *Architects Act 2002* in the architect's professional practice if the work is associated with a building;
- (l) work performed by a registered professional engineer under the *Professional Engineers Act 2002* in the engineer's professional practice if the work is associated with a building;
- (m) work performed by a surveyor under the *Surveyors Act 2003* in the surveyor's professional practice if the work is associated with a building;
- (n) electrical work under the *Electrical Safety Act 2002* if the work is associated with a building;
- (o) the erection of scaffolding that is associated with a building;
- (p) earthmoving and excavating that is associated with a building;
- (q) certification work performed by a building certifier under the *Building Act 1975* in the certifier's

- professional practice if the work is associated with a building;
- (r) the assessment of energy efficiency of a building;
  - (s) work performed by a fire safety adviser under the *Building Fire Safety Regulation 2008* if the work is associated with a building;
  - (t) the laying of wet pour rubber, including the laying of a blended mix of graded rubber particles and binder to provide a continuous surface if the work is associated with a building;
  - (u) the installation of prefabricated components of a building;
  - (v) mechanical services work that is associated with a building.
- (2) ***Project trust work*** also includes work prescribed by regulation to be project trust work.
- (3) However, ***project trust work*** does not include work prescribed by regulation not to be project trust work.

## **8B Meaning of *protected work***

- (1) ***Protected work*** means any of the following work—
- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings, whether permanent or not, forming, or to form, part of land;
  - (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;

- (c) the installation in any building or other works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
  - (d) the external or internal cleaning of buildings and other works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
  - (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—
    - (i) site clearance, earthmoving, excavation, tunnelling and boring; and
    - (ii) the laying of foundations; and
    - (iii) the erection, maintenance or dismantling of scaffolding; and
    - (iv) the prefabrication of components to form part of any building or other works, whether carried out on-site or off-site; and
    - (v) site restoration, landscaping and the provision of roadways and other access works;
  - (f) the painting or decorating of the internal or external surfaces of any building or other works;
  - (g) the testing of soils and road making materials during the construction and maintenance of roads;
  - (h) the prefabrication of complete buildings or components of a building or other works, whether carried out on-site or off-site;
  - (i) any other work of a kind prescribed by regulation.
- (2) However, *protected work* does not include any of the following work—
- (a) the drilling for, or extraction of, oil or natural gas;

- (b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose;
  - (c) work prescribed by regulation not to be protected work.
- (3) To remove any doubt, it is declared that project trust work is protected work unless the work is prescribed under subsection (2)(c).

*Note—*

The scope of work that is protected work is broader than the scope of work that is project trust work.

## 9 Meaning of *contract price*

- (1) The *contract price*, for a contract, means the amount the contracted party is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract.
- (2) In working out the amount under subsection (1), an amount for GST is not to be included.

# Part 2 Project trusts

## Division 1 Preliminary

### 10 Definitions for part

In this part—

*head contract* means a contract for project trust work that is not also a subcontract of another contract.

*minimum contract price* means an amount prescribed by regulation.

***project trust account*** means the account for a project trust at a financial institution.

***related services*** means—

- (a) architectural, design, surveying or quantity surveying services relating to protected work; or
- (b) building advisory services, engineering advisory services, interior or exterior decoration advisory services or landscaping advisory services if relating to protected work; or
- (c) soil testing services relating to protected work.

***subcontractor beneficiary***, for a project trust, means a subcontractor who is a beneficiary of the trust under section 11A(4).

## **10A Who is a *related entity***

- (1) A person is a ***related entity*** for another person if—
  - (a) for individuals—they are members of the same family; or
  - (b) for an individual and a corporation—the individual or a member of the individual’s family—
    - (i) is a majority shareholder, director or secretary of the corporation or a related body corporate of the corporation; or
    - (ii) has an interest of 50% or more in the corporation; or
  - (c) for an individual and a trustee of a trust—the individual or a related entity under another provision of this section is a beneficiary of the trust; or
  - (d) for corporations—they are related bodies corporate; or
  - (e) for a corporation and a trustee of a trust—the corporation or a related entity under another provision of this section is a beneficiary of the trust; or

- (f) for trustees of 2 or more trusts—
  - (i) a person is a beneficiary of both trusts; or
  - (ii) a person is a beneficiary of 1 trust and a related entity under another provision of this section is a beneficiary of the other trust.
- (2) Also, a person is a *related entity* for another person if the persons acquire interests in a land holding trust and the acquisitions form, evidence, give effect to or arise from what is substantially 1 arrangement.
- (3) In this section—

*family*, for a person, means—

  - (a) the person’s spouse; or
  - (b) a parent of the person or the person’s spouse; or
  - (c) a grandparent of the person or the person’s spouse; or
  - (d) a brother, sister, aunt, uncle, nephew or niece of the person or the person’s spouse; or
  - (e) a child of the person or the person’s spouse; or
  - (f) a grandchild of the person or the person’s spouse; or
  - (g) the spouse of any person mentioned in paragraphs (b) to (f).

*land holding trust* see the *Duties Act 2001*, schedule 6.

*related bodies corporate* means bodies corporate that are related under the Corporations Act, section 50.

## **10B When amount liable to be paid to subcontractor**

For this chapter, a person who is a party to a subcontract is liable to pay an amount to the subcontractor if any of the following circumstances apply—

- (a) the amount is due to be paid by the person to the subcontractor in accordance with the terms of the subcontract;

- (b) under the subcontract, the amount is certified, or otherwise assessed, as payable by the person to the subcontractor;
- (c) the person gives the subcontractor a payment schedule for the amount;
- (d) the person is liable to pay the amount to the subcontractor under section 77;
- (e) the person must pay the amount to the subcontractor under chapter 3, part 4 because of an adjudication of a disputed progress payment for the subcontract;
- (f) the person must pay the amount to the subcontractor because of a final and binding dispute resolution process;
- (g) a court or tribunal orders the person to pay the amount to the subcontractor.

## **10C References to particular terms in this part**

In this part—

- (a) a reference to a contract in association with a reference to a project trust is a reference to the contract for which the trust is required; and
- (b) a reference to a contracting party in association with a reference to a project trust is a reference to the contracting party for the contract for which the trust is required; and
- (c) a reference to a contracted party in association with a reference to a project trust is a reference to the contracted party for the contract for which the trust is required; and
- (d) a reference to a trustee in association with a reference to a project trust, or a contract for which a project trust is required, is a reference to the trustee for the project trust; and

- (e) a reference to a subcontract in association with a reference to a project trust is a reference to a subcontract of the contract for which the trust is required; and
- (f) a reference to a subcontractor beneficiary in association with a reference to a project trust is a reference to a subcontractor beneficiary for the trust; and
- (g) a reference to a trustee in association with a reference to a project trust account is a reference to the trustee for the trust to which the account relates.

## **Division 2                      Project trusts**

### **11        What is a *project trust***

A *project trust* is a trust—

- (a) over the following amounts—
  - (i) amounts paid by the contracting party to the contracted party under a contract (the *project trust contract*) for which a project trust is required;
  - (ii) amounts paid by the contracted party to subcontractors for the project trust contract;
  - (iii) amounts deposited in the project trust account as required under this chapter; and
- (b) primarily for the benefit of subcontractors for the project trust contract.

### **11A      Who are the trustee and beneficiaries of a project trust**

- (1) This section applies to a project trust established for a contract (the *project trust contract*).
- (2) The contracted party for the project trust contract is both the trustee and a beneficiary of the project trust.
- (3) The contracted party—

- (a) becomes the trustee and a beneficiary of the project trust when the trust is established; and
  - (b) ceases to be the trustee and a beneficiary of the project trust when the trust is lawfully dissolved.
- (4) A subcontractor for the project trust contract is a beneficiary of the project trust if—
- (a) its subcontract is a first tier subcontract of the project trust contract; and
- Note—*
- If the project trust contract is a subcontract of a head contract, a first tier subcontract of the project trust contract would also be a second tier subcontract of the head contract.
- (b) the contracted work for its subcontract is protected work or the supply of related services; and
  - (c) the contract price for its subcontract is at least the minimum contract price.
- (5) A subcontractor who is a beneficiary under subsection (4)—
- (a) becomes a beneficiary of the project trust when its subcontract is entered into; and
  - (b) ceases to be a beneficiary of the project trust when paid all amounts it is entitled to be paid under its subcontract.
- (6) Subsection (7) applies if—
- (a) the same parties enter into 2 or more separate subcontracts; and
  - (b) the separate subcontracts are for carrying out protected work at the same site or adjacent sites.
- (7) The contract price for each of the separate subcontracts for the purpose of subsection (4)(c) is the total of the contract prices for all the separate subcontracts.

## **11B What are the beneficial interests in a project trust**

- (1) The beneficiaries of a project trust for a contract have a beneficial interest in—
  - (a) for a subcontractor for the contract (as beneficiary)—an amount the subcontractor is entitled to be paid under its subcontract; or
  - (b) for the contracted party for the contract (as beneficiary)—the remainder for the trust.
- (2) In this section—

*remainder*, for a project trust, means the amount still held in trust after subtracting all amounts subcontractor beneficiaries are entitled to be paid in connection with their subcontracts.

## **Division 3 Contracts requiring project trusts**

### **Subdivision 1 When project trust required**

#### **12 When project trust required for a contract**

- (1) This section applies to a contract entered into on or after the commencement of this section.
- (2) A project trust is required for a contract if—
  - (a) the contract is eligible for a project trust under subdivision 2; and
  - (b) the contract is not exempted under subdivision 3; and
  - (c) the contracted party enters into a subcontract for all or part of the contracted work.
- (3) The requirement starts on the first day a project trust is required under subsection (2).

- (4) The requirement continues until the project trust is dissolved under section 21, regardless of any of the following changes—
  - (a) a variation, or any other amendment, of the contract;
  - (b) a change in the contract price;
  - (c) a change in the contracted work.
- (5) If a project trust is required for a contract and a project trust is also required for a subcontract of the contract, separate project trusts are required for the contract and the subcontract.
- (6) Despite subsection (1), if the contract was entered into because of a tender process, this section only applies to the contract if the tender process was started on or after the commencement of this subsection.
- (7) If the tender process for the contract was started before the commencement of this subsection, this chapter, as in force when the tender process was started, continues to apply for the contract despite any amendment of this chapter after the start of the tender process.

## **Subdivision 2      Eligible contracts**

### **14      Particular contracts for project trust work**

- (1) A contract is eligible for a project trust if—
  - (a) the contracting party is the State or a hospital and health service; and
  - (b) more than 50% of the contract price is for project trust work; and
  - (c) the contract price is \$1 million or more.
- (2) Also, a contract is eligible for a project trust if—
  - (a) the contracting party is a State authority that has decided a project trust is to be established for the contract; and

- (b) more than 50% of the contract price is for project trust work; and
  - (c) the contract price is \$1 million or more.
- (3) In this section—  
*State* does not include a State authority.

#### **14A Amendments of contracts requiring project trusts**

- (1) This section applies if an amendment is made to a contract and—
- (a) before the amendment is made, the contract is not eligible for a project trust under section 14; and
  - (b) after the amendment is made, the contract is eligible for a project trust under section 14.

*Note—*

If a contract requires a project trust under section 14 but, after an amendment of the contract is made, it would not require a project trust under section 14, the requirement to have a project trust continues regardless of the amendment. See section 12(4).

- (2) The contract is eligible for a project trust when the amendment takes effect.
- (3) However, if the amendment is only an increase in the contract price, a project trust is required for the contract only if the amendment, together with any earlier amendments of the contract, increases the original contract price by 30% or more.
- (4) In this section—  
*amendment*, of a contract, includes any variation of the contract or change in the contract price.

#### **14B Multiple contracts at same site or adjacent sites**

- (1) This section applies if—
- (a) the same parties enter into 2 or more separate contracts; and

- (b) the separate contracts are for carrying out project trust work at the same site or adjacent sites.
- (2) The separate contracts are taken to be a single contract (the ***larger contract***) for the purpose of applying this division.

*Example—*

The larger contract would be eligible for a project trust if the contract would be eligible for a project trust under section 14.

- (3) To remove any doubt, it is declared that the exemptions under subdivision 3 apply only to the larger contract and not to the separate contracts.

*Note—*

If the separate contracts are for small scale residential construction work under section 15C, the exemption under section 15C does not apply to exclude the separate contracts from being taken to be a single contract under subsection (2).

- (4) This section does not apply to separate contracts entered into as a result of separate tender processes.

## **14C Subcontracts with related entities require project trusts**

- (1) A subcontract is eligible for a project trust if—
  - (a) the subcontract is a first tier subcontract for a head contract; and
  - (b) a project trust is required for the head contract; and
  - (c) the subcontractor is a beneficiary of the project trust for the head contract; and
  - (d) the subcontractor is a related entity for the contracted party for the head contract.

*Note—*

The contracted party for the head contract would also be the contracting party for the subcontract.

- (2) To remove any doubt, it is declared that the subcontractor continues to be a beneficiary of the project trust for the head contract.

#### **14D Prescribed contracts require project trusts**

A contract is eligible for a project trust if it is of a type of contract prescribed by regulation.

#### **14E Prescribed subcontracts require project trusts**

- (1) A subcontract is eligible for a project trust if—
  - (a) the subcontract is a first tier subcontract for a head contract; and
  - (b) a project trust is required for the head contract; and
  - (c) the subcontractor is a beneficiary of the project trust for the head contract; and
  - (d) the subcontract is a type of subcontract prescribed by regulation.
- (2) To remove any doubt, it is declared that the subcontractor continues to be a beneficiary of the project trust for the head contract.

### **Subdivision 3 Exempt contracts**

#### **15 Subcontracts generally**

A project trust is not required for a subcontract unless it is a type of subcontract to which section 14C or 14E apply.

#### **15A Contracts with particular entities**

A project trust is not required for a contract if the contracting party or contracted party is an entity prescribed by regulation.

#### **15B Contracts between the State and a state authority**

A project trust is not required for a contract if the only parties to the contract are the State and a state authority.

### **15C Contracts for small scale residential construction work**

- (1) A project trust is not required for a contract if the only project trust work to be carried out under the contract is residential construction work for less than 3 living units.
- (2) For subsection (1)—
  - (a) a single detached dwelling is taken to be 1 living unit; and
  - (b) a residential unit is taken to be 1 living unit; and
  - (c) a duplex is taken to be 2 living units.

- (3) In this section—

*residential construction work* means the type of work prescribed by regulation.

*residential unit* means a part of a building designed for separate occupation as a residence.

### **15D Contracts for maintenance work**

- (1) A project trust is not required for a contract if the only project trust work to be carried out under the contract is maintenance work.

- (2) In this section—

*maintenance work*—

- (a) means—
  - (i) testing; and
  - (ii) taking samples and restoring the sample site; and
  - (iii) work required on an ongoing basis to—
    - (A) prevent deterioration or failure of a thing; or
    - (B) restore a thing to its correct operating specifications; or
    - (C) replace a component at the end of its working life; but

- (b) does not include—
  - (i) improving a building to increase its capabilities or functions; or
  - (ii) improving a building to meet new statutory requirements applying to the building; or
  - (iii) a refurbishment or replacement of a building that extends the life of the building.

## 15E Contracts for professional design, advisory or contract administration work

- (1) A project trust is not required for a contract if the only work to be carried out under the contract is advisory work or design work carried out, either directly or indirectly, by—
  - (a) an architect under the *Architects Act 2002*; or
  - (b) a registered professional engineer under the *Professional Engineers Act 2002*; or
  - (c) a building designer; or
  - (d) a person who carries on a business as a landscape architect.
- (2) Also, a project trust is not required for a contract if the only work to be carried out under the contract is contract administration carried out, either directly or indirectly, by a person mentioned in subsection (1) for the construction of a building wholly or partly designed by the person.
- (3) In this section—

**advisory work** means—

  - (a) the inspection or investigation of a building; or
  - (b) the provision of advice or a report about a building.

**building designer** means a person who holds a licence of a class mentioned in the *Queensland Building and Construction Commission Regulation 2018*, schedule 2, part 11, 12 or 13.

*design work* means the preparation of plans or specifications for project trust work.

## 15F Contracts with less than 90 days until practical completion

(1) A project trust is not required for a contract if there is less than 90 days between—

(a) the first day a project trust would, apart from this section, be required for the contract (the *trigger date*); and

*Note—*

If the effect of an amendment of a contract is that the contract becomes eligible for a project trust for the first time, the trigger date is the day the amendment takes effect. See section 14A.

(b) the day practical completion for the contracted work is expected to occur.

(2) If a project trust is not required for a contract because of subsection (1), the contracted party must review the application of this section to the contract each time an amendment of the contract is made that is likely to affect the day practical completion for the contracted work is expected to occur.

(3) In this section—

*amendment*, of a contract, includes any variation of the contract or change in the contract price.

*practical completion*, for contracted work for a contract, means—

(a) practical completion as provided for under the contract; or

(b) if the contract does not provide for practical completion—when the contracted work would reasonably be estimated to be completed—

- (i) in compliance with the contract, including all plans and specifications for the work and all statutory requirements applying to the work; and
- (ii) without any defects or omissions, other than minor defects or minor omissions that will not unreasonably affect the intended use of the work.

## **Division 4            Project trust administration**

### **Subdivision 1        Establishing project trusts**

#### **17            Establishment of project trust**

Once a project trust is required for a contract under section 12, the trust is established by the first of the following being made after the trust is required—

- (a) payment of an amount from the contracting party to the contracted party under the contract;
- (b) payment of an amount from the contracted party to a subcontractor beneficiary for subcontracted work under the contract;
- (c) a deposit in the project trust account as required under this chapter.

### **Subdivision 2        Project trust accounts**

#### **18            Contracted party must open project trust account**

- (1) If a project trust is required for a contract under section 12, the contracted party must open an account at a financial institution for the trust as required by this section.

Maximum penalty—500 penalty units.

- (2) The project trust account must be opened within 20 business days after the contracted party enters into the first subcontract for the contract.
- (3) However—
  - (a) if a project trust is not required for the contract until after an amendment of the contract; and  
*Note—*  
See section 14A about amendments of contracts affecting the requirement to establish a project trust.
  - (b) the contracted party entered into a subcontract for the contract before the amendment of the contract;  
the project trust account must be opened within 20 business days after the day the contract is amended.
- (4) The project trust account must not be a virtual account or subordinate to any other account at a financial institution.
- (5) There must not be more than 1 project trust account for the project trust.
- (6) A provision of a contract that provides that the project trust account must be opened less than 20 business days after the contract is entered into is of no effect.

## **18A Restrictions for project trust account**

- (1) A trustee must ensure the project trust account is held at an approved financial institution.  
Maximum penalty—200 penalty units.
- (2) A trustee must ensure the project trust account is held under a name that includes the trustee's name and the word 'trust'.  
Maximum penalty—200 penalty units.
- (3) A trustee must ensure that deposits of amounts to, and withdrawals of amounts from, the project trust account are made using only methods that create an electronic record of the transfer.

Maximum penalty—500 penalty units.

### **18B Notice of project trust account's opening, closing or name change**

- (1) This section applies if a trustee, or another person on behalf of a trustee, takes any of the following actions in relation to the project trust account—
  - (a) opens the account;
  - (b) changes the name of the account;
  - (c) closes the account;
  - (d) transfers the account.
- (2) Within 5 business days after taking the action, the trustee must give to the contracting party, and must give to the commissioner using an approved way, a notice—
  - (a) stating the action taken; and
  - (b) including the information prescribed by regulation.

Maximum penalty—200 penalty units.

### **18C Change of financial institution**

- (1) A trustee must not transfer the project trust account to an alternative financial institution unless—
  - (a) the alternative financial institution is an approved financial institution; and
  - (b) all amounts held in the account are transferred with the account to the alternative financial institution; and
  - (c) the trustee informs the contracting party, the commissioner and the subcontractor beneficiaries about the transfer as prescribed by regulation.

Maximum penalty—200 penalty units.

*Note—*

See, also, section 18B for the trustee's obligation to inform the contracting party and the commissioner of closing and opening a project trust account.

- (2) When transferring the project trust account to an alternative financial institution, the trustee may withdraw the amounts of interest credited to the account by a financial institution.
- (3) Nothing in this section enables the trustee to have more than 1 project trust account for a project trust at the same time beyond the period necessary to transfer the project trust account.
- (4) In this section—  
*alternative financial institution*, for a project trust account, means a financial institution that is not the financial institution at which the account is currently kept.

### **Subdivision 3      Payments to project trust account**

#### **19      All payments from contracting party to be deposited in project trust account**

- (1) This section applies to any of the following amounts paid by the contracting party to the contracted party in connection with a contract for which a project trust is required—
  - (a) an amount paid in accordance with the terms of the contract;
  - (b) an amount paid because the contracting party is liable under section 77 to pay the amount to the contracted party in connection with the contract;
  - (c) an amount paid under chapter 3, part 4 because of an adjudication of a disputed progress payment relating to the contract;
  - (d) an amount paid because of a final and binding dispute resolution process relating to the contract;

- (e) an amount paid because of a court order relating to the contract;
  - (f) an amount, paid for any other reason, that reduces the unpaid amount of the contract price for the contract.
- (2) The contracting party must deposit the amount into the project trust account for the contract (the *deposit obligation*) unless—
- (a) the amount was due to be paid before the trust was established; or
  - (b) the amount is paid into court; or
  - (c) the amount is to be withheld because of a payment withholding request given to the contracting party under section 97B; or
  - (d) the amount is paid directly to a person under chapter 4 in connection with a subcontractor's charge; or
  - (e) the contracting party has a reasonable excuse for failing to deposit the amount into the account.

Maximum penalty—200 penalty units.

- (3) Once the amount is deposited into the project trust account, the deposit is taken to be a payment made by the contracting party to the contracted party and discharges the contracting party's liability to pay that amount to the contracted party.
- (4) If an amount is paid to the contracted party or its agent in contravention of the deposit obligation, the contracted party must deposit the amount into the project trust account as soon as practicable after receiving the amount.

Maximum penalty for subsection (4)—200 penalty units or 2 years imprisonment.

## **19A Limited purposes for which money may be deposited in project trust account**

- (1) A trustee must not cause an amount to be deposited into the project trust account for any purpose other than—

- (a) paying the trustee, as the contracted party, an amount the contracting party must deposit into the account under section 19(2); or
- (b) paying a subcontractor beneficiary an amount the contracted party is liable to pay the beneficiary in connection with its subcontract; or
- (c) repaying an amount withdrawn from the account in error; or
- (d) making another payment prescribed by regulation.

Maximum penalty—200 penalty units or 1 year's imprisonment.

- (2) This section does not apply to an amount of interest credited to the project trust account by a financial institution.

## **Subdivision 4      Payments from project trust account**

### **20      All payments to subcontractor beneficiaries to be paid from project trust account**

- (1) This section applies if a project trust is required for a contract and the contracted party is liable to pay an amount to a subcontractor beneficiary in connection with its subcontract.
- (2) The contracted party may only pay the amount to the subcontractor beneficiary—
  - (a) from the project trust account; and
  - (b) by depositing the amount into the account of a financial institution nominated by the beneficiary.

Maximum penalty—200 penalty units or 1 year's imprisonment.

- (3) To remove any doubt, it is declared that the obligation to pay an amount from the project trust account applies whether or not the amount is held in the account when it is to be paid.

*Note—*

See section 51 about covering shortfalls.

- (4) The account nominated by the subcontractor beneficiary under subsection (2)(b) must be—
  - (a) controlled by the beneficiary; and
  - (b) if the beneficiary is also required to establish a project trust for its subcontract—the account for the project trust for the subcontract.
- (5) This section does not apply to—
  - (a) a retention amount withheld from payment to a subcontractor beneficiary if the amount is deposited into a retention trust account of which the subcontractor is, or will be, a beneficiary; and
  - (b) a retention amount to be released to a subcontractor beneficiary from a retention trust account.

## **20A Limited purposes for which money may be withdrawn from project trust account**

- (1) A trustee must not withdraw an amount from the project trust account for any purpose other than—
  - (a) paying a subcontractor beneficiary an amount the contracted party is liable to pay the beneficiary in connection with its subcontract; or
  - (b) paying the trustee, as the contracted party, an amount the contracting party is liable to pay the contracted party for contracted work but only to the extent the contracted party is not also liable to pay a subcontractor beneficiary for the same work; or
  - (c) returning an amount paid in error by the contracting party; or
  - (d) depositing a retention amount into a retention trust account; or

- (e) making payment relating to the contract in accordance with an adjudication under chapter 3, part 4; or
- (f) making payment relating to the contract as ordered by a court; or
- (g) making another payment prescribed by regulation.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (2) A trustee must repay all amounts it withdraws in contravention of subsection (1) as soon as practicable after the trustee becomes aware the withdrawal is in contravention of that subsection.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (3) A trustee is taken to have withdrawn an amount from the project trust account if—
  - (a) the trustee authorises any person to make the withdrawal; or
  - (b) the trustee knowingly contributes to the withdrawal being made.
- (4) This section does not apply to the withdrawal of an amount for the project trust account for—
  - (a) an amount of interest as mentioned under section 18C(2); or
  - (b) an amount for fees charged by the approved financial institution for the project trust account.

## **20B Order of priority**

A trustee must not withdraw an amount from the project trust account to pay itself, or make another payment prescribed by regulation, unless there would still be a sufficient amount available in the account after the withdrawal to pay all amounts the contracted party is liable to pay subcontractor beneficiaries at the time of the withdrawal.

Maximum penalty—300 penalty units or 2 years imprisonment.

## **20C Insufficient amounts available for payments**

- (1) This section applies if—
  - (a) a project trust is established for a contract; and
  - (b) the contracted party is liable to pay 2 or more subcontractor beneficiaries (each a *claimant*) an amount at the same time; and
  - (c) the total amount held in the project trust account is insufficient to satisfy in full all of the amounts liable to be paid to the claimants; and
  - (d) when an amount liable to be paid to a claimant is due to be paid, the contracted party has not complied with its obligation under section 51 to cover the insufficient amount.
- (2) The amount to be paid by the contracted party to each claimant is to be reduced in proportion to the amounts liable to be paid to each.

*Example—*

If one subcontractor beneficiary is to be paid \$50,000 and another subcontractor beneficiary is to be paid \$30,000 but only \$40,000 is available, the beneficiaries are to be paid \$25,000 and \$15,000 respectively.

- (3) If the contracted party makes a payment complying with subsection (2), the party must, using an approved way, inform the commissioner of the payment as soon as practicable after making it.

Maximum penalty—100 penalty units.

- (4) While there continues to be an insufficient amount held in the project trust account, the contracted party must not pay a subcontractor beneficiary unless the payment complies with subsection (2).

Maximum penalty—100 penalty units or 1 year’s imprisonment.

- (5) Nothing in this section relieves the contracted party of the party’s liability to pay in full the amounts the party is liable to pay each subcontractor beneficiary.

## **Subdivision 5 Ending project trust**

### **21 Ending project trust**

- (1) Once a project trust is established for a contract, the trustee may dissolve the trust only if—

- (a) there are no longer any subcontractor beneficiaries for the trust; or

*Note—*

A subcontractor beneficiary ceases to be a beneficiary when paid all amounts the contracted party is liable to pay the subcontractor in connection with its subcontract. See section 11A(5)(b).

- (b) the only remaining work to be carried out under the contract is maintenance work.
- (2) A project trust is dissolved by the trustee—
    - (a) closing the project trust account; and
    - (b) giving written notice to the commissioner of the trust having been dissolved.
  - (3) A trustee is taken not to dissolve the project trust by closing the project trust account if the account was only closed for the purpose of transferring the account to another financial institution under section 18C.
  - (4) When dissolving the project trust, the trustee may pay itself the following amounts—
    - (a) any amount for interest that the trustee is entitled to under section 51D;

- (b) any remaining amount that is not owing to a subcontractor beneficiary.
- (5) In this section—  
*maintenance work* see section 15D(2).

### **21A Unauthorised dissolution of project trust**

- (1) A person must not purport to dissolve a project trust before it may be dissolved under section 21(1).  
Maximum penalty—500 penalty units or 1 year's imprisonment.
- (2) Without limiting subsection (1), the person is taken to purport to dissolve a project trust if the person closes the account for the trust while it is still required.
- (3) Subsection (2) does not apply to a person transferring the project trust account to another financial institution under section 18C.

## **Division 5 Information sharing**

### **23 Notice of project trust before entering subcontracts**

- (1) If a project trust is required for a contract under section 12, the contracted party must give each subcontractor a notice about the use of a project trust account (*notice of project trust*) as required by this section.  
Maximum penalty—200 penalty units or 1 year's imprisonment.
- (2) The notice of project trust must—
  - (a) be in writing; and
  - (b) include a statement that a project trust will be used for making payments to the subcontractor; and
  - (c) include the information prescribed by regulation.

- (3) The notice of project trust must be given to the subcontractor—
  - (a) if the project trust is not yet established when the contracted party and the subcontractor enter into a subcontract—within 10 business days after the trust is established; or
  - (b) if the project trust is already established when the contracted party and the subcontractor enter into a subcontract—before the contracted party and the subcontractor enter into a subcontract.
- (4) However—
  - (a) if a project trust is not required for a contract until after an amendment of the contract; and

*Note—*

See section 14A about amendments of a contract affecting the requirement to establish a project trust.

- (b) the contracted party entered into a subcontract for the contract before the amendment of the contract;

the notice of project trust must be given within 10 business days after opening the project trust account.

### **23A Subcontractor beneficiary to be informed of particular withdrawals**

- (1) This section applies if—
  - (a) a withdrawal is made from a project trust account to make a payment to a subcontractor beneficiary; or
  - (b) a withdrawal is made from a project trust account to deposit an amount, withheld from payment to a subcontractor beneficiary, in a retention trust account for the benefit of the subcontractor beneficiary.
- (2) Within 5 business days after making the withdrawal, the trustee for the project trust must give the subcontractor beneficiary a notice of the withdrawal that includes the

information prescribed by regulation, unless the trustee has a reasonable excuse.

Maximum penalty—100 penalty units.

### **23B Subcontractor beneficiary may request particular information**

- (1) A person who is, or was, a subcontractor beneficiary of a project trust may, in writing, request the trustee give the person the following information to the extent it relates to the person—
  - (a) a statement of balance for the project trust account;
  - (b) a copy of the transactions for the project trust account;
  - (c) a copy of the trust records;
  - (d) a copy of supporting statements given to the contracting party with the payment claims made by the trustee as the contracted party.
- (2) The trustee must give the person the requested information within 10 business days after being given the request, unless—
  - (a) the trustee has a reasonable excuse; or
  - (b) the information is already available to the person; or
  - (c) the information has not changed since it was previously given to the person.

Maximum penalty—100 penalty units.

- (3) The requested information must be given to the person in writing and any words used in the information to explain a transaction must be in the English language.
- (4) It is not a reasonable excuse for the trustee to fail to comply with the request on the grounds that complying with the request might tend to incriminate the trustee or expose the trustee to a penalty.
- (5) In this section—

*supporting statement* see section 75(9).

## **Division 6                      Obligations of contracting party**

### **24            Contracting party to report related entities**

- (1) This section applies if—
  - (a) a project trust is established for a contract; and
  - (b) the contracting party knows, or ought reasonably to know, that a subcontractor beneficiary is a related entity for the contracted party.
- (2) The contracting party must, using an approved way, inform the commissioner of the matter within 5 business days after the party first becomes aware, or ought reasonably to have become aware, of the matter.

Maximum penalty—50 penalty units.

### **24A        Contracting party to report failure to establish project trust**

- (1) This section applies if the contracting party for a contract knows or ought reasonably to know—
  - (a) a project trust is required for the contract; and
  - (b) a project trust account has not been opened for the trust as required under section 18.
- (2) The contracting party must, using an approved way, report the matter to the commissioner.

Maximum penalty—100 penalty units.

## **Division 7                    Other matters**

### **25            Contracted party to report related entities**

- (1) This section applies if—
  - (a) a project trust is established for a contract; and
  - (b) the contracted party enters into a subcontract with a related entity for the party.
- (2) The contracted party must, using an approved way, inform the commissioner about entering into the subcontract with the related entity within 5 business days after entering into the subcontract.

Maximum penalty—200 penalty units.

### **25A          Limited liability of contracting party**

Nothing in this part creates or supports a right of action against the contracting party for a contract by a subcontractor, or the contracted party, as a beneficiary of a project trust for the contract.

### **25B          No assignment of entitlement by contracted party**

An assignment by the contracted party of an entitlement of the party to an amount held in trust for a project trust is of no effect.

## **Part 3                        Retention trusts**

### **Division 1                  Preliminary**

#### **30            Definitions for part**

In this part—

***building contract*** see *Queensland Building and Construction Commission Act 1991*, section 67AAA.

***minimum contract price*** means the contract price amount prescribed by regulation.

***retention trust*** see section 31.

***retention trust account*** means the account for a retention trust at a financial institution.

### **30A References to particular terms in this part**

In this part—

- (a) a reference to a contract in association with a reference to a retention trust is a reference to the contract for which the trust is required; and
- (b) a reference to a contracting party in association with a reference to a retention trust is a reference to the contracting party for the contract for which the trust is required; and
- (c) a reference to a contracted party in association with a reference to a retention trust is a reference to the contracted party for the contract for which the trust is required; and
- (d) a reference to a trustee in association with a reference to a retention trust or a contract for which a retention trust is required is a reference to the trustee for the retention trust.

## **Division 2 Retention trusts**

### **31 What is a *retention trust***

A ***retention trust*** is a trust—

- (a) over the following amounts—

- (i) retention amounts withheld in the form of cash under particular contracts;
  - (ii) deposits in the retention trust account as required under this chapter; and
- (b) primarily for the benefit of the party who will be entitled to the retention amount.

### **31A Who are the trustee and beneficiaries of a retention trust**

- (1) This section applies to a retention trust established for retention amounts withheld from payment under a contract (the *retention trust contract*).
- (2) The contracting party is both the trustee and a beneficiary of the retention trust.
- (3) The contracting party—
  - (a) becomes the trustee and a beneficiary of the retention trust when the trust is established; and
  - (b) ceases to be the trustee and a beneficiary of the retention trust when the trust is dissolved.
- (4) The contracted party is a beneficiary of the retention trust.
- (5) The contracted party—
  - (a) becomes a beneficiary of the retention trust when a retention amount is withheld from payment to the party under the retention trust contract; and
  - (b) ceases to be a beneficiary of the retention trust when paid all retention amounts it has a beneficial interest in.

*Note—*

A retention amount need only be released to a contracted party when required under the relevant contract.

### **31B What are the beneficial interests in a retention trust**

- (1) The beneficiaries of a retention trust have a beneficial interest in—
- (a) for the contracted party as beneficiary—all retention amounts held in the trust that were withheld from payment to the contracted party; or
  - (b) for the contracting party as beneficiary—all amounts held in the trust after subtracting the beneficial interests mentioned in paragraph (a).

*Note—*

The contracting party's beneficial interest will generally only exist once the contracted party's beneficial interest has ended under subsection (2).

- (2) However, the contracted party's beneficial interest in a retention amount ends—
- (a) if and when the contracting party becomes entitled to be paid the amount under the relevant contract; and
  - (b) to the extent the contracting party becomes entitled to be paid the amount under the relevant contract.

*Example of when the contracting party becomes entitled to be paid a retention amount—*

The contracting party becomes entitled under the contract to be paid a retention amount to pay for corrections to defects in the contracted work.

## **Division 3 When retention trusts required**

### **32 When retention trust required**

- (1) A retention trust is required for a retention amount withheld from payment under a contract (the *withholding contract*) if—
- (a) the withholding contract is—
    - (i) a head contract; or

- (ii) a first tier subcontract for a head contract; and
  - (b) the contracting party withholds the retention amount in the form of cash; and
  - (c) a project trust is required for the head contract.
- (2) The requirement starts on the first day the contracting party withholds the retention amount from payment.
- (3) The requirement continues until all of the retention amount has been released to the parties entitled to it under the withholding contract, regardless of any of the following changes—
- (a) a variation, or any other amendment, of the contract;
  - (b) a change in the contracted work.
- (4) This section does not apply to a retention amount withheld from payment under a contract if—
- (a) the contracting party is the State, the Commonwealth, a state authority, a local government or another entity prescribed by regulation; or
  - (b) the contract price for the contract is at least the minimum contract price.
- (5) In this section—
- head contract*** means—
- (a) a contract that is not also a subcontract for another contract; or
  - (b) a subcontract that is eligible for a project trust under section 14C or 14D.

## **Division 4                      Retention trust administration**

### **Subdivision 1                Establishing retention trusts**

#### **33                      Establishment of retention trust**

- (1) This section applies if, under section 32, a retention trust is required for a retention amount withheld from payment under a contract.
- (2) The retention trust is established by the contracting party withholding the retention amount from payment.

#### **33A                    Charge over retention amounts held in retention trust**

- (1) This section applies if, under section 32, a retention trust is required for a retention amount withheld from payment under a contract.
- (2) In addition to the retention trust, the retention amount is also subject to a charge in favour of the contracted party for securing the release of the amount when the party becomes entitled to the amount.
- (3) However, if and when the contracting party becomes entitled to be paid part of the retention amount under the contract, the charge is released over that part of the retention amount.
- (4) The contracted party may enforce the charge as if the charge had been given to it under a written agreement between it and the contracting party.
- (5) An act done to defeat, or purporting to operate so as to defeat, the charge is of no effect against the contracted party.
- (6) The charge is declared to be a statutory interest to which the *Personal Property Securities Act 2009* (Cwlth), section 73(2) applies.

## **Subdivision 2      Retention trust accounts**

### **34      Contracting party withholding retention amount must open retention trust account**

- (1) This section applies if, under section 32, a retention trust is required for a retention amount withheld from payment under a contract.
- (2) The contracting party must open an account for the retention trust at a financial institution before withholding the retention amount from payment.

Maximum penalty—500 penalty units.

- (3) However, the contracting party need only establish 1 retention trust account for all retention amounts withheld by the party under any number of contracts for which it is the contracting party.

### **34A      Restrictions for retention trust account**

- (1) A trustee must ensure the retention trust account is held at an approved financial institution.

Maximum penalty—200 penalty units.

- (2) A trustee must ensure the retention trust account is held under a name that includes the trustee's name and the word 'trust'.

Maximum penalty—200 penalty units.

- (3) A trustee must ensure that deposits of amounts to, and withdrawals of amounts from, the retention trust account are made using only methods that create an electronic record of the transfer.

Maximum penalty—500 penalty units.

- (4) A trustee must not close the retention trust account unless—
  - (a) all retention amounts held in the account have been released to the parties entitled to it under the relevant contracts; or

- (b) the account is transferred to an alternative financial institution under section 34C.

Maximum penalty—200 penalty units.

### **34B Notice of retention trust account's opening, closing or name change**

- (1) This section applies if a trustee, or another person on behalf of the trustee, takes any of the following actions in relation to the retention trust account—
  - (a) opens the account;
  - (b) changes the name of the account;
  - (c) closes the account;
  - (d) transfers the account.
- (2) Within 5 business days after taking the action, the trustee must, using an approved way, give the commissioner a notice—
  - (a) stating the action taken; and
  - (b) including the information prescribed by regulation.

Maximum penalty—200 penalty units.

### **34C Change of financial institution**

- (1) A trustee must not transfer the retention trust account to an alternative financial institution unless—
  - (a) the alternative financial institution is an approved financial institution; and
  - (b) all amounts held in the account are transferred with the account to the alternative financial institution; and
  - (c) the trustee informs all contracted parties, from whom retention amounts held in the account have been withheld from payment, about the transfer as prescribed by regulation.

Maximum penalty—200 penalty units.

*Note—*

See, also, section 34B for the trustee's obligation to inform the commissioner of closing and opening a retention trust account.

- (2) When transferring the retention trust account to an alternative financial institution, the trustee may withdraw the amounts of interest credited to the account by a financial institution.
- (3) In this section—

*alternative financial institution*, for a retention trust account, means a financial institution that is not the financial institution at which the account is currently kept.

### **Subdivision 3      Payments to retention trust account**

#### **35      All retention amounts withheld must be deposited in retention trust account**

- (1) This section applies if, under section 32, a retention trust is required for a retention amount withheld from payment under a contract.
- (2) The contracting party must ensure the retention amount is held in a retention trust account for the party (the *deposit obligation*).

Maximum penalty—200 penalty units or 2 years imprisonment.

- (3) If the contracting party withheld the retention amount before a retention trust was required under section 32, the party must deposit the amount in the retention trust account within 5 business days after the retention trust is required.

Maximum penalty—200 penalty units.

*Note—*

See section 14A about amendments of contracts affecting the requirement to establish a project trust.

- (4) A term of a contract is of no effect to the extent it is inconsistent with the deposit obligation.

**35A Limited purposes for which money may be deposited in retention trust account**

- (1) A trustee must not cause an amount to be deposited into the retention trust account for any purpose other than—
- (a) withholding a retention amount from payment under a contract for which the trustee is the contracting party; or
  - (b) repaying an amount withdrawn in error.
- Maximum penalty—200 penalty units or 1 year’s imprisonment.
- (2) This section does not apply to a deposit of an amount that is interest earned on amounts held in a retention trust account.

**Subdivision 4 Payments from retention trust account**

**36 Limited purposes for which money may be withdrawn from retention trust account**

- (1) A trustee must not withdraw an amount from the retention trust account for any purpose other than—
- (a) paying a beneficiary who is a contracted party from whom a retention amount was withheld from payment; or
  - (b) paying the trustee, as contracting party, for the purpose of correcting defects or omissions in contracted work, or otherwise to secure, wholly or partly, the performance of a contract; or
  - (c) paying another person for the purpose of correcting defects or omissions in contracted work.

*Note—*

As the contracting party for a contract, the trustee's ability to make a payment mentioned in paragraph (a), (b) or (c) would be governed by the contract under which the retention amount was withheld.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (2) A trustee must not withdraw an amount from the retention trust account for a payment mentioned in subsection (1)(b) until after the defects liability period, applying to the amount, ends.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (3) The trustee must repay all amounts the trustee withdraws in contravention of subsection (1) as soon as practicable after withdrawing the amount.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (4) The trustee is taken to have withdrawn an amount from the retention trust account if—
- (a) the trustee authorises any person to make the withdrawal; or
  - (b) the trustee knowingly contributes to the withdrawal being made.

- (5) This section does not apply to that part of a retention amount withheld from payment under a contract that is beyond the amount that may be lawfully withheld under the contract.

*Note—*

See the *Queensland Building and Construction Commission Act 1991*, part 4A for limits on retention amounts that may be withheld from payment under a contract.

**36A All retention amounts withheld to be released from retention trust account**

- (1) This section applies if a contracted party becomes entitled to the release of a retention amount held in a retention trust.
- (2) The trustee must not release the retention amount other than by—
  - (a) withdrawing the amount from the retention trust account; and
  - (b) depositing the amount into the contracted party's account at a financial institution.

Maximum penalty—200 penalty units or 1 year's imprisonment.

**Subdivision 5 Ending retention trust**

**37 Ending retention trust**

- (1) If a retention trust is established for a retention amount withheld from payment under a contract, the trust is dissolved if all of the amount has been released to the parties entitled to it under the contract.
- (2) On the dissolution of a retention trust, the trustee may pay itself all amounts held in the trust that are not owing to another beneficiary.

**37A Unauthorised dissolution of retention trust**

- (1) A trustee must not purport to dissolve the retention trust before it is dissolved under section 37(1).

Maximum penalty—500 penalty units or 1 year's imprisonment.

- (2) Without limiting subsection (1), a trustee is taken to purport to dissolve the retention trust if the trustee closes the retention trust account while the trust is still required under section 32.

- (3) Subsection (2) does not apply to a trustee transferring the retention trust account to another financial institution under section 34C.

## **Division 5                      Information sharing**

### **40            Notice of retention trust before withholding retention amount**

- (1) If, under section 32, a retention trust is required for a retention amount withheld from payment under a contract, the contracting party must give the contracted party a notice about the use of a retention trust (*notice of retention trust*) as required by this section.

Maximum penalty—200 penalty units or 1 year's imprisonment.

- (2) The notice of retention trust must—
- (a) be in writing; and
  - (b) include a statement that a retention trust will be used for withholding retention amounts under the contract; and
  - (c) include the information prescribed by regulation.
- (3) The notice of retention trust must be given to the contracted party before withholding the retention amount.
- (4) However, if the retention trust account was not opened before the retention trust is required under section 32, the notice of retention trust must be given to the contracted party within 5 business days after opening the account.

### **40A          Beneficiary to be informed of transactions affecting retention amount**

- (1) This section applies if a trustee—
- (a) deposits a retention amount into the retention trust account; or

- (b) withdraws all or part of a retention amount held in the retention trust account.
- (2) Within 5 business days after making the deposit or withdrawal, the trustee must give to the contracted party from whom the retention amount was withheld a notice of the deposit or withdrawal that includes the information prescribed by regulation, unless the trustee has a reasonable excuse.  
Maximum penalty—100 penalty units.
- (3) This section does not apply to the deposit of a retention amount if the trustee has informed the contracted party of the deposit under section 23A.

#### **40B Beneficiary may request particular information**

- (1) A person who is, or was, a beneficiary of a retention trust may, in writing, request the trustee give the person the following information to the extent it relates to the person—
  - (a) a statement of balance for the retention trust account;
  - (b) a copy of the transactions affecting the retention trust account;
  - (c) a copy of the trust records.
- (2) The trustee must give the person the requested information within 10 business days after being given the request, unless—
  - (a) the trustee has a reasonable excuse; or
  - (b) the information is already available to the person; or
  - (c) the information has not changed since it was previously given to the person.

Maximum penalty—100 penalty units.

- (3) The requested information must be given to the person in writing and any words used in the information to explain a transaction must be in the English language.

- (4) It is not a reasonable excuse for the trustee to fail to comply with the request on the grounds that complying with the request might tend to incriminate the trustee or expose the trustee to a penalty.
- (5) In this section—  
*trust records* see section 52(1).

## Division 6                      Compulsory training

### 41            Training before withholding retention amount

- (1) This section applies if, under section 32, a retention trust is required for a retention amount withheld from payment under a contract.
- (2) If the trustee will not be responsible for administering the retention trust account, the trustee must nominate a person who is responsible for administering the retention trust account on behalf of the trustee.
- (3) The trustee may change the nomination mentioned in subsection (2) at any time and must make another nomination if the previous nominee is no longer responsible for administering the retention trust account.
- (4) The trustee must, using an approved way, inform the commissioner of each nomination made under subsection (2).
- (5) The trustee must ensure each person nominated under subsection (2) completes the training prescribed by regulation (the *retention trust training*) within the period required by regulation.  
Maximum penalty—100 penalty units.
- (6) If the trustee does not nominate a person under subsection (2), the trustee must complete retention trust training within the period required by regulation.  
Maximum penalty—100 penalty units.

- (7) A regulation may provide for—
  - (a) an extension of time for a trustee or nominee to complete the training; or
  - (b) an exemption of a trustee from complying with subsection (5) or (6).
- (8) Subsections (5) and (6) apply to a trustee subject to an extension or exemption under subsection (7) applying to the trustee.
- (9) The trustee is liable for all costs associated with the trustee or a nominated person completing the retention trust training.

## **Division 7                      Other matters**

### **43A    No assignment of entitlement by contracting party**

An assignment by the contracting party of an entitlement of the party to an amount held in trust for a retention trust is of no effect.

## **Part 4                                      Common provisions for project trusts and retention trusts**

### **Division 1                      Preliminary**

#### **50            Definitions for part**

In this part—

*account review report* see section 57A(2).

*registered company auditor* see the Corporations Act, section 9.

*trust account* means a project trust account or retention trust account.

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## Division 2                      Powers, obligations and restrictions for trustees

### 51        Trustee to cover shortfalls

(1) This section applies if there is an insufficient amount available in a trust account to pay an amount due to be paid to a beneficiary of the trust.

(2) The trustee must immediately deposit an amount equal to the shortfall in the trust account (a *shortfall deposit*).

Maximum penalty—100 penalty units or 1 year’s imprisonment.

(3) In this section—

*shortfall*, in a trust account, means an amount equal to the difference between the amount available in the trust account for payment and the amount to be paid from the account.

### 51A      Amounts in trust account unavailable for trustee’s debts

(1) An amount paid, or required to be paid, into a trust account under this chapter can not be—

(a) used to recover a debt owed to a creditor of the trustee;  
or

(b) attached or taken in execution under a court order or process for the benefit of a creditor of the trustee.

(2) Subsection (1)—

(a) applies in relation to the trustee, whether in the capacity of trustee or otherwise; and

(b) ceases to apply to an amount once lawfully withdrawn from the trust account; and

(c) does not apply to the extent it would interfere with the right of a beneficiary under this Act.

(3) In this section—

*beneficiary*, of a trust account, does not include a beneficiary who is also the trustee for the account.

### **51B No power of trustee to invest**

- (1) The trustee for a project trust or retention trust must not invest the funds held in trust in any form of investment.

Maximum penalty—200 penalty units or 1 year’s imprisonment.

- (2) The trustee does not contravene subsection (1) only by earning interest on an amount held in a trust account that is paid by the financial institution at which the account is held.

### **51C Trustee not entitled to payment for administration of trust or fees**

- (1) This section applies to costs incurred for—
  - (a) the administration of a project trust or retention trust; or
  - (b) fees payable in relation to a project trust or retention trust.

- (2) The trustee for the project trust or retention trust is not entitled to recover the costs from a beneficiary or the funds held in trust for a beneficiary.

- (3) In this section—

*beneficiary*, of a project trust or retention trust, does not include a beneficiary who is also the trustee for the trust.

### **51D Interest earned on amounts held in trust account**

- (1) The trustee for a project trust or retention trust is entitled to receive all interest earned on amounts held in the trust account.
- (2) The trustee may withdraw an amount equal to the interest earned on amounts held in the trust account once every 12 months or on the dissolution of the trust, unless the

withdrawal would prevent the full payment of another amount that must be paid from the account.

### **51E Employment or engagement of agents**

- (1) This section applies if the trustee for a project trust or retention trust employs, or otherwise engages, a person (an *agent*) to do any act relating to the trust on behalf of the trustee.
- (2) The trustee is liable for all acts and defaults of its agent as if the acts and defaults were the trustee's own acts and defaults.
- (3) The costs of employing or engaging the agent are not recoverable from funds held in trust for the project trust or retention trust or from any beneficiary of the trust, other than the trustee.

### **51F Power to delegate**

- (1) The trustee for a project trust or retention trust may delegate to a person resident in the State any powers of the trustee relating to the trust, other than this power to delegate.

*Note—*

See the *Acts Interpretation Act 1954*, section 27A about delegations of functions or powers.

- (2) Subsection (3) applies if—
  - (a) a person (the *delegate*) is delegated a power of a trustee under subsection (1); and
  - (b) the delegate purports to—
    - (i) exercise a different power of the trustee; or
    - (ii) exercise the power while the delegation is not in force; or
    - (iii) exercise the power after the delegation has been revoked by the trustee or by operation of law; and

- (c) another person relies on the purported exercise of the power by the delegate.
- (3) Unless the other person had actual notice that the delegate was not authorised to exercise the power, the purported exercise of the power is taken to be as valid as if it were exercised under a delegation that was in force and authorised the purported exercise of the power.
- (4) The costs relating to the delegation are not recoverable from funds held in trust for a project trust or retention trust or from any beneficiary for the trust, other than the trustee.
- (5) The trustee must keep evidence of the delegation for a period of 7 years.

### **51G Right of trustee to apply to Supreme Court for directions**

- (1) The trustee for a project trust or retention trust may apply to the Supreme Court for directions about—
  - (a) an amount held in trust; or
  - (b) the administration of the trust; or
  - (c) the exercise of a power by the trustee.
- (2) A copy of the application must be given to all beneficiaries for the trust unless otherwise directed by the Supreme Court.

## **Division 3 Trust records**

### **52 Trust records**

- (1) The trustee for a project trust or retention trust must keep records for the trust (the *trust records*) as required by this section.  
Maximum penalty—300 penalty units or 1 year's imprisonment.

- (2) The trustee must keep the following records for the project trust or retention trust—
  - (a) an individual trust account ledger for the trust;
  - (b) another record prescribed by regulation.
- (3) The trust account ledger must be capable of providing separate information for each beneficiary of the project trust or retention trust.
- (4) Transactions must be recorded in Australian dollars.
- (5) Any words used to explain a transaction must be in the English language.
- (6) The trust records must—
  - (a) be kept in the way, and include the information, prescribed by regulation; and
  - (b) be accurate records of the transactions affecting the trust account; and
  - (c) enable convenient and proper audit of the transactions affecting the trust account.
- (7) All deposits to, and withdrawals from, the trust account must be recorded within 5 business days after the deposit or withdrawal is made.
- (8) Trust records must be retained for a period of not less than 7 years.
- (9) Any computer system used to store the trust records must comply with the requirements prescribed by regulation.

## **52A Monthly bank reconciliation**

- (1) The trustee for a project trust or retention trust must complete a bank reconciliation for the trust account within 15 business days after the end of each month.

Maximum penalty—50 penalty units.

- (2) The bank reconciliation must be completed as required by regulation.

## **Division 4            Oversight powers**

### **Subdivision 1        Powers exercised by the commissioner**

#### **53            Register of project trusts and retention trusts**

- (1) The commissioner must maintain a register of the project trusts and retention trusts of which the commissioner has been notified.
- (2) The commissioner may publish information about the project trusts and retention trusts in the way decided by the commissioner.

#### **53A        Power to require particular information**

- (1) The commissioner may, by written notice, require any of the following entities to give stated information, or copies of documents, to the commissioner within the period stated in the notice (the *compliance period*)—
  - (a) the trustee for a project trust or retention trust;
  - (b) a beneficiary for a project trust or retention trust;
  - (c) a person that was a trustee or beneficiary mentioned in paragraph (a) or (b);
  - (d) an entity that has taken control of the financial affairs of a trustee or beneficiary mentioned in paragraph (a) or (b);
  - (e) a financial institution;
  - (f) a registered company auditor;

- (g) another person the commissioner believes has information about a project trust or retention trust.
- (2) However, the requirement may relate to only the following information or documents—
- (a) trust account records required to be kept under section 52;
  - (b) the contract to which the project trust or retention trust relates;
  - (c) information about amounts deposited into, or withdrawn from, a trust account;
  - (d) details of the financial institution at which a trust account is held;
  - (e) information that enables the commissioner to contact the beneficiaries of a project trust or retention trust;
  - (f) the details of an account at a financial institution into which a beneficiary of a project trust or retention trust is to be paid amounts from a trust account;
  - (g) other information the commissioner reasonably considers necessary to exercise the commissioner's powers under this division or to investigate an entity's compliance with this Act.
- (3) The compliance period must not be less than 5 business days after the day the notice is given to the entity.
- (4) The entity must comply with the requirement within the compliance period.

Maximum penalty—100 penalty units.

### **53B Power to issue directions affecting trust accounts**

- (1) This section applies if—
- (a) the contract for a project trust or retention trust (the *trust contract*) is terminated; or

- (b) the contracted party for the trust contract becomes an insolvent under administration within the meaning of the Corporations Act, section 9; or
  - (c) the commissioner reasonably suspects a trust account is not being used as required under this Act or is being used in a way that is inconsistent with this Act; or
  - (d) for a trustee that is a licensee under the *Queensland Building and Construction Commission Act 1991*—
    - (i) the trustee’s licence is suspended or cancelled; or
    - (ii) the trustee does not satisfy the minimum financial requirements under the *Queensland Building and Construction Commission Act 1991*.
- (2) The commissioner may, by written notice, give the trustee—
- (a) a direction that an amount not be withdrawn from a stated trust account without the commissioner’s written approval; or
  - (b) a direction that the trustee give the commissioner an account review report for 1 or more of the trust accounts for the trustee.
- (3) The direction must include the information prescribed by regulation.
- (4) If the commissioner gives a trustee a direction under subsection (2)—
- (a) the commissioner must give a copy of the direction to the relevant financial institution; and
  - (b) the commissioner may end or withdraw the direction by giving written notice of the matter to each entity given the direction or a copy of the direction.
- (5) The trustee must comply with the direction within the period stated in the notice unless the direction is withdrawn.
- Maximum penalty—100 penalty units.
- (6) In this section—

*trustee* means—

- (a) if subsection (1)(a) or (b) applies—the trustee for the project trust or retention trust; or
- (b) if subsection (1)(c) applies—the trustee for the trust account; or
- (c) if subsection (1)(d) applies—the trustee mentioned in that subsection.

### **53C Right of commissioner to apply to Supreme Court for directions**

- (1) The commissioner may apply to the Supreme Court for directions about an amount held in trust for a project trust or retention trust.
- (2) A copy of the application must be served on all beneficiaries for the project trust or retention trust unless otherwise directed by the Supreme Court.

## **Subdivision 2 Special investigators**

### **53D Power to appoint special investigator**

- (1) The commissioner may, by written instrument, appoint an appropriately qualified person as a special investigator for 1 or more trust accounts.
- (2) The function of a special investigator is to investigate a person's compliance with the requirements of this Act relating to trust accounts.
- (3) In carrying out the special investigator's functions, the investigator may do any of the following—
  - (a) inspect trust records or another record relating to a trust account;
  - (b) prepare or construct incomplete trust records for a trust account;

- (c) perform accounting tasks to establish the state of a trust account;
  - (d) report to the commissioner about the state of a trust account or a trustee's compliance with this Act;
  - (e) require a financial institution or trustee to give copies of, or access to, documents relevant to trust accounts or money deposited into trust accounts;
  - (f) request a person to give copies of, or access to, documents relevant to any person's compliance with this chapter;
  - (g) carry out another function, or exercise another power, prescribed by regulation.
- (4) A special investigator holds office subject to any conditions stated in the investigator's instrument of appointment, including any limitations on the exercise of a power.
- (5) If a special investigator is appointed for a trust account, the commissioner must give the trustee for the account a notice stating the terms of the appointment and the investigator's functions and powers.
- (6) In exercising a power in relation to a person in the person's presence, a special investigator must produce the investigator's instrument of appointment for the person's inspection before exercising the power.
- (7) If an investigation by a special investigator establishes that a person has contravened a provision of this Act, the commissioner may recover the cost of the investigation, as a debt, from the person.
- (8) The office of a person appointed as a special investigator ends if any of the following happens—
- (a) the term of office stated in a condition of office ends;
  - (b) under another condition of office, the office ends;
  - (c) the investigator's resignation under subsection (9) takes effect.

- (9) A special investigator may resign by signed notice given to the commissioner.

### **53E Obstructing special investigator**

- (1) A person must not obstruct a special investigator exercising a power under this Act, or someone helping a special investigator exercising a power under section 53D, unless the person has a reasonable excuse.

Maximum penalty—100 penalty units.

- (2) If a person has obstructed a special investigator, or someone helping a special investigator, and the investigator decides to proceed with the exercise of the power, the investigator must warn the person that—
- (a) it is an offence to cause an obstruction, unless the person has a reasonable excuse; and
  - (b) the investigator considers the person's conduct an obstruction.
- (3) Subsection (2) does not apply if the obstruction constitutes an assault.
- (4) In this section—  
*obstruct* includes assault, hinder, resist and attempt or threaten to obstruct.

### **53F Impersonating special investigator**

A person must not impersonate a special investigator.

Maximum penalty—40 penalty units.

## **Subdivision 3      Other matters**

### **53G      Protection from civil liability**

- (1) Neither the commissioner, nor an employee or agent of the commission, incurs civil liability for performing a function or exercising a power under this division if the conduct is engaged in good faith and without negligence.
- (2) A civil liability that would, apart from subsection (1), attach to the commissioner, employee or agent attaches instead to the commission.
- (3) This section does not affect the liability of a person to disciplinary action under the conditions of the person's employment.
- (4) In this section—  
*agent*, of the commission, includes a special investigator.

## **Division 5              Exclusion of auditors**

### **54      Definitions for division**

In this division—

*accepted representations* see section 54C(2).

*show cause notice* see section 54B(2).

*show cause period* see section 54B(2)(d).

### **54A      Grounds for excluding persons from undertaking trust account reviews and preparing account review reports**

Each of the following circumstances is grounds for excluding a person from undertaking reviews of trust accounts and preparing account review reports—

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

#### **54B Show cause notice**

- (1) This section applies if the commissioner believes grounds exist to exclude a person from undertaking reviews of trust accounts and preparing account review reports.
- (2) The commissioner must give the person a notice (a *show cause notice*) stating—
  - (a) the commissioner proposes to exclude the person from undertaking reviews of trust accounts and preparing account review reports; and
  - (b) the grounds for the proposed exclusion; and
  - (c) an outline of the facts and circumstances forming the basis for the grounds; and
  - (d) an invitation to the person to show within a stated period (the *show cause period*) why the proposed exclusion should not be made.
- (3) The show cause period must not be less than 14 days after the show cause notice is given to the person.

#### **54C Representations about show cause notice**

- (1) A person given a show cause notice may, during the show cause period, make written representations to the commissioner as to why the exclusion proposed in the notice should not be made.
- (2) The commissioner must consider all representations made under subsection (1) (the *accepted representations*).

#### **54D Ending show cause process without further action**

- (1) This section applies if, after considering the accepted representations for a show cause notice, the commissioner no longer believes grounds exist for excluding a person from undertaking reviews of trust accounts and preparing account review reports.
- (2) The commissioner must not take any further action in relation to the show cause notice.
- (3) The commissioner must give the person written notice that no further action is to be taken in relation to the show cause notice.

#### **54E Excluding persons from undertaking trust account reviews and preparing account review reports**

- (1) If, at the end of the show cause period, the commissioner still believes grounds exist for excluding a person from undertaking trust account reviews and preparing account review reports, the commissioner may decide to exclude the person.
- (2) If the commissioner decides to exclude the person, the commissioner must give the person an information notice for the decision.

*Note—*

The decision is a reviewable decision under the *Queensland Building and Construction Commission Act 1991*, section 86.

- (3) The exclusion applies for 3 years and takes effect from the later of the following days—
  - (a) the day the person is given the information notice;
  - (b) the day stated in the information notice for that purpose.
- (4) In this section—

**information notice**, for a decision of the commissioner, means a written notice stating—

  - (a) the decision; and

- (b) the reasons for the decision; and
- (c) that the person to whom the notice is given may have the decision reviewed within 28 days; and
- (d) how the person may have the decision reviewed.

#### **54F Commissioner may publish information about exclusions**

- (1) The commissioner may publish a list of persons the commissioner has decided to exclude from undertaking reviews of trust accounts and preparing account review reports.
- (2) However, the commissioner must not include a person on the list—
  - (a) until after—
    - (i) the period during which the person may apply for a review of the decision; and
    - (ii) if the person does apply for a review of the decision—a decision on the review is made; and
  - (b) if the decision to exclude the person is overturned on review or appeal.

## **Division 6 Financial institutions**

### **55 Approval of financial institutions**

- (1) The commissioner may approve the financial institutions at which trust accounts may be kept.
- (2) However, the commissioner may approve a financial institution under subsection (1) only if the financial institution has entered into an agreement with the commission about providing financial services for trust accounts.
- (3) The agreement may provide for the following matters—

- (a) a requirement to inform the commissioner of amounts held in trust accounts;
  - (b) the auditing of trust accounts;
  - (c) other matters prescribed by regulation.
- (4) The commissioner may, if the financial institution agrees, amend or revoke the agreement.
- (5) The commissioner must publish the names of all financial institutions approved under section (1) on the commission's website.

#### **55A Financial institutions not subject to particular obligations and liabilities**

- (1) A financial institution at which a trust account is kept—
- (a) is not under an obligation to control or supervise transactions in relation to the account or to oversee the application of money disbursed from the account; and
  - (b) is not liable to any action for the loss or damage suffered by another person as a result of the institution complying with this Act; and
  - (c) does not have any recourse or right, whether by way of set-off, counter-claim, charge or otherwise, against money in the account for a liability of the trustee owing to the financial institution.
- (2) Subsection (1) does not relieve a financial institution, nor any officer or employee of the institution, from any liability to which the institution, officer or employee is subject apart from this section.

#### **55B Reports, records and information**

- (1) A financial institution at which a trust account is kept must, as soon as practicable after becoming aware that the account is overdrawn, report that matter to the commissioner in the way agreed under section 55.

Maximum penalty—50 penalty units.

- (2) A financial institution at which a trust account is kept must, if asked by a special investigator who has provided the institution with evidence of the investigator's appointment in relation to the trustee—
  - (a) provide, for inspection or copying by the investigator, requested records relating to the account or money deposited into the account; and
  - (b) provide the investigator with complete details of any transactions relating to the account.

Maximum penalty—50 penalty units.

- (3) A financial institution must provide the records and details under subsection (2) without charge.
- (4) Subsections (1) and (2) apply despite any duty of confidence to the contrary.
- (5) Neither the financial institution at which a trust account is kept, nor an officer or employee of the institution, is liable to any action for loss or damage suffered by a person as a result of—
  - (a) reporting a matter under subsection (1); or
  - (b) providing records or details under subsection (2).

## **55C Directions to financial institutions**

- (1) The commissioner may, by written notice, require a financial institution to comply with a direction that an amount not be withdrawn from a stated trust account without the commissioner's written approval.
- (2) The direction must include the information prescribed by regulation.
- (3) If the commissioner gives a financial institution a direction under subsection (1)—

- (a) the commissioner must give a copy of the direction to the relevant trustee; and
  - (b) the commissioner may end or withdraw the direction by giving written notice of the matter to each entity given the direction or a copy of the direction.
- (4) The financial institution must comply with the direction within the period stated in the notice unless the direction is withdrawn.
- Maximum penalty—50 penalty units.
- (5) Subsection (4) applies despite any duty of confidence to the contrary.
  - (6) Neither the financial institution, nor an officer or employee of the institution, is liable to any action for loss or damage suffered by a person as a result of complying with the direction.

## Division 7                      Application of particular Acts

### 56            Application of Personal Property Securities Act 2009 (Cwlth)

- (1) A project trust or retention trust—
  - (a) is declared to be a statutory interest to which section 73(2) of the *Personal Property Securities Act 2009* (Cwlth) applies; and
  - (b) has priority over all security interests in relation to all funds held in trust for the project trust or retention trust.
- (2) In this section—

*security interest* has the meaning given by the *Personal Property Securities Act 2009* (Cwlth), section 12.

## **56A Application of Trust Accounts Act 1973 and Trusts Act 1973**

The *Trust Accounts Act 1973* and the *Trusts Act 1973* do not apply to—

- (a) a project trust or retention trust; or
- (b) a trust account; or
- (c) a trustee or beneficiary of a project trust or retention trust.

## **56B Equity and court's jurisdiction preserved**

- (1) A principle of equity relating to trusts applies for a project trust or retention trust except to the extent the principle is inconsistent with this Act.
- (2) Nothing in this chapter affects a court's inherent jurisdiction to supervise a project trust or retention trust as a trust.

## **Division 8 Auditing and reporting**

### **57 Engaging auditor for review of trust account**

- (1) The trustee for a project trust or retention trust must engage an auditor to carry out a review of the trust account as required by this section.

Maximum penalty—200 penalty units or 1 year's imprisonment.

- (2) The review must be carried out at the times prescribed by regulation.
- (3) The period of the review (the *review period*) is the period prescribed by regulation.
- (4) The review must be complete within 40 business days after starting the review.

- (5) The review must be carried out by a registered company auditor that is independent of the trustee and has not been excluded by the commissioner under section 54E.
- (6) A registered company auditor is independent of the trustee if the auditor is not any of the following—
  - (a) an employee of the trustee;
  - (b) if the trustee is a company—an executive officer, investor or shareholder for the company;
  - (c) if the trustee is a partnership—a partner in the partnership;
  - (d) a related entity for the trustee.
- (7) The trustee need not engage a registered company auditor to carry out a review of the trust account—
  - (a) if—
    - (i) a retention amount was not held in the account during the review period; and
    - (ii) within 10 business days after the end of the review period the trustee gave the commissioner a written statement, using an approved way, as to why the trustee did not engage an auditor to carry out the review; or
  - (b) in the circumstances prescribed by regulation.

### **57A Account review report**

- (1) The auditor engaged by a trustee to carry out a review of a trust account under section 57 must prepare, and give to the trustee, an account review report for the account as required under this section.

Maximum penalty—200 penalty units.

- (2) An *account review report* for a trust account is a report certifying that, based on a review of the administration of the account, it is the auditor's opinion that the trustee has

complied with all the requirements of this Act for the account during the period to which the report relates.

- (3) The account review report must include the following information—
- (a) the name of the auditor who carried out the review for the report;
  - (b) details of the auditor's membership of a professional association and the auditor's qualifications;
  - (c) details of the trust account reviewed, including—
    - (i) the name of the account; and
    - (ii) the identifying number of the financial institution for the account;
- Note—*
- The identifying number is commonly referred to as the bank state branch number (BSB).
- (iii) the account number;
  - (d) a statement as to whether or not—
    - (i) the review has been completed by an auditor who is independent of the trustee; and
    - (ii) the trust records relating to the trust account have been examined; and
    - (iii) the trust records relating to the trust account have been kept in compliance with this Act;
    - (iv) the trustee has complied with all requirements for the relevant trust under this Act;
  - (e) details of any irregularities identified during the review of the trust records relating to the trust account;
  - (f) if an account was closed during the review period, a statement of whether or not the account was closed in compliance with this Act;
  - (g) other information prescribed by regulation.

(4) The account review report may include any other information the auditor considers relevant.

(5) The auditor must give the commissioner a copy of the account review report, in the approved way, within 20 business days after completing the relevant review.

Maximum penalty—50 penalty units.

(6) When complying with subsection (5), the auditor must also give the trustee a copy of the account review report.

Maximum penalty—50 penalty units.

### **57B Trust records to be given to auditor**

(1) This section applies if the trustee for a project trust or retention trust engages an auditor to carry out a review of the trust account.

(2) The trustee must provide the auditor with all trust records requested by the auditor as soon as practicable after the records are requested.

Maximum penalty—200 penalty units.

### **57C Reporting serious breaches**

(1) This section applies if the trustee for a project trust or retention trust engages an auditor to carry out a review of the trust account.

(2) If the auditor reasonably believes any of the following circumstances apply, the auditor must, using an approved way, notify the commissioner of the belief within 5 business days after forming the belief—

(a) the auditor can not report that a trust account has been kept in compliance with this Act;

(b) the auditor finds an irregularity relating to a trust account;

- (c) the auditor suspects the trustee has not met the trustee's obligations under this Act;
- (d) the auditor suspects a contravention of this Act, prescribed by regulation, has occurred.

Maximum penalty—200 penalty units or 1 year's imprisonment.

## Division 9                      Other matters

### 58                      **Commissioner may give redacted information to professional bodies**

- (1) This section applies if the commissioner reasonably suspects the conduct of an auditor engaged under section 57 breaches a professional standard or condition applying to the auditor.
- (2) The commissioner may inform the relevant professional body of the conduct and give the body any information necessary to investigate the conduct.
- (3) The commissioner must redact from any information given to the professional body all information identifying the trustee of a project trust or retention trust.

- (4) In this section—

***condition*** means a condition imposed as part of registration as an auditor or accountant.

***professional body*** means—

- (a) an entity of which an auditor is a member as an auditor or accountant; or
- (b) an entity that registers or licenses a person as an auditor.

***professional standard*** means a standard about auditing or accounting made, or adopted, by a professional body.

**58A Liability of executive officer for offence committed by corporation against executive liability provision**

- (1) An executive officer of a corporation commits an offence if—
- (a) the corporation commits an offence against an executive liability provision; and
  - (b) the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

Maximum penalty—the penalty for a contravention of the executive liability provision by an individual.

- (2) In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps for subsection (1)(b), a court must have regard to—
- (a) whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence against the executive liability provision; and
  - (b) whether the officer was in a position to influence the corporation's conduct in relation to the offence against the executive liability provision; and
  - (c) any other relevant matter.
- (3) The executive officer may be proceeded against for, and convicted of, an offence against subsection (1) whether or not the corporation has been proceeded against for, or convicted of, the offence against the executive liability provision.
- (4) This section does not affect—
- (a) the liability of the corporation for the offence against the executive liability provision; or
  - (b) the liability, under the Criminal Code, chapter 2, of any person, whether or not the person is an executive officer of the corporation, for the offence against the executive liability provision.
- (5) In this section—

*executive liability provision* means any of the following provisions—

- section 18(1)
- section 19(2)
- section 20A(1)
- section 20A(2)
- section 20B
- section 34(2)
- section 36(1)
- section 36(3).

*executive officer*, of a corporation, means a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

## **58B Failures and defects do not affect validity**

- (1) The failure of a trustee to comply with an obligation relating to a project trust or retention trust does not affect the validity of the trust.
- (2) If a trustee's failure to comply with an obligation relating to a project trust or retention trust would prevent another person (the *affected person*) from taking action under this chapter, the trustee is taken to have complied with the obligation to the extent it enables the affected person to take the action.
- (3) A defect in a document relating to a project trust or retention trust does not affect the validity of the trust or the ability of a beneficiary to rely on the document, as it would be without the defect, for the purpose of exercising a right under this chapter.
- (4) If an amount must be deposited into a trust account under section 19 or 35, the failure of a person to deposit the amount does not release the amount from the relevant project trust or retention trust.

- (5) Nothing in this section prevents action being taken against a trustee for the trustee's failure to comply with an obligation relating to a project trust or retention trust, nor relieves the trustee of the obligation.
- (6) In this section—
- obligation* means an obligation under this chapter.
- trustee* means—
- (a) the trustee of a project trust or retention trust; or
  - (b) a person who would, if not for a failure to comply with an obligation to establish a project trust or retention trust, be the trustee of that trust.

## **Chapter 3      Progress payments**

### **Part 1            Preliminary**

#### **Division 1        Application and operation of chapter**

##### **61      Application of chapter**

- (1) Subject to subsections (2) to (4), this chapter applies to construction contracts—
- (a) whether written or oral, or partly written and partly oral; and
  - (b) whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland; and
  - (c) whether entered into before or after the commencement of this section, other than to the extent the repealed

*Building and Construction Industry Payments Act 2004* continues to apply to unfinished matters under section 205.

- (2) This chapter does not apply to—
- (a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—
    - (i) to lend an amount or to repay an amount lent; or
    - (ii) to guarantee payment of an amount owing or repayment of an amount lent; or
    - (iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract; or
  - (b) a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside; or
  - (c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated other than by reference to the value of the work carried out or the value of the goods and services supplied.
- (3) This chapter does not apply to a construction contract to the extent it includes—
- (a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or
  - (b) provisions under which a party undertakes to carry out construction work, or to supply related goods and

- services in relation to construction work, as a condition of a loan agreement with a recognised financial institution; or
- (c) provisions under which a party undertakes—
- (i) to lend an amount or to repay an amount lent; or
  - (ii) to guarantee payment of an amount owing or repayment of an amount lent; or
  - (iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract.
- (4) This chapter does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland.
- (5) In this section—
- resident owner***, in relation to a construction contract for carrying out domestic building work, means a resident owner under the *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 1, but does not include a person—
- (a) who holds, or should hold, an owner-builder permit under the *Queensland Building and Construction Commission Act 1991* relating to the work; or
  - (b) who is a building contractor within the meaning of the *Queensland Building and Construction Commission Act 1991*.

## **62 Effect of giving notice of claim for subcontractors' charges**

- (1) This section applies if a person gives a notice of claim under chapter 4 in relation to construction work or related goods and services the subject of a construction contract.

- (2) Proceedings or other action may not be started or continued by the person under part 3 for all or part of the construction work or related goods and services.
- (3) Without limiting subsection (2), if the person gave a respondent a payment claim for all or part of the construction work or related goods and services before or at the same time as giving the notice of claim—
  - (a) the respondent is not required to pay an amount to the person under section 77(2) in relation to the claim; and
  - (b) amounts may not be recovered by the person as a debt owing to the person in any court of competent jurisdiction in relation to the claim; and
  - (c) if the person made an adjudication application in relation to the claim and the application has not been decided by an adjudicator before the notice of claim is given, the person is taken to have withdrawn the application; and
  - (d) if the person made an adjudication application in relation to the claim and the application has been decided by an adjudicator before the notice of claim was given—
    - (i) the respondent to the application is not required to pay the adjudicated amount under section 90; and
    - (ii) the registrar must not give the person an adjudication certificate under section 91 relating to the adjudication; and
    - (iii) any adjudication certificate provided in relation to the adjudication can not be enforced by the person under section 93 as a judgment of a court; and
  - (e) the person may not suspend, or continue to suspend, carrying out all or part of the construction work or the supply of the related goods and services under section 98.

- (4) This section does not affect the operation of section 95 and an adjudication application taken to have been withdrawn by the person under subsection (3)(c) is taken to have been withdrawn for the purpose of section 95.
- (5) This section does not stop the person serving, under this chapter, a payment claim in relation to all or part of the construction work or related goods and services and taking other action under this chapter in relation to that claim, if the notice of claim in so far as it relates to the construction work or related goods and services, or part, is withdrawn.
- (6) In this section—  
*notice of claim* see section 122(1).

### **63 Act does not limit claimant's other rights**

A claimant's entitlements and remedies under this chapter do not limit—

- (a) another entitlement a claimant may have under a construction contract; or
- (b) any remedy a claimant may have for recovering the other entitlement.

## **Division 2 Interpretation**

### **64 Definitions for chapter**

In this chapter—

*adjudicated amount* see section 88(1).

*adjudication application* see section 79(1).

*adjudication certificate* see section 91(1).

*adjudication response* see section 82(1).

***adjudicator***, in relation to an adjudication application, means an adjudicator appointed under section 81 to decide the application.

***carry out construction work*** means—

- (a) carry out construction work personally; or
- (b) directly or indirectly, cause construction work to be carried out; or
- (c) provide advisory, administrative, management or supervisory services for carrying out construction work.

***claimant*** see section 75(1).

***complex payment claim*** means a payment claim for an amount more than \$750,000 or, if a greater amount is prescribed by regulation, the amount prescribed.

***construction contract*** means a contract, agreement or other arrangement under which 1 party undertakes to carry out construction work for, or to supply related goods and services to, another party.

***construction work*** see section 65.

***due date***, for a progress payment, means the day the progress payment becomes payable under section 73.

***payment claim*** see section 68(1).

***payment schedule*** see section 69.

***progress payment*** means a payment to which a person is entitled under section 70, and includes, without affecting any entitlement under the section—

- (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
- (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or

- (c) a payment that is based on an event or date, known in the building and construction industry as a ‘milestone payment’.

*reference date* see section 67.

*related goods and services* see section 66.

*relevant construction contract*, for a progress payment or payment claim, means the construction contract to which the progress payment, or to which the payment claim, relates.

*respondent* see section 75(1).

*standard payment claim* means a payment claim that is not a complex payment claim.

## 65 Meaning of *construction work*

- (1) *Construction work* means any of the following work—

- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;
- (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their

- construction, alteration, repair, restoration, maintenance or extension;
- (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—
    - (i) site clearance, earthmoving, excavation, tunnelling and boring; and
    - (ii) the laying of foundations; and
    - (iii) the erection, maintenance or dismantling of scaffolding; and
    - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
    - (v) site restoration, landscaping and the provision of roadways and other access works;
  - (f) the painting or decorating of the internal or external surfaces of any building, structure or works;
  - (g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;
  - (h) any other work of a kind prescribed by regulation.
- (2) To remove doubt, it is declared that **construction work** includes building work within the meaning of the *Queensland Building and Construction Commission Act 1991*.
- (3) However, **construction work** does not include any of the following work—
- (a) the drilling for, or extraction of, oil or natural gas;
  - (b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose.

## **66 Meaning of *related goods and services***

- (1) ***Related goods and services***, in relation to construction work, means any of the following—
  - (a) goods of the following kind—
    - (i) materials and components to form part of any building, structure or work arising from construction work;
    - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
  - (b) services of the following kind—
    - (i) the provision of labour to carry out construction work;
    - (ii) architectural, design, surveying or quantity surveying services relating to construction work;
    - (iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;
    - (iv) soil testing services relating to construction work;
  - (c) goods and services, relating to construction work, of a kind prescribed by regulation.
- (2) In this chapter, a reference to related goods and services includes a reference to related goods or services.

## **67 Meaning of *reference date***

- (1) A ***reference date***, for a construction contract, means—
  - (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract; or
  - (b) if the contract does not provide for the matter—

- (i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
  - (ii) the last day of each later month.
- (2) However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated.

## **68 Meaning of *payment claim***

- (1) A *payment claim*, for a progress payment, is a written document that—
- (a) identifies the construction work or related goods and services to which the progress payment relates; and
  - (b) states the amount (the *claimed amount*) of the progress payment that the claimant claims is payable by the respondent; and
  - (c) requests payment of the claimed amount; and
  - (d) includes the other information prescribed by regulation.
- (2) The amount claimed in the payment claim may include an amount that—
- (a) the respondent is liable to pay the claimant under section 98(3); or
  - (b) is held under the construction contract by the respondent and that the claimant claims is due for release.
- (3) A written document bearing the word ‘invoice’ is taken to satisfy subsection (1)(c).

## **69 Meaning of *payment schedule***

A *payment schedule*, responding to a payment claim, is a written document that—

- (a) identifies the payment claim to which it responds; and
- (b) states the amount of the payment, if any, that the respondent proposes to make; and
- (c) if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment; and
- (d) includes the other information prescribed by regulation.

## **Part 2 Right to progress payments**

### **70 Right to progress payments**

From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract.

### **71 Amount of progress payment**

The amount of a progress payment to which a person is entitled under a construction contract is—

- (a) if the contract provides for the matter—the amount calculated in accordance with the contract; or
- (b) if the contract does not provide for the matter—the amount calculated on the basis of the value of construction work carried out, or related goods and services supplied, by the person in accordance with the contract.

### **72 Valuation of construction work and related goods and services**

- (1) Construction work carried out under a construction contract is to be valued—

- (a) if the contract provides for the matter—in accordance with the contract; or
  - (b) if the contract does not provide for the matter—having regard to—
    - (i) the contract price for the work; and
    - (ii) any other rates or prices stated in the contract; and
    - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
    - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
- (2) Related goods and services supplied under a construction contract are to be valued—
- (a) if the contract provides for the matter—in accordance with the contract; or
  - (b) if the contract does not provide for the matter—having regard to—
    - (i) the contract price for the goods and services; and
    - (ii) any other rates or prices stated in the contract; and
    - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
    - (iv) if any of the goods are defective, the estimated cost of rectifying the defect.
- (3) For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the valuation are those that have become or, on payment, will become the property of the party or other person for whom construction work is being carried out.

(4) In this section—

***contracted party***, for a construction contract, means the party to the contract who is required to carry out the construction work under the contract.

***contract price***, for a construction contract, means the amount the contracted party is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract.

### 73 Due date for payment

(1) A progress payment under a construction contract becomes payable—

(a) if the contract provides for the matter—on the day on which the payment becomes payable under the contract;  
or

*Notes—*

- 1 A ‘pay when paid’ provision in a construction contract has no effect, see section 74.
- 2 A provision in a construction management trade contract or subcontract providing for payment of a progress payment later than 25 business days is void, see the *Queensland Building and Construction Commission Act 1991*, section 67U.
- 3 A provision in a commercial building contract providing for payment of a progress payment later than 15 business days is void, see the *Queensland Building and Construction Commission Act 1991*, section 67W.

(b) if the contract does not provide for the matter—on the day that is 10 business days after the day a payment claim for the progress payment is made under part 3.

(2) Interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—

(a) the rate stated in the contract;

- 
- (b) the rate prescribed under the *Civil Proceedings Act 2011*, section 59(3) for a money order debt.
- (3) However, for a construction contract to which the *Queensland Building and Construction Commission Act 1991*, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section.
- (4) Each of the following construction contracts are taken to be a contract to which subsection (1)(b) applies—
- (a) a construction contract that includes a ‘pay when paid’ provision;
  - (b) a construction management trade contract or subcontract mentioned in the *Queensland Building and Construction Commission Act 1991*, section 67U;
  - (c) a commercial building contract mentioned in the *Queensland Building and Construction Commission Act 1991*, section 67W.
- (5) In this section—
- ‘pay when paid’ provision**, of a construction contract, see section 74.

## 74 Effect of ‘pay when paid’ provisions

- (1) A ‘pay when paid’ provision of a construction contract has no effect in relation to any payment for construction work carried out, or related goods and services supplied, under the construction contract.
- (2) In this section—
- amount owing**, in relation to a construction contract, means an amount owing for construction work carried out, or related goods and services supplied, under the construction contract.
- ‘pay when paid’ provision**, of a construction contract, means a provision of the contract—
- (a) that makes the liability of 1 party (the **first party**) to pay an amount owing to another party (the **second party**)



- (b) 28 days after the end of the last defects liability period for the construction contract;
  - (c) 6 months after the completion of all construction work to be carried out under the construction contract;
  - (d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.
- (4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.
- (5) A payment claim may include an amount that was included in a previous payment claim.
- (6) Subsection (7) applies if—
- (a) there is a subcontract under the construction contract for the progress payment; and
  - (b) the construction contract is not also a subcontract for another construction contract.
- (7) The claimant must ensure the payment claim is accompanied with a supporting statement.

Maximum penalty—100 penalty units.

- (8) A failure of the claimant to comply with subsection (7) does not affect the validity of a payment claim.
- (9) In this section—

***final payment*** means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

***supporting statement***, for a payment claim, means a written document—

- (a) declaring that all subcontractors have been paid all amounts owed to them by the claimant at the date of the payment claim; or
- (b) stating—

- (i) the following for each subcontractor who has not been paid the full amount owed to them by the claimant at the date of the payment claim—
  - (A) the subcontractor’s name;
  - (B) the amount still unpaid;
  - (C) the details of the unpaid payment claim for the subcontractor;
  - (D) the date the subcontractor carried out the construction work or supplied the related goods and services;
  - (E) the reasons the amount was not paid in full; and
- (ii) that all other subcontractors have been paid the full amount owed to them by the claimant.

## 76 Responding to payment claim

- (1) If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first—
  - (a) the period, if any, within which the respondent must give the payment schedule under the relevant construction contract;
  - (b) 15 business days after the payment claim is given to the respondent.

Maximum penalty—100 penalty units.

*Note—*

A failure to give a payment schedule as required under this section is also grounds for taking disciplinary action under the *Queensland Building and Construction Commission Act 1991*.

- (2) However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates.

- (3) If the respondent gives the claimant a payment schedule, the respondent must pay the claimant the amount proposed in the payment schedule no later than the due date for the progress payment to which the payment schedule relates.

Maximum penalty—100 penalty units.

- (4) Subsection (3) does not apply to an amount to the extent the respondent is required to retain the amount under chapter 3, part 4A.

## **77 Consequences of failing to give payment schedule**

- (1) This section applies if a respondent given a payment claim does not respond to the claim by giving the claimant a payment schedule as required under section 76.
- (2) The respondent is liable to pay the amount claimed under the payment claim to the claimant on the due date for the progress payment to which the payment claim relates.

## **78 Consequences of failing to pay claimant**

- (1) This section applies if a respondent given a payment claim for a progress payment does not pay the amount owed to the claimant in full on or before the due date for the progress payment.
- (2) The claimant may either—
  - (a) recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant, in a court of competent jurisdiction; or
  - (b) apply for adjudication of the payment claim under part 4.
- (3) In addition to the action mentioned in subsection (2), the claimant may give the respondent written notice of the claimant's intention to suspend carrying out construction work, or supplying related goods and services, under the relevant construction contract under section 98.



- 
- the payment claim—30 business days after the later of the following days—
- (A) the day of the due date for the progress payment to which the claim relates;
  - (B) the last day the respondent could have given the payment schedule under section 76; or
- (ii) for an application relating to a failure to pay the full amount stated in the payment schedule—20 business days after the due date for the progress payment to which the claim relates; or
  - (iii) for an application relating to the amount stated in the payment schedule being less than the amount stated in the payment claim—30 business days after the claimant receives the payment schedule; and
- (c) must identify the payment claim and the payment schedule, if any, to which it relates; and
  - (d) must be accompanied by the fee prescribed by regulation for the application; and
  - (e) may include the submissions relevant to the application the claimant chooses to include.
- (3) A copy of an adjudication application must be given to the respondent.
  - (4) The registrar must, within 4 business days after the application is received, refer the application to a person eligible to be an adjudicator under section 80.

## **80 When adjudicator ineligible to adjudicate**

An adjudicator is not eligible to adjudicate an adjudication application if the adjudicator—

- (a) is a party to the construction contract to which the application relates; or
- (b) has a conflict of interest as prescribed by regulation.

## **81 Appointment of adjudicator**

- (1) If the registrar refers an adjudication application to an adjudicator for a decision, the adjudicator must, unless the adjudicator has a reasonable excuse, accept or reject the referral within 4 business days after the referral is made.
- (2) The adjudicator may accept the referral by serving written notice of the acceptance on the claimant, the respondent and the registrar.
- (3) The adjudicator may reject the referral by notifying the registrar of the refusal.
- (4) If the adjudicator rejects the referral or does not accept it within the time required under subsection (1)—
  - (a) the registrar must refer the adjudication application to another adjudicator within 4 business days after becoming aware of the refusal or failure; and
  - (b) no fee is payable for referring the adjudication application to another adjudicator.
- (5) The other adjudicator may accept the referral by serving written notice of the acceptance on the claimant, the respondent and the registrar.
- (6) The other adjudicator may reject the referral by notifying the registrar of the refusal.
- (7) On accepting a referral of an adjudication application under subsection (1) or (5), an adjudicator is taken to have been appointed to decide the application.

## **82 Adjudication response**

- (1) After being given notice of an adjudicator's acceptance of an adjudication application under section 81, the respondent may give the adjudicator a response to the adjudication application (the *adjudication response*).

- (2) However, the respondent must not give an adjudication response if the respondent failed to give the claimant a payment schedule as required under section 76.
- (3) The adjudication response—
  - (a) must be in writing; and
  - (b) must identify the adjudication application to which it relates; and
  - (c) may include the submissions relevant to the response the respondent chooses to include.
- (4) However, the adjudication response must not include any reasons (*new reasons*) for withholding payment that were not included in the payment schedule when given to the claimant.
- (5) The adjudicator may require the respondent to resubmit the adjudication response without the new reasons.

### **83 Time for making adjudication response**

- (1) If responding to a standard payment claim, the respondent must give the adjudicator the adjudication response within the later of the following periods to end—
  - (a) 10 business days after receiving a copy of the adjudication application;
  - (b) 7 business days after receiving notice of the adjudicator’s acceptance of the adjudication application.
- (2) If responding to a complex payment claim, the respondent must give the adjudicator the adjudication response within the later of the following to end—
  - (a) 15 business days after receiving a copy of the adjudication application;
  - (b) 12 business days after receiving notice of the adjudicator’s acceptance of the adjudication application.
- (3) However, if responding to a complex payment claim, the respondent may apply to the adjudicator for an extension of

time, of up to 15 additional business days, to give the adjudication response to the adjudicator.

- (4) The application must—
  - (a) be in writing; and
  - (b) be made within the later of the following periods to end—
    - (i) 5 business days after receiving a copy of the adjudication application;
    - (ii) 2 business days after receiving notice of the adjudicator's acceptance of the adjudication application; and
  - (c) include the reasons for requiring the extension of time.
- (5) If the application is granted, the respondent may give the adjudicator the adjudication response no later than the end of the extension of time granted by the adjudicator.
- (6) If the respondent gives the adjudicator an adjudication response under this section, the respondent must give a copy of the response to the claimant not more than 2 business days after giving the response to the adjudicator.

## **84 Adjudication procedures**

- (1) Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
  - (a) an adjudication application;
  - (b) applications for extensions of time under section 83.
- (2) For a proceeding conducted to decide an adjudication application, an adjudicator—
  - (a) must decide—
    - (i) whether he or she has jurisdiction to adjudicate the application; and

- (ii) whether the application is frivolous or vexatious; and
  - (b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and
  - (c) may set deadlines for further submissions and comments by the parties; and
  - (d) may call a conference of the parties; and
  - (e) may carry out an inspection of any matter to which the claim relates.
- (3) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation unless allowed by the adjudicator.
- (4) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

## **85 Time for deciding adjudication application**

- (1) Subject to section 86, an adjudicator must decide an adjudication application no later than—
- (a) for a standard payment claim—10 business days after the response date; or
  - (b) for a complex payment claim—15 business days after the response date.
- (2) The *response date* is—
- (a) if the adjudicator is given an adjudication response under section 83—the day on which the adjudicator receives the response; or
  - (b) if the respondent is prevented from giving the adjudicator an adjudication response under section 82(2)—the last day on which the respondent could have given the adjudicator an adjudication

- response under section 83 had it not been prevented from doing so under section 82(2); or
- (c) otherwise—the last day on which the respondent could give the adjudicator an adjudication response under section 83.
- (3) An adjudicator must not decide an adjudication application before the end of the period that the respondent may give an adjudication response to the adjudicator under section 83, unless—
- (a) the adjudicator decides he or she does not have jurisdiction to adjudicate the application; or
  - (b) the adjudicator decides the application is frivolous or vexatious.

## 86 Extending time for deciding adjudication application

- (1) The claimant and respondent for an adjudication application may, before or after the end of the maximum period for deciding the application under section 85(1), agree in writing that the adjudicator has additional time to decide the application.
- (2) Despite section 85(1), an adjudicator may decide an adjudication application within a longer period if—
- (a) the claimant and respondent have informed the adjudicator that they have agreed under subsection (1) that the adjudicator has additional time to decide the application; or
  - (b) the application relates to a complex payment claim and, in the opinion of the adjudicator, the claimant and respondent have failed to reach an agreement mentioned in subsection (1).
- (3) The *longer period* is—

- (a) if subsection (2)(a) applies—the additional time agreed to by the claimant and respondent under subsection (1); or
  - (b) if subsection (2)(b) applies—5 business days after the time the adjudicator would otherwise have to decide the application under section 85(1).
- (4) If the adjudicator has additional time to decide an adjudication application under this section, the adjudicator must notify the registrar of the additional time to decide the application within 4 business days after—
- (a) if subsection (2)(a) applies—the day the claimant and respondent agreed under subsection (1); or
  - (b) if subsection (2)(b) applies—the day the adjudicator decided he or she had additional time under subsection (2)(b).

## **87 Valuation of work etc. in later adjudication application**

- (1) This section applies if, in deciding an adjudication application, an adjudicator has decided the value of—
- (a) any construction work carried out under a construction contract; or
  - (b) any related goods and services supplied under a construction contract.

*Note—*

See section 72 for the valuation of construction work and related goods and services.

- (2) Any adjudicator must, in any later adjudication application that involves the working out of the value of the construction work or of the related goods and services, give the work, or the goods and services, the same value as that previously decided by the adjudicator unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision.

- (3) However, if a decision or order of a court changes the value of the construction work or of the related goods and services, the adjudicator must give the work, or the goods and services, the same value as changed by the decision or order unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the decision or order.

## **88 Adjudicator's decision**

- (1) An adjudicator is to decide—
- (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the *adjudicated amount*); and
  - (b) the date on which any amount became or becomes payable; and
  - (c) the rate of interest payable on any amount.
- (2) In deciding an adjudication application, the adjudicator is to consider the following matters only—
- (a) the provisions of this chapter and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;
  - (b) the provisions of the relevant construction contract;
  - (c) the payment claim to which the application relates, together with all submissions, including relevant documents, that have been properly made by the claimant in support of the claim;
  - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documents, that have been properly made by the respondent in support of the schedule;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

- (3) However, the adjudicator must not consider any of the following—
  - (a) an adjudication response, to which the adjudication application relates, that was not given to the adjudicator within the time required under section 83;
  - (b) a reason included in an adjudication response to the adjudication application, if the reason is prohibited from being included in the response under section 82.
- (4) Also, the adjudicator may disregard an adjudication application or adjudication response to the extent that the submissions or accompanying documents contravene any limitations relating to submissions or accompanying documents prescribed by regulation.
- (5) The adjudicator’s decision must—
  - (a) be in writing; and
  - (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.
- (6) The adjudicator must give the registrar—
  - (a) a copy of the decision; and
  - (b) notice of all fees and expenses paid, and to be paid, to the adjudicator for the decision.

Maximum penalty—40 penalty units.
- (7) The adjudicator must give the registrar the information mentioned in subsection (6) at the same time the adjudicator gives a copy of the decision to the claimant and the respondent.

## **89 Adjudicator may correct clerical mistakes etc.**

- (1) This section applies if the adjudicator’s decision includes—
  - (a) a clerical mistake; or
  - (b) an error arising from an accidental slip or omission; or

- (c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter mentioned in the decision; or
  - (d) a defect of form.
- (2) The adjudicator may, on the adjudicator's own initiative or on the application of the claimant or respondent, correct the decision.
  - (3) The adjudicator may, if requested by the registrar, correct the decision.

## **90 Respondent required to pay adjudicated amount**

- (1) This section applies if an adjudicator decides that a respondent is required to pay an adjudicated amount.
- (2) The respondent must pay the amount to the claimant on or before—
  - (a) the day that is 5 business days after the day on which the adjudicator gives a copy of the adjudicator's decision to the respondent; or
  - (b) if the adjudicator decides a later date for payment under section 88(1)(b)—the later date.

Maximum penalty—200 penalty units.

- (3) If the respondent pays the amount to the claimant, the respondent must—
  - (a) notify the registrar, using an approved way, within 5 business days after making the payment; and
  - (b) provide the registrar with evidence the payment was made.

Maximum penalty—20 penalty units.

## 91 Adjudication certificate

- (1) As soon as practicable after being given a copy of a decision by an adjudicator, but no later than 5 business days after being given the decision, the registrar must give the claimant a certificate (an *adjudication certificate*) of the decision stating the following matters—
  - (a) the name of the claimant;
  - (b) the name of the respondent who is liable to pay the adjudicated amount;
  - (c) the adjudicated amount;
  - (d) the date on which payment of the adjudicated amount was required to be paid to the claimant;
  - (e) the rate of interest payable on the adjudicated amount;
  - (f) the fees, identified in the decision, that the respondent is to pay;
  - (g) that the certificate is made under this Act.
- (2) However, the registrar does not have to give the claimant an adjudication certificate if—
  - (a) the respondent is not required to pay an amount under the decision; or
  - (b) the adjudicator decided he or she does not have jurisdiction to decide the application; or
  - (c) the adjudicator decided the adjudication application is frivolous or vexatious.

## 92 Consequences of not paying adjudicated amount

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant as required under section 90, the claimant may give the respondent written notice of the claimant's intention to suspend carrying out construction work, or supplying related goods and services, under the construction contract under section 98.

- (2) The notice about suspending work must state that it is made under this Act.

### **93 Filing of adjudication certificate as judgment debt**

- (1) An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.
- (2) An adjudication certificate can not be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or a part of the adjudicated amount has not been paid to the claimant at the time the certificate is filed.
- (3) If the affidavit states that part of the adjudicated amount has been paid, the judgment is for the unpaid part of the amount only.
- (4) If the respondent commences proceedings to have the judgment set aside—
  - (a) the respondent is not, in those proceedings, entitled—
    - (i) to bring any counterclaim against the claimant; or
    - (ii) to raise any defence in relation to matters arising under the construction contract to which the adjudication certificate relates; or
    - (iii) to challenge the adjudicator’s decision; and
  - (b) the respondent is required to pay into the court, as security, the unpaid portion of the adjudicated amount pending the final decision in those proceedings.

### **94 Claimant may make new application in certain circumstances**

- (1) Subsection (2) applies if an adjudicator, who accepts a referral to decide an adjudication application (the *original application*), does not decide the application within the period required under section 85.

- (2) The claimant may do either of the following within 5 business days after the period mentioned in subsection (1)—
  - (a) request the registrar refer the original application to another adjudicator; or
  - (b) make a new adjudication application (the *new application*) under section 79.
- (3) If the claimant requests the registrar refer the original application to another adjudicator—
  - (a) the registrar must refer the application to another adjudicator within 4 business days after the request is made; and
  - (b) no fee is payable for referring the original application to another adjudicator.
- (4) Also, if another adjudicator accepts the referral, this division applies for the original application with the following changes—
  - (a) the claimant must give the adjudicator a copy of his or her submissions included in the original application within 5 business days after the adjudicator accepts the referral;
  - (b) the respondent must give the adjudicator a copy of his or her submissions included in an adjudication response, if any, for the original application within 5 business days after the adjudicator accepts the referral;
  - (c) the response date for the application under section 85(2) is the day—
    - (i) the adjudicator receives the copy of the submission from the respondent; or
    - (ii) if the respondent does not give the adjudicator the copy of the submission within the period mentioned in paragraph (b)—immediately after the end of the period;

- (d) in deciding the adjudication application, the adjudicator must not consider any submissions other than—
  - (i) the submissions mentioned in paragraph (a) or (b); or
  - (ii) further written submissions asked for by the adjudicator under section 84(2)(b).
- (5) This division applies to the new application in the same way it applies to any other adjudication application made under section 79.
- (6) However, the claimant may, despite section 79(2)(b), make the new application within 5 business days after the claimant becomes entitled to act under subsection (2).

## 95 Adjudicator's fees

- (1) An adjudicator is entitled to be paid for adjudicating an adjudication application—
  - (a) the amount, by way of fees and expenses, agreed between the adjudicator and the parties to the adjudication; or
  - (b) if no amount is agreed, the amount, for fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.
- (2) A regulation may prescribe the maximum amount for fees and expenses (the *prescribed maximum*) an adjudicator may be paid for adjudicating an adjudication application.
- (3) Despite subsection (1), an adjudicator is not entitled to be paid any amount that is more than the lower of the following amounts—
  - (a) a reasonable amount having regard to the work done and expenses incurred by the adjudicator;
  - (b) the prescribed maximum.
- (4) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

- (5) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions unless the adjudicator decides otherwise.
- (6) An adjudicator is not entitled to be paid any fees or expenses for adjudicating an adjudication application if the adjudicator fails to make a decision on the application.
- (7) An adjudicator does not fail to make a decision only because—
  - (a) the adjudication application is withdrawn; or
  - (b) the adjudicator decided he or she did not have jurisdiction to adjudicate the application; or
  - (c) the adjudicator decided the application was frivolous or vexatious; or
  - (d) the adjudicator refuses to communicate the adjudicator's decision on an adjudication application until the adjudicator's fees and expenses are paid.
- (8) Also, if a court finds that the adjudicator's decision is void and unenforceable, the adjudicator is still entitled to be paid any fees or expenses for adjudicating the application if the adjudicator acted in good faith in adjudicating the application.
- (9) In this section—

*adjudicating*, an adjudication application, includes accepting, considering and deciding the application.

## 96 Deciding fees payable by claimant and respondent

- (1) When making a decision about an adjudication application, an adjudicator may also decide the following—
  - (a) the proportion of the adjudicator's fees and expenses to be paid by the claimant and respondent;
  - (b) the proportion of the fee, payable for the adjudication application under section 79(2)(d), for which the respondent is to reimburse the claimant.

- (2) In making the decision, the adjudicator—
- (a) must consider the conduct of the claimant and respondent; and
  - (b) may consider any of the following matters—
    - (i) the relative success of the claimant or respondent in the adjudication;
    - (ii) whether the claimant or respondent commenced or participated in the adjudication for an improper purpose;
    - (iii) whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success;
    - (iv) the reasons given by the respondent for not making the progress payment the subject of the adjudication application;
    - (v) whether an adjudication application is withdrawn;
    - (vi) the services provided by the adjudicator in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed;
    - (vii) another matter the adjudicator considers relevant in making the decision.

- (3) In this section—

***adjudicating***, an adjudication application, includes accepting, considering and deciding the application.

***conduct***, of the claimant and respondent, includes—

- (a) whether the claimant or respondent has acted unreasonably leading up to, or during, the adjudication; or
- (b) whether the respondent attempted to include new reasons in an adjudication response in contravention of section 82(4).

*new reasons* see section 82(4).

## **97 Withdrawing from adjudication**

- (1) An adjudication application—
  - (a) is withdrawn if the claimant has given a written notice of discontinuation to the adjudicator and respondent; or
  - (b) is taken to have been withdrawn if the respondent has, before an adjudicator has decided the application, paid the claimant the amount stated in the payment claim the subject of the adjudication application.

*Note—*

Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application, see section 95.

- (2) If subsection (1)(b) applies, the claimant must as soon as practicable inform the adjudicator and the respondent that the adjudication application has been withdrawn because of payment.
- (3) As soon as practicable after an adjudication application is withdrawn, the claimant must inform the registrar that the application has been withdrawn and whether it was withdrawn as mentioned in subsection (1)(a) or (b).

Maximum penalty—20 penalty units.

## **Part 4A Requiring higher party to withhold payment**

### **97A Definitions for part**

In this part—

*financier* means—

- (a) a financial institution; or

- (b) a person who, in the ordinary course of the person's business, supplies finance for construction contracts.

***head contractor*** means the contracted party for a contract that is not also a subcontract of another contract.

***higher party***, for an adjudicated amount, means—

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

***payment withholding request*** see section 97B(2).

***related work or services***, for an adjudicated amount, means—

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

## **97B Higher party may be required to retain amount owed to respondent**

- (1) This section applies if—
  - (a) an adjudicator decides that a respondent is required to pay an adjudicated amount to a claimant under section 88; and
  - (b) the respondent has not paid the adjudicated amount to the claimant as required under section 90.
- (2) The claimant may, using an approved form, require a higher party for the adjudicated amount to retain a sufficient amount to cover payment of the adjudicated amount out of a related amount payable to the respondent (a ***payment withholding request***).

- (2A) However, the claimant may not give a payment withholding request to a higher party, for the adjudicated amount, that is a resident owner.
- (3) The ***related amount payable to the respondent*** is the amount that is or becomes payable by the higher party to the respondent under an arrangement for—
- (a) the construction work to which the adjudicated amount relates; or
  - (b) the supply of related goods and services to which the adjudicated amount relates.
- (4) The claimant must give a copy of the payment withholding request to the respondent at the same time it gives the request to the higher party.

Maximum penalty—50 penalty units.

- (5) A person who is given a payment withholding request must, if the person is not the higher party for the adjudicated amount, give notice to the claimant about not being a higher party within 5 business days after receiving the request.

*Note—*

A person may no longer be a higher party as a result of paying all amounts owed by the party to the respondent before being given the payment withholding request.

Maximum penalty—50 penalty units.

- (6) In this section—  
***resident owner*** see section 61(5).

### **97C Obligation of higher party to retain amount payable to respondent**

- (1) This section applies if a claimant gives a payment withholding request to a higher party for an adjudicated amount.
- (2) The higher party must retain, out of the related amount payable to the respondent, either the adjudicated amount or

the related amount payable to the respondent, whichever is less.

*Example—*

If the adjudicated amount is \$55,000 but the amount payable to the respondent is only \$40,000, the higher party's obligation is to retain \$40,000.

If the adjudicated amount is \$55,000 and the amount payable to the respondent is \$120,000, the higher party's obligation is to retain \$55,000.

Maximum penalty—50 penalty units.

- (3) The obligation under subsection (2) remains in force only until the claimant is paid the adjudicated amount.
- (4) A part payment of the adjudicated amount removes the obligation under subsection (2) to the extent of the part payment.
- (5) If the claimant is paid the adjudicated amount, the claimant must inform the higher party of the payment within 5 business days after the amount is paid.

Maximum penalty—50 penalty units.

- (6) In this section—  
*related amount payable to the respondent* see section 97B(3).

## **97D Contravention of requirement by higher party**

- (1) This section applies if—
  - (a) a claimant gives a payment withholding request to a higher party for an adjudicated amount; and
  - (b) the higher party fails to retain an amount as required under section 97C.
- (2) The higher party becomes jointly and severally liable with the respondent for paying the adjudicated amount to the claimant but only to the extent of the failure.

*Note—*

The higher party may not be required to retain the same amount as the respondent's debt, see section 97B(2).

- (3) The higher party may recover as a debt from the respondent any amount that the claimant recovers from the higher party under a right of action conferred by subsection (2).

### **97E Protections for higher party**

- (1) An obligation of a higher party to retain an amount in compliance with a payment withholding request operates, while the obligation continues, as a defence against recovery of the amount by the respondent from the higher party.
- (2) Any period during which the higher party retains an amount in compliance with a payment withholding request is not to be taken into account for the purposes of working out any period for which that amount has gone unpaid to the respondent.

### **97F Respondent to provide information about higher party**

- (1) The claimant for an adjudicated amount may require the respondent to give the claimant the following information—
  - (a) the name of the higher party for the adjudicated amount;
  - (b) the address of the higher party's place of business or, if the higher party does not have a place of business, the higher party's place of residence;
  - (c) whether any amount is, or will become payable, by the higher party to the respondent under an arrangement for—
    - (i) the construction work to which the adjudicated amount relates; or
    - (ii) the supply of related goods and services to which the adjudicated amount relates.
- (2) The respondent must comply with the requirement within 5 business days after receiving it.

Maximum penalty—20 penalty units.

- (3) The respondent must not, in purported compliance with the requirement, give the claimant information that the respondent knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

### **97G Charge over amount retained**

- (1) This section applies if a claimant gives a payment withholding request to a higher party.
- (2) In addition to the obligation of the higher party to retain an amount in compliance with the payment withholding request, the amount is also subject to a charge in favour of the claimant for securing payment of the amount to the claimant if the claimant becomes entitled to that amount.
- (3) The charge over the amount expires if any of the following happens—
  - (a) the respondent pays the amount to the claimant;
  - (b) the adjudication decision relating to the amount is set aside and the respondent pays into court, as security, the unpaid portion of the amount pending a final decision;
  - (c) the adjudication certificate relating to the amount is filed in court as a judgment for debt, but the court dismisses the proceedings for enforcement.
- (4) The claimant may enforce the charge as if the charge had been given to it under a written agreement between it and the higher party.
- (5) An act done to defeat, or purporting to operate so as to defeat, the charge is of no effect against the claimant.
- (6) The charge is declared to be a statutory interest to which the *Personal Property Securities Act 2009* (Cwlth), section 73(2) applies.

## **97H Other rights of claimant not affected**

This part, or any action taken by a claimant under this part, does not limit or otherwise affect the taking of any other action by the claimant to enforce an adjudication decision or recover an adjudicated amount.

## **Part 5 Suspending work**

### **98 Claimant's right to suspend work**

- (1) A claimant may suspend carrying out construction work, or supplying related goods and services, under a construction contract if at least 2 business days have passed since the claimant gave notice of intention to do so to the respondent under section 78 or 92.
- (2) The right conferred under subsection (1) exists until the day on which the claimant receives payment from the respondent of the amount mentioned in section 78(1) or 92(1), and continues for another 3 business days immediately following that day.
- (3) If, in exercising the right to suspend carrying out construction work or supplying related goods and services under a construction contract, the claimant incurs a loss or expense because the respondent removes any part of the work or supply from the contract, the respondent is liable to pay the claimant the amount of the loss or expense.
- (4) A claimant who suspends carrying out construction work, or supplying related goods and services under a construction contract under subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, because of the claimant not carrying out that work or not supplying those goods and services, during the suspension.



## 100 Proceedings to recover unpaid amount as debt

- (1) This section applies if a claimant starts proceedings in a court under section 78(2)(a) to recover an unpaid amount from a respondent as a debt owing to the claimant.
- (2) Judgment in favour of the claimant is not to be given by a court unless the court is satisfied that—
  - (a) the respondent did not pay the amount to the claimant on or before the due date for the progress payment to which the payment claim relates; and
  - (b) if the respondent's liability to pay the amount arises because of a failure to give a payment schedule—the respondent did not give the claimant a payment schedule within the time required to do so under this Act.
- (3) The respondent is not, in those proceedings, entitled—
  - (a) to bring any counterclaim against the claimant; or
  - (b) to raise any defence in relation to matters arising under the construction contract.

## Part 6A Charge over property

### 100A Definitions for part

In this part—

*appropriate form* means the form required by the registrar of titles.

*head contractor* means the contracted party for a contract that is not also a subcontract of another contract.

*registered owner* see the *Land Title Act 1994*, schedule 2.

*relevant property*, for an adjudicated amount, means the lot—

- (a) on which the construction work, related to the adjudicated amount, was carried out; or

- (b) to which the related goods and services, related to the adjudicated amount, were supplied.

### **100B Registering charge over property for unpaid adjudicated amount**

- (1) This section applies if—
  - (a) the claimant for an adjudication application is a head contractor; and
  - (b) an adjudicator decides the respondent for the adjudication application is required to pay an adjudicated amount; and
  - (c) the respondent does not pay the adjudicated amount as required under section 90; and
  - (d) the claimant files the adjudication certificate as a judgment for a debt under section 93; and
  - (e) the respondent, or a related entity for the respondent, is the registered owner of the relevant property.
- (2) The claimant may request a charge over the relevant property, by way of a security interest providing security to the claimant for payment of the adjudicated amount, be registered by lodging all of the following documents with the registrar of titles—
  - (a) a request to register the charge over the lot made in the appropriate form;
  - (b) the adjudication certificate;
  - (c) a statutory declaration, made by or on behalf of the claimant, stating—
    - (i) the lot on plan description of the relevant property; and
    - (ii) that the adjudicated amount has not been paid to the claimant; and

- (iii) if the registered owner is a related entity for the respondent—that the registered owner is a related entity for the respondent.
- (3) The registrar of titles may rely on the information provided by the claimant under subsection (3) to register the charge.
- (4) In this section—  
*lot* see the *Land Title Act 1994*, schedule 2.

### **100C Expiry of charge**

- (1) If a charge has been registered over relevant property under section 100B, the charge expires the day that is 24 months after the day the charge is registered.
- (2) However, before the expiry of the charge under subsection (1), the claimant may apply to a court of competent jurisdiction to extend the charge for an additional period of not more than 24 months.
- (3) The court may grant the application for extension if satisfied the charge was registered under section 100B and it would be appropriate to make the order.
- (4) If the court grants the application for extension—
  - (a) the claimant must notify the registrar of titles of the extension in the appropriate form; and
  - (b) the charge expires at the end of the extension.
- (5) The charge also expires if—
  - (a) the adjudication decision for the adjudicated amount, the subject of the charge, is set aside; or
  - (b) the respondent pays into court, as security, the unpaid portion of the adjudicated amount, the subject of the charge, pending the final decision in the relevant proceedings; or

- (c) after filing the adjudication certificate as a judgment for a debt under section 93, a court dismisses the proceedings for the enforcement of the debt.

### **100D Release of charge**

- (1) Subsection (2) applies if a charge has been registered over relevant property under section 100B and either of the following events happen—
  - (a) the charge expires under section 100C;
  - (b) the adjudicated amount, the subject of the charge, is paid to the claimant.
- (2) As soon as practicable after the event happens, the claimant must, in the appropriate form, lodge a request to release the charge over the relevant property with the registrar of titles.  
Maximum penalty—100 penalty units.
- (3) On receipt of the request, the registrar of titles must register the release of the charge over the relevant property.
- (4) If satisfied an event mentioned in subsection (1) has happened and the claimant has failed to act under subsection (2), the registered owner of the relevant property may, in the appropriate form, lodge a request to release the charge over the property with the registrar of titles.
- (5) The request of the respondent must include a statutory declaration stating that—
  - (a) the charge has expired under section 100C; or
  - (b) the adjudicated amount, the subject of the charge, has been paid to the claimant.
- (6) Also, if the charge expired under section 100C(1), the statutory declaration must also state that a search of court records indicates that the claimant has not applied for an extension under section 100C(2).
- (7) On receipt of the request, the registrar of titles must register the release of the charge over the relevant property.

### **100E Application to set aside charge**

- (1) If a charge has been registered over relevant property under section 100B, the registered owner of the property may apply to a court of competent jurisdiction to have the charge set aside.
- (2) However, the registered owner may make the application only if the owner has given the claimant written notice of the owner's intention to make the application.
- (3) On hearing the application, the court may order that the charge be set aside if the court is satisfied—
  - (a) the adjudicated amount, the subject of the charge, has been paid; or
  - (b) the registered owner is not the respondent or a related entity for the respondent.
- (4) If the court orders that the charge be set aside, the registered owner of the relevant property may, in the appropriate form, request the registrar of titles remove the charge for the register.
- (5) The request must be accompanied by a copy of the court order.

### **100F Enforcing a charge**

- (1) If a charge is registered over relevant property under section 100B, the claimant may apply to a court of competent jurisdiction for an order that the property be sold.
- (2) However, the claimant may make the application only if the claimant has given the registered owner of the relevant property written notice of the claimant's intention to make the application.
- (3) Any person who appears to the court to have a sufficient interest in the application is entitled—
  - (a) to be joined as a party to the proceeding; and
  - (b) to be heard on the application.

### **100G Orders court may make**

- (1) On hearing an application made under section 100F, the court may order that the relevant property be sold if satisfied the adjudicated amount, the subject of the charge, remains unpaid and it would be appropriate to make the order.
- (2) Without limiting the orders it may make, the court may—
  - (a) set aside the charge; or
  - (b) appoint a person to act as the claimant’s agent for the sale.

### **100H Effect of court order**

- (1) An order for the sale of relevant property made under section 100G—
  - (a) authorises the sale of the property free of all encumbrances affecting the property, other than the encumbrances the court preserves in its order; and
  - (b) has effect despite—
    - (i) any encumbrances affecting the property; or
    - (ii) any Act, other than this Act.
- (2) A person appointed by the court as the claimant’s agent has the power to convey the relevant property to a purchaser and to do all things necessary to effect the conveyance.
- (3) Subsections (4) and (5) apply if the claimant sells the relevant property under a court order made under section 100G.
- (4) On lodgement of the appropriate form under the *Land Title Act 1994*, the registrar of titles must register the transfer of the interest of the registered owner to the purchaser free of all encumbrances other than those preserved in the relevant court order.
- (5) On settlement, the claimant is to apply the sale proceeds in the following order—



- (a) must allow for any amount paid to a party to the contract under or for this chapter in any order or award it makes in those proceedings; and
  - (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.
- (4) If, in any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under this chapter is affected by jurisdictional error, the court may—
- (a) identify the part affected by the error; and
  - (b) allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.

## 102 Service of notices

- (1) A notice or other document that, under this chapter, is authorised or required to be given to a person may be given to the person in the way, if any, provided under the relevant construction contract.

*Example—*

A contract may allow for the service of notices by email.

- (2) Subsection (1) is in addition to, and does not limit or exclude, the *Acts Interpretation Act 1954*, section 39 or the provisions of any other law about the giving of notices.
- (3) To remove any doubt, it is declared that nothing in this Act—
- (a) excludes the proper service of notices or documents by a person's agent; or
  - (b) requires a person's acknowledgement of a notice or document properly given to the person.

## Chapter 4 Subcontractors' charges

### Part 1 Preliminary

#### Division 1 Application and operation of chapter

##### 103 Application to particular domestic building work

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

#### Division 2 Interpretation

##### 104 Definitions

In this chapter—

*contractor*, for a contract, means the party to the contract who is required to carry out work under the contract.

*contract price*, for a contract, means the amount the contractor is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contractor is entitled to be paid under the contract.

*court* means the Magistrates Court, District Court or Supreme Court in which a proceeding may be taken under this chapter.

*land* means any land within Queensland and includes land under water.

*notice of claim* see section 122(1).

**person** includes an unincorporated association.

**security**, for a contract, means something—

- (a) given to, or for the direct or indirect benefit of, the party to the contract for whom the work the subject of the contract is to be performed, by the contractor; and
- (b) intended to secure, wholly or partly, the performance of the contract; and
- (c) in the form of either, or a combination of both, of the following—
  - (i) an amount of money, other than an amount held as a retention amount;
  - (ii) 1 or more valuable instruments, whether or not exchanged for, or held instead of, a retention amount.

**structure**, for a structure on land under water, includes a structure made up of component parts that include—

- (a) component parts fixed to the land; and
- (b) component parts that rise and fall with the rise and fall of the water, and that are otherwise confined in their location by component parts fixed to the land.

*Example of a structure included under this definition—*

A marina made up of fixed pylons, and pontoons that rise and fall with the water level that are otherwise confined in their location by the pylons.

**subcontractor's charge** see section 109(4).

**valuable instrument** means any of the following—

- (a) banker's undertaking;
- (b) bond;
- (c) inscribed stock;
- (d) guarantee policy;
- (e) interest-bearing deposit;

- (f) another instrument, to the extent it is convertible into an amount of money.

*variation*, of a contract, means an addition to, or an omission from, the work required to be carried out under the contract.

*work* see section 105.

## 105 Meaning of *work*

- (1) *Work*, for a contract—
- (a) means labour, whether skilled or unskilled, carried out by a person in connection with—
- (i) the construction, decoration, alteration or repair of a building or other structure; or
  - (ii) the development or working of a mine, quarry, sandpit, drain, embankment or other excavation in or on land; or
  - (iii) the placement, fixation or erection of materials, plant or machinery used or intended to be used for a purpose mentioned in subparagraph (i) or (ii); or
  - (iv) the alteration or improvement of a thing; or
  - (v) the demolition, removal or relocation of a building or other structure; and
- (b) includes—
- (i) the supply of materials used by a subcontractor in connection with other work the subject of a contract; or
  - (ii) the manufacture or fabrication, wherever it happens, of project-specific components for a contract; or
  - (iii) the supply of labour for a contract, other than labour that is only administrative in nature; but
- (c) does not include—

- (i) the mere delivery of goods sold by a vendor under a contract for the sale of goods; or
- (ii) labour done by a person under a contract of service; or
- (iii) labour done by a person in connection with the testing of materials or the taking of measurements; or
- (iv) a contract for the hire of plant or machinery not intended to be incorporated into work mentioned in paragraph (a).

(2) In this section—

*manufacture or fabrication*, of project-specific components for a contract, does not include—

- (a) the manufacture or fabrication of project-specific components if—
  - (i) the components have not been fixed in place for the purposes of the contract; and
  - (ii) the components could, without substantial change, reasonably be used other than for the purpose of the contract; or
- (b) the manufacture or fabrication of project-specific components if the manufacture or fabrication consists merely of cutting something to size or mixing things together.

*Example of mixing things together—*

mixing things together to make concrete or asphalt

*project-specific components*, for a contract, means components meeting the particular requirements of the contract, other than components that are standard or ordinary product lines of a commercially available specification.

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

In this chapter, unless a contrary intention appears—

- (a) a reference to the amount of money payable under a contract is taken to include all amounts that, under the contract, contribute to a complete or partial satisfaction of the contract price; and
- (b) a reference to the payment of any money in reduction of the contract price for a contract includes all amounts that, under the contract, contribute to a complete or partial satisfaction of the contract price; and
- (c) a reference to completion of the work specified in a subcontract is taken to be completion of the work by a subcontractor who has given a notice of claim in relation to the contract, subcontract or a higher subcontract.

## **107 When work specified in contract completed**

In this chapter, the work specified in a contract is taken to be completed when, with any variations, omissions or deductions authorised or agreed, it has been performed in accordance with the contract, whether or not the contractor—

- (a) is later employed to do additional work that is connected or related to the work but is not specified in the contract; or
- (b) is liable to rectify defects in the work discovered after the performance of the work and during a defects liability period for the contract.

## **Part 2**                      **Right to subcontractor's charge**

### **108**      **Contracts to which this part applies**

This part applies if a person contracts with another person for the carrying out of work in relation to land or a building.

### **109**      **Charges in favour of subcontractors**

- (1) Each subcontractor for the contract is entitled to a charge over money payable to—
  - (a) the contractor under the contract; or
  - (b) another subcontractor under a higher subcontract.
- (2) Also, if payment can not be satisfied by a charge mentioned in subsection (1), the subcontractor is entitled to a charge on any security for the contract or higher subcontract.
- (3) However, a security for the contract or higher subcontract is only available to the extent—
  - (a) of the security's maximum possible value for securing performance of the contract or higher subcontract; and
  - (b) it is not required to be used for securing the performance of the contract or higher subcontract.
- (4) A charge mentioned in subsection (1) or (2) is a *subcontractor's charge*.
- (5) A subcontractor's charge secures payment in accordance with the subcontract of all money that is payable, or is to become payable, to the subcontractor for the subcontracted work.

### **110**      **Limits on amount recoverable under subcontractor's charge**

The total amount recoverable under a subcontractor's charge can not exceed the amount payable—

- (a) to the subcontractor under its subcontract; or

*Example—*

If the amount payable to the subcontractor for work is \$18,000, the subcontractor's charge can not be for more than \$18,000.

- (b) if the charge relates to money payable to the contractor under the contract—to the contractor under the contract; or

*Example—*

If the amount payable to the subcontractor for work is \$18,000 and the amount payable to the contractor under the contract is \$11,000, the subcontractor's charge for the related contract can not be for more than \$11,000.

- (c) if the charge relates to money payable to another subcontractor under a higher subcontract—to the other subcontractor under the higher subcontract.

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

A subcontractor's charge may be for money, the payment of which is governed by a provision of the subcontract that is still to be complied with, including, for example, the following—

- (a) a provision establishing a procedure for the certification of the amount, quality or value of work that has been performed;
- (b) a provision establishing a procedure for the resolution of a dispute about the amount, quality or value of work that has been performed.

### **112 Damages etc. not covered by subcontractor's charge**

A subcontractor's charge can not include the following—

- (a) damages for breach of contract or in tort;

[s 113]

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- (b) an amount payable on the basis of an extra-contractual remedy, including, for example, as reasonable compensation for work done;
- (c) damages or other relief under another chapter or another Act;
- (d) damages or other relief under an Act of another State or the Commonwealth.

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

- (1) For a subcontractor's charge, the amount of money payable to the contractor under the contract is taken to include all money paid in reduction of the contract price to any person other than the subcontractor claiming the charge, unless that money is paid—
  - (a) in good faith and not for the purpose of defeating or impairing a subcontractor's charge; and
  - (b) without contravening section 126.
- (2) Subsection (1) applies in relation to money payable to another subcontractor for a higher subcontract as if—
  - (a) a reference in the subsection to a contractor were a reference to the other subcontractor; and
  - (b) a reference in the subsection to the contract were a reference to the higher subcontract.

**114 Assignments etc. of no effect against subcontractor's charge**

- (1) An assignment, disposition or charge of any kind that is made or given by a contractor for money that is or is to become payable to the contractor under the contract has no effect against a subcontractor's charge.
- (2) However, subsection (1) does not apply to an assignment, disposition or charge made or given by the contractor to the

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contractor's employees for wages payable to them in relation to the contract.

- (3) Subject to this chapter, money that is, or is to become, payable to the contractor can not be attached or passed or charged by operation of law so as to defeat or impair a subcontractor's charge.
- (4) Subsections (1) to (3) apply in relation to another subcontractor for a higher subcontract as if—
  - (a) a reference in the subsections to a contractor were a reference to the other subcontractor; and
  - (b) a reference in the subsections to the contract were a reference to the higher subcontract.

## **115 Insufficient money available for claims**

- (1) This section applies if—
  - (a) there are 2 or more subcontractors' charges made against a contractor for the same contract; and
  - (b) the money that is, or is to become, payable to the contractor under the contract is insufficient to satisfy all of the subcontractors' charges for the contract in full.
- (2) The total amount recoverable under the subcontractors' charges is reduced in proportion to the amounts of the charges.

*Example—*

If there is a subcontractor's charge for \$5,000, another for \$10,000 and the amount remaining to be paid to the contractor is only \$12,000, the amount recoverable under the charges would be reduced to \$4,000 and \$8,000 respectively.

- (3) The money mentioned in subsection (1)(b) includes money that is, or is to become, payable on the basis of a subcontractor's charge on a security for the contract, including money payable under section 130 or under an order of the court under section 132.

- (4) Subsection (1) applies in relation to another subcontractor for a higher subcontract as if—
- (a) a reference in the subsection to a contractor were a reference to the other subcontractor; and
  - (b) a reference in the subsection to the contract were a reference to the higher subcontract.

### **116 Assignment and transmission of subcontractor's charge**

- (1) If the debt secured by a subcontractor's charge passes to another person on the death or bankruptcy of the person entitled to the charge, or otherwise by operation of law, the right to the charge passes with that debt.
- (2) A subcontractor's charge may be assigned together with the debt secured by the charge.

### **117 No subcontractor's charge over money held in trust under a project trust or retention trust**

No entitlement to a subcontractor's charge exists to the extent it relates to money held in trust under a project trust or retention trust.

### **118 Limit of 1 claim for work**

- (1) A subcontractor may make more than 1 claim in relation to money that is payable, or is to become payable, to the subcontractor for subcontracted work, however—
  - (a) each claim must be about a separate and distinguishable item of work done by the subcontractor under the subcontract; and
  - (b) there must not be more than 1 claim about any 1 item.
- (2) A subcontractor's charge that is inconsistent with subsection (1) is of no effect and does not attach.



Maximum penalty—20 penalty units.

- (4) Subsections (1) to (3) apply in relation to another subcontractor for a higher subcontract as if—
  - (a) a reference in the subsections to a contractor were a reference to the other subcontractor; and
  - (b) a reference in the subsections to the contract were a reference to the higher subcontract.

## **120 Damages payable for failure to give information**

- (1) This section applies if a person fails to give a subcontractor information as required under section 119.
- (2) The person is liable to pay the subcontractor an amount for damages that the subcontractor incurred as a consequence of the failure.
- (3) Damages under subsection (2) must be decided by the court on the application of the subcontractor.
- (4) In a proceeding mentioned in subsection (3) the person is excused from the liability under subsection (2) if the person satisfies the court that the person has a reasonable excuse for the failure.

# **Part 4 Claiming subcontractor's charge**

## **Division 1 Preliminary**

### **121 Application of part**

- (1) This part applies if a subcontractor intends to claim a subcontractor's charge on money payable to the contractor for the contract or to another subcontractor for a higher subcontract.

- (2) For applying this part in relation to money payable to another subcontractor for a higher subcontract—
  - (a) a reference in a provision to a contractor is taken to be a reference to the other subcontractor; and
  - (b) a reference in a provision to the contract is taken to be a reference to the higher subcontract.

## **Division 2                      Action by subcontractor**

### **122      Notice of claim**

- (1) To claim a subcontractor's charge over money payable to the contractor under the contract, the subcontractor must give written notice (a *notice of claim*) to the person obliged to pay the money under the contract.
- (2) The notice of claim must be made in the approved form and—
  - (a) state the amount of the claim; and
  - (b) include details of the work done by the subcontractor, certified as prescribed by a qualified person; and
  - (c) include the other information prescribed by regulation.
- (3) The amount of the claim must be certified by a qualified person, as prescribed by regulation.
- (4) The notice of claim may be given even if the work is not completed, or payment of the money relating to the charge is not yet due.
- (5) However, if the work has been completed, the notice of claim must be given within 3 months after practical completion for the work.
- (6) The claim may relate only to—
  - (a) money payable to the subcontractor by the date the notice is given; and

- (b) money to become payable to the subcontractor after the date the notice is given if the money is for work done by the subcontractor before that date.
- (7) To remove any doubt, it is declared that a subcontractor's charge on money payable under the contract includes a charge on a retention amount for the contract.
- (8) If the notice of claim relates only to a retention amount for the contract, the notice—
  - (a) may be given at any time while work under the contract is being performed; and
  - (b) must be given within 3 months after the expiration of the defects liability period for the contract.
- (9) If the notice of claim is not given in compliance with this section, the notice is of no effect and the subcontractor's charge does not attach.
- (10) In this section—  
*qualified person* see section 147(1).

## **123 Copy of notice of claim to contractor**

- (1) This section applies if a subcontractor gives a notice of claim to a person obliged to pay money to a contractor under a contract.
- (2) The subcontractor must—
  - (a) give the contractor a copy of the notice of claim; and
  - (b) advise the contractor of the name and address of the person given the notice of claim.
- (3) If the subcontractor does not comply with subsection (2), the notice is of no effect and the subcontractor's charge does not attach.

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

- (1) This section applies if—
  - (a) a subcontractor gives a notice of claim to a person (the *recipient*) obliged to pay money to a contractor under a contract; and
  - (b) a person other than the recipient holds a security for the contract.
- (2) The subcontractor must give a copy of the notice of claim to the person who holds the security.
- (3) If a copy of the notice of claim is not given as required under subsection (2), the claimed subcontractor's charge does not attach to the security.
- (4) To remove any doubt, it is declared that subsection (3) does not affect a subcontractor's charge to the extent it otherwise attaches under this chapter.

## **125 Withdrawing a notice of claim**

- (1) A subcontractor may at any time withdraw, wholly or partly, a notice of claim by giving notice of the withdrawal, in the approved form, to the person to whom the subcontractor gave the notice of claim.
- (2) If a subcontractor withdraws, wholly or partly, a notice of claim under subsection (1), the subcontractor must give a copy of the notice of withdrawal to each of the persons to whom the subcontractor gave a copy of the notice of claim.

## **Division 3                      Action by person given notice of claim**

### **126      Person given notice of claim must retain money**

- (1) This section applies if a notice of claim is given to a person under section 122 because the person is obliged to pay money to a contractor under a contract.
- (2) The person must retain a sufficient part of the money that is or is to become payable by the person under the contract to satisfy the claim until the court in which the claim is heard makes an order about to whom, and in what way, the money is to be paid.
- (3) If the person fails to retain the money as required under subsection (2), the person is personally liable to pay to the subcontractor the amount of the claim, not exceeding the amount that the person is required to retain under subsection (2).
- (4) However, the person may, at any time after the notice of claim is given to the person, pay into court the amount that the person is required to retain under subsection (2).
- (5) An amount paid into court by a person under subsection (4)—
  - (a) may be paid out only under an order of the court; and
  - (b) discharges the person of all further liability relating to the amount and of the costs of any proceeding in relation to the amount.

### **127      Person given notice of claim must comply with request from security holder about s 130 or 131**

- (1) This section applies if a subcontractor—
  - (a) gives a notice of claim to a person obliged to pay money to a contractor under a contract; and

- (b) gives the holder of a security for the contract a copy of the notice of claim.
- (2) The holder of the security may, in writing, ask the person for information the holder reasonably requires to comply with section 130 or 131.
- (3) The person must comply with a request made under subsection (2) to the greatest practicable extent.
- (4) Subsection (5) applies if—
  - (a) the person fails to comply with a request made under subsection (2); and
  - (b) because of the failure the security holder does not comply with section 130(2) or 131(2).
- (5) The person, instead of the holder of the security, is personally liable to pay the subcontractor the amount the subcontractor is liable to be paid under section 130(2) or 131(2).

## **Division 4                      Action by contractor given copy of notice of claim**

### **128      Contractor given copy of notice of claim must respond**

- (1) This section applies if a subcontractor gives a contractor a copy of a notice of claim.
- (2) The contractor must give both of the following persons a written response to the claim within 10 business days after the contractor is given the copy of the notice of claim, unless the contractor has a reasonable excuse—
  - (a) the person given the notice of claim;
  - (b) the subcontractor.Maximum penalty—20 penalty units.
- (3) The response to the claim must be made in the approved form and—

- (a) accept liability to pay the amount claimed; or
- (b) accept liability to pay an amount stated in the response, but otherwise dispute the claim; or
- (c) dispute the claim.

## **Division 5                      Payment of claim**

### **129      Payment of amount claimed**

- (1) This section applies if—
  - (a) a subcontractor gives a notice of claim to a person under section 122 because the person is obliged to pay money to a contractor under a contract; and
  - (b) the subcontractor gives a copy of the notice of claim to a contractor under section 123; and
  - (c) in the contractor's response to the claim under section 128, the contractor—
    - (i) accepts liability to pay the amount claimed; or
    - (ii) accepts liability to pay an amount stated in the response but otherwise disputes the claim.
- (2) If, in the response to the claim, the contractor accepts liability to pay the amount claimed, the person given the notice of claim must pay the subcontractor the amount the person is required to retain.
- (3) If, in the response to the claim, the contractor accepts liability to pay an amount stated in the response but otherwise disputes the claim, the person given the notice of claim must pay the subcontractor the amount the person is required to retain, up to the amount stated in the response.
- (4) However, the person given the notice of claim is required to comply with subsection (2) or (3) only if, after payment is made under that subsection, the retained amount will be equal to or more than the unsatisfied amount.

(5) A payment made by a person in compliance with this section discharges the person of all further liability relating to the amount paid and of the costs of any proceeding relating to the amount paid.

(6) In this section—

*retained amount*, in relation to a notice of claim given to a person, means the total of all amounts—

- (a) still retained by the person under section 126(2) in relation to the claim; and
- (b) paid into court by the person under section 126(4) in relation to the claim.

*unsatisfied amount*, in relation to a notice of claim given to a person, means the total of all amounts of claims for which the notice of claim has been given, other than amounts that have been—

- (a) satisfied by payment under subsection (2) or (3); or
- (b) the subject of a notice of claim that has been withdrawn.

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

(1) This section applies if—

- (a) a subcontractor gives a notice of claim to a person under section 122 because the person is obliged to pay money to a contractor under a contract; and
- (b) the subcontractor gives a copy of the notice of claim to the contractor under section 123; and
- (c) in the contractor's response to the claim under section 128, the contractor accepts liability to pay the amount claimed; and
- (d) the unsatisfied amount for the contract is more than the retained amount for the contract.

(2) The holder of a security for the contract must—

- (a) retain the security until the court in which the subcontractor's claim is heard makes an order under section 132 about enforcing the subcontractor's charge over the security; or
  - (b) instead of retaining the security—
    - (i) if the security is held as an amount of money—pay the amount, up to the difference amount for the contract, to the subcontractor or subcontractors to whom the acceptance of liability relates; or
    - (ii) if the security is not held as an amount of money but may be converted into an amount of money—convert the security, wholly or partly, into an amount of money and pay the amount, up to the difference amount for the contract, to the subcontractor or subcontractors to whom the acceptance of liability relates.
- (3) If the holder of the security does not comply with subsection (2), the holder is personally liable to pay to a subcontractor the amount of the subcontractor's claim to the extent that the security would have been capable under this chapter, if the holder had complied with the subsection, of satisfying the claim.
- (4) A payment of an amount under subsection (2)(b) discharges the holder of the security of all further liability for the amount paid and of the costs of any proceeding in relation to the amount paid.
- (5) Subsections (2) and (3) do not stop the holder of the security from exercising an entitlement to use the security for securing the performance of the contract, including by keeping control of the security until the security would be required to be surrendered, wholly or partly, if this section did not apply.
- (6) A provision of the contract, or of another arrangement, about the security, including a provision of the security itself, and including a provision providing for the surrender, wholly or partly, of the security, is of no effect to the extent it purports—

- (a) to stop the holder of the security from complying with subsection (2); or
  - (b) to operate to the detriment of a person if the holder complies with subsection (2).
- (7) In this section—

*difference amount*, for a contract, means the amount by which the unsatisfied amount for the contract is more than the retained amount for the contract.

*retained amount*, for a contract, means the total of—

- (a) all amounts a person is retaining under section 126(2) for the contract; and
- (b) all amounts a person has paid into court under section 126(4) for the contract; and
- (c) all amounts the holder of a security for the contract has paid to a subcontractor under subsection (2)(b) in relation to the security.

*unsatisfied amount*, for a contract, means the total of all amounts of claims for the contract for which a notice of claim has been given, other than amounts that have been—

- (a) satisfied by payment under section 129(2) or (3); or
- (b) the subject of a notice of claim that has been withdrawn.

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

- (1) This section applies if—
- (a) a subcontractor gives a notice of claim to a person under section 122 because the person is obliged to pay money to a contractor under a contract; and
  - (b) the subcontractor gives a copy of the notice of claim to the contractor under section 123; and

- (c) in the contractor's response to the claim under section 128, the contractor disputes the claim (does not accept liability to pay the amount claimed); and
  - (d) the unsatisfied amount for the contract is more than the retained amount for the contract.
- (2) The holder of a security for the contract must—
- (a) retain the security until the court in which the subcontractor's claim is heard makes an order under section 132 about enforcing the subcontractor's charge over the security; or
  - (b) instead of retaining the security—
    - (i) if the security is held as an amount of money—pay the amount, up to the difference amount for the contract, into court; or
    - (ii) if the security is not held as an amount of money but may be converted into an amount of money—convert the security, wholly or partly, into an amount of money and pay the amount, up to the difference amount for the contract, into court.
- (3) If the holder of the security does not comply with subsection (2), the holder is personally liable to pay the subcontractor the amount of the subcontractor's claim to the extent that the security would have been capable under this chapter, if the holder had complied with the subsection, of satisfying the claim.
- (4) A payment of an amount under subsection (2)(b) discharges the holder of the security of all further liability for the amount paid and of the costs of any proceeding in relation to the amount paid.
- (5) Subsections (2) and (3) do not stop the holder of the security from exercising an entitlement to use the security for securing the performance of the contract, including by keeping control of the security until the security would be required to be surrendered, wholly or partly, if this section did not apply.

- (6) A provision of the contract, or of another arrangement, about the security, including a provision of the security itself, and including a provision providing for the surrender, wholly or partly, of the security, is of no effect to the extent it purports—
- (a) to stop the holder of the security from complying with subsection (2); or
  - (b) to operate to the detriment of a person if the holder complies with subsection (2).
- (7) An amount paid into court under subsection (2)(b) may be paid out only under an order of the court.
- (8) In this section—

*difference amount*, for a contract, means the amount by which the unsatisfied amount for the contract is more than the retained amount for the contract.

*retained amount*, for a contract, means the total of—

- (a) all amounts a person is retaining under section 126(2) for the contract; and
- (b) all amounts a person has paid into court under section 126(4) for the contract; and
- (c) all amounts the holder of a security for the contract has paid into court under subsection (2)(b) in relation to the security.

*unsatisfied amount*, for a contract, means the total of all amounts of claims of charge for the contract for which a notice of claim has been given, other than amounts that have been—

- (a) satisfied by payment under section 129(2) or (3); or
- (b) the subject of a notice of claim that has been withdrawn.

## 132 Authority of court for security

- (1) This section applies if the holder of a security for a contract—

- (a) is retaining the security under section 130(2)(a) or 131(2)(a) for a subcontractor's charge; or
  - (b) has paid an amount for the security into court under section 131(2)(b) for a subcontractor's charge.
- (2) The court may make the order it considers appropriate for enforcing the subcontractor's charge over the security, including an order for realising the security.
- (3) However, the court may make an order for realising the security only if the holder of the security is no longer entitled, under any contract or other arrangement about the security, including under the security itself, to use the security—
- (a) for securing the performance of the contract; or
  - (b) in some other way provided for in the contract.
- (4) Without limiting the orders the court may make under subsection (2), the court may order the holder of the security to produce the security to the court.
- (5) A precondition or expiry provision for the security is of no effect to the extent that the provision purports to stop the realisation of a security under subsection (2).
- (6) In this section—

***expiry provision***, for a security, means a provision of a contract or another arrangement about the security, including a provision of the security itself, under which the security stops, wholly or partly, having effect.

***precondition provision***, for a security, means a provision of a contract or another arrangement about the security, including a provision of the security itself, stating the circumstances that are to apply before the holder of the security may exercise an entitlement to use the security for securing the performance of a contract.

### **133 Particular subcontractor securities of no effect**

To the extent that something is given by or for a subcontractor for securing, wholly or partly, the performance by a contractor of the contractor's contract it is of no effect.

## **Part 5 Enforcing subcontractor's charge**

### **134 Recovering amount claimed**

- (1) This section applies if—
  - (a) a subcontractor gives a notice of claim to a person under section 122 because the person is obliged to pay money to a contractor under a contract; and
  - (b) the person does not pay, or make satisfactory arrangements for paying, the subcontractor the amount claimed.
- (2) The subcontractor may recover the amount claimed from the person, as a debt owing to the subcontractor, in any court of competent jurisdiction.
- (3) Without limiting the arrangements a person may make for paying a subcontractor an amount claimed, a person makes satisfactory arrangements for paying an amount claimed if the person pays into court the amount the person is required to retain under section 126(2).

### **135 Enforcing subcontractor's charge on behalf of other subcontractors**

- (1) An action to enforce a subcontractor's charge under this chapter may be brought by or on behalf of any number of subcontractors claiming subcontractors' charges.

- (2) Every action brought by a subcontractor to enforce a subcontractor's charge is deemed to be also brought on behalf of every other subcontractor—
  - (a) who has given a notice of claim under section 122; and
  - (b) whose charge has not been extinguished under section 136(3); and
  - (c) who becomes a party to the action in accordance with *Uniform Civil Procedure Rules 1999* and subsection (3).
- (3) Subject to the *Uniform Civil Procedure Rules 1999*, a subcontractor may become a party at any time before the date appointed for the hearing or any adjournment of the hearing.

### **136 Proceedings for subcontractor's charge**

- (1) A proceeding for a subcontractor's charge must—
  - (a) be started within—
    - (i) if the claim is for the retention amount only—4 months after the balance of the retention amount is payable; and
    - (ii) otherwise—1 month after notice of the claim is given under section 122 to the person by whom the money is payable; and
  - (b) be brought by way of action.
- (2) For a proceeding for a subcontractor's charge, it is sufficient if the subcontractor proves that the charge attached to money payable or a security in existence on any date before the date of hearing.
- (3) A subcontractor's charge is extinguished if the proceedings to enforce it are not started as required under subsection (1).

### **137 Claims of charge relating to retention amount not limited**

To remove any doubt, it is declared that, for a subcontractor's charge relating only to a retention amount—

- (a) the charge to which the subcontractor is entitled is not limited to merely a charge on a retention amount; and
- (b) the charge to which the subcontractor is entitled is not limited to merely a charge on a security that has been exchanged for, or is held instead of, a retention amount.

## **Part 6**

### **Protection against subcontractor's charge**

#### **138 When person prejudicially affected by a claim**

Without limiting the circumstances in which a person may be prejudicially affected by a claim of a subcontractor's charge, a person is taken to be prejudicially affected by the claim if—

- (a) because of the claim—
  - (i) the payment of an amount to which the person is entitled is delayed or otherwise affected; or
  - (ii) the release of a security for a contract given by or for the person is delayed or otherwise affected; and
- (b) the person is the contractor or a subcontractor for a higher subcontract; and
- (c) under the contract or higher subcontract, the person has already paid another person an amount for work the subject of the claim.

#### **139 Application to court by person prejudicially affected**

- (1) A person who alleges to be prejudicially affected by a claim of a subcontractor's charge may apply to any court of competent jurisdiction for an order that—
  - (a) the claim be cancelled; or
  - (b) the effect of the claim be modified.

- (2) The court must hear and determine the application summarily and may make such order as it considers appropriate.

#### **140 Vexatious claims**

- (1) A person who vexatiously, or without reasonable grounds, gives a notice of claim to another person is liable to pay to a person prejudicially affected by the claim an amount for the damages the person incurs because of the claim.
- (2) Without limiting subsection (1), a person gives a notice of a claim without reasonable grounds if the person knows, or ought reasonably to know, that the amount of the claim unreasonably exceeds the amount actually payable to the person.
- (3) Damages mentioned in subsection (1) must be decided by a court on an application by the person prejudicially affected.

## **Part 7 Miscellaneous**

#### **141 Effect of payment made under order of the court**

A payment of money by a person to another person in compliance with an order of a court made under this chapter is, to the extent of the amount paid, a sufficient discharge of the person's liability to pay the money to another person who, if not for the order, would have been entitled to receive payment of that money.

#### **142 Court jurisdiction**

Claims and all other matters arising under this chapter between a person claiming a subcontractor's charge and any other person alleged to be liable to pay an amount claimed or otherwise interested in money that may be affected by a claim of a subcontractor's charge and between persons claiming a subcontractor's charge may be heard, determined and

enforced by proceedings under this chapter in a court of competent jurisdiction.

### **143 Consolidation of actions**

If separate actions are brought under this chapter against the same person, or against several persons in relation to the whole or any part of the work required to be carried out under the same contract, the court may order those actions be consolidated on the terms the court considers appropriate.

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

The court may proceed to hear and determine an action or a dispute in the absence of any person to whom an originating process or application is directed on proof on oath of the service of the originating process or application.

### **145 Costs**

Costs of proceedings under this chapter as between party and party are at the discretion of the court.

### **146 Appeal**

An appeal lies from a decision of the court given in any proceeding under this chapter as if it were a decision given in a proceeding brought otherwise than under this chapter.

### **147 Qualified persons**

- (1) A person is a *qualified person* for the purpose of certifying a notice of claim under section 122 if the person is—
  - (a) an architect registered under the *Architects Act 2002*; or
  - (b) a registered professional engineer under the *Professional Engineers Act 2002*; or

- (c) a person licensed under the *Queensland Building and Construction Commission Act 1991* to carry out or supervise work of the type to which the claim relates; or
  - (d) a quantity surveyor who is a member of the Australian Institute of Quantity Surveyors; or
  - (e) a person having expert knowledge of the work to which the claim relates and who is accepted in a particular case as a qualified person by the contractor and subcontractor.
- (2) A person must not give a certificate for a claim that relates to any work if the person—
- (a) performed any of the work; or
  - (b) has a direct or indirect financial interest in the work.
- (3) If a person gives a certificate for a claim in contravention of subsection (2), the claim is of no effect and the relevant subcontractor's charge does not attach.
- (4) A person who gives a certificate for a claim does not have a financial interest in the work only because the person is paid a fee for giving the certificate.
- (5) A person who gives a certificate for a claim does not incur civil liability by reason only of the giving of the certificate unless the person is convicted of fraud in relation to giving the certificate.

## **148 Right to recover debt generally preserved**

Unless otherwise expressly provided for under this chapter, nothing in this chapter affects the right of a person to whom a debt is due and owing for work done to maintain a personal action to recover the debt against the person liable for it, and a judgment obtained by the plaintiff in any action brought does not affect a charge or other right to which the plaintiff is entitled under this chapter.

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## Chapter 5 Administration

### Part 1 Registry and staff

#### Division 1 Registry

##### 149 Registry

- (1) The Adjudication Registry (the **registry**) established under the repealed *Building and Construction Industry Payments Act 2004* is continued.
- (2) The registry consists of the registrar and those employees (**registry staff**) of the employing office that are assigned to the registry.
- (3) The role of the registry staff is limited to assisting the registrar perform his or her functions or exercise a power.
- (4) Other than accepting adjudication applications and the associated fees, only registry staff may assist the registrar to perform his or her functions or exercise a power.
- (5) In this section—  
*employing office* see the *Queensland Building and Construction Commission Act 1991*, schedule 2.

#### Division 2 Registrar

##### 150 Adjudication registrar

- (1) There is to be an Adjudication Registrar (the **registrar**).
- (2) The registrar is appointed by the Governor in Council.
- (3) A person is eligible for appointment as the registrar only if the person—

- (a) is eligible for admission in the legal profession under the *Legal Profession Act 2007*, section 30; and
- (b) has particular knowledge and experience of public administration or other matters of substantial relevance to the functions of the registrar.

*Examples of other matters for paragraph (b)—*

the application of laws relating to building or dispute resolution processes

- (4) The commissioner may appoint a person to act as registrar for a period of not more than 6 months—
  - (a) during a vacancy in the office; or
  - (b) during any period, or all periods, when the registrar is absent from duty or, for another reason, can not perform the duties of the office.
- (5) The registrar is appointed under this Act and not the *Public Service Act 2008*.
- (6) The registrar is an employee of the employing office.
- (7) In this section—  
*employing office* see the *Queensland Building and Construction Commission Act 1991*, schedule 2.

## 151 Disqualification from appointment

A person is disqualified from being appointed as the registrar if the person—

- (a) has a recorded conviction, other than a spent conviction, for an indictable offence; or
- (b) is, or has been, convicted of an offence against this Act; or
- (c) is an insolvent under administration within the meaning of the Corporations Act, section 9; or
- (d) is not able to manage a corporation because of the Corporations Act, part 2D.6; or

- (e) is a member of the board within the meaning of the *Queensland Building and Construction Commission Act 1991*; or
- (f) is a person engaged by the commission under a contract to provide advice or a particular service.

## **152 Term of appointment**

- (1) The registrar holds office for the term stated in the person's appointment as registrar.
- (2) The stated term must not be more than 3 years.
- (3) The registrar may be reappointed.

## **153 Conditions of appointment**

The registrar is to be paid the remuneration and allowances decided by the Governor in Council.

## **154 Registrar's functions and powers**

- (1) The registrar is responsible for managing the registry and the administration of the registry.
- (2) The registrar has the following functions—
  - (a) referring adjudication applications to adjudicators;
  - (b) keeping a register containing details of adjudicators (the *adjudicator register*);
  - (c) ensuring the adjudicator register is available for inspection by a person—
    - (i) if a regulation prescribes a fee for the inspection—on payment of the fee prescribed; or
    - (ii) otherwise—without charge;
  - (d) supplying a certificate as to the correctness of a matter in the adjudicator register to a person paying the fee prescribed by regulation for the certificate;

- (e) keeping and publishing records of decisions by adjudicators;
  - (f) keeping account of fees paid or payable to the registrar;
  - (g) collecting statistical data and other information relevant to the administration of the registry for the commissioner's report to the Minister under section 157;
  - (h) administering the continuing professional development requirements prescribed by regulation for adjudicators;
  - (i) making a code of conduct for adjudicators;
  - (j) providing an advisory service to consumers about the role of the registry or the adjudication process;
  - (k) reporting to the commissioner about the administration of the registry;
  - (l) performing another function given under this Act or another Act.
- (3) The registrar has the powers reasonably necessary to perform the registrar's functions.
- (4) The registrar must perform the registrar's functions and exercise the registrar's powers impartially and transparently.
- (5) The commissioner must not direct the registrar in performing a function mentioned in subsection (2)(a), (d) or (e).

### **155 Registrar's policy**

- (1) The registrar may make a policy about the administration of chapter 3 or this chapter.
- (2) However, the policy does not take effect until approved by regulation.
- (3) The commissioner must—
  - (a) publish the policy on the commission's website; and

- (b) keep copies of the policy available for inspection, free of charge, at the commission's office when the office is open to the public; and
- (c) if asked, advise where copies of the policy may be obtained.

### **156 Delegation by registrar**

The registrar may delegate the registrar's powers under this Act or another Act to an appropriately qualified member of the registry staff.

## **Division 3 Other matters**

### **157 Annual report on operation of chapter and registry**

- (1) As soon as practicable after each financial year, but not later than 30 September, the commissioner must give the Minister a report including—
  - (a) a review of the operation of chapter 3 and the registry during the preceding financial year; and
  - (b) proposals for improving the operation of, and forecasts of the workload of, the registry in the present financial year.
- (2) The report may be included in the commission's annual report.
- (3) Unless the report is included in the commission's annual report, the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report.
- (4) In this section—

*annual report* means an annual report prepared under the *Financial Accountability Act 2009*, section 63.

## Part 2                      Adjudicators

### Division 1                Preliminary

#### 158    Definitions for chapter

In this chapter—

*accepted representations* see section 172(2).

*adjudicated amount* see section 88(1).

*adjudication application* see section 79(1).

*conviction* means a finding of guilt, or the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded.

*corresponding law* means a law applying, or that applied, in another State, the Commonwealth or a foreign country that provides, or provided, for the same matter as this part or a provision of this part.

*information notice*, for a decision of the registrar under this part, is a written notice stating—

- (a) the decision; and
- (b) the reasons for the decision; and
- (c) that the person to whom the notice is given may have the decision reviewed within 28 days; and
- (d) how the person may have the decision reviewed.

*original decision* see section 177(1).

*payment claim* means a claim mentioned in section 75.

*proposed action* see section 171(3)(a).

*review decision* see section 178(2).

*review notice* see section 178(3).

*show cause notice* see section 171(2).

*show cause period* see section 171(3)(e).

*spent conviction* means a conviction—

- (a) for which the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* has expired under that Act; and
- (b) that is not revived as prescribed by section 11 of that Act.

## **Division 2                      Registration of adjudicators**

### **159      Application for registration as adjudicator**

- (1) An individual may apply to the registrar for registration as an adjudicator.
- (2) The application—
  - (a) must be—
    - (i) in the approved form; and
    - (ii) signed by or for the applicant; and
    - (iii) accompanied by the fee prescribed by regulation for the application; and
  - (b) must state the following—
    - (i) the name and address of the applicant;
    - (ii) an address in Queensland for service of documents;
    - (iii) the experience and qualifications of the applicant, relevant to deciding adjudication applications;
    - (iv) other details, required in the approved form for the application, to enable the registrar to decide whether the applicant is a suitable person to be registered as an adjudicator.

## **160 Consideration of application**

- (1) The registrar must consider the application and either grant, or refuse to grant, the application.
- (2) The registrar may grant the application only if the registrar is satisfied the applicant is a suitable person to be registered as an adjudicator.

## **161 Suitability of person to be registered**

- (1) A person is not eligible to be registered as an adjudicator unless the person holds—
  - (a) an adjudication qualification; or
  - (b) another qualification that the registrar considers to be equivalent to an adjudication qualification.
- (2) In deciding whether an applicant is a suitable person to be registered as an adjudicator, the registrar may have regard to the following matters—
  - (a) whether the person—
    - (i) has a conviction for a relevant offence, other than a spent conviction; or
    - (ii) held a registration under this part, or a licence or registration under a corresponding law, that was suspended or cancelled; or
    - (iii) has been refused registration under this part or a licence or registration under a corresponding law; or
    - (iv) is an insolvent under administration within the meaning of the Corporations Act, section 9; or
    - (v) is competent to adjudicate matters under chapter 3; or
  - (b) whether the person's registration with a professional association was cancelled because of disciplinary action;

- (c) the experience and qualifications of the person;
  - (d) the matters stated in the application for registration under section 159;
  - (e) anything else relevant to the person's ability to perform the person's functions as an adjudicator.
- (3) In this section—

***adjudication qualification*** means a qualification issued by a body prescribed by regulation to an individual stating that the individual has achieved an adjudication competency standard prescribed by regulation.

***relevant offence*** means—

- (a) an indictable offence, other than an indictable offence that is taken to be a simple offence under the Criminal Code, section 659; or
- (b) an offence against this Act; or
- (c) an offence against a corresponding law; or
- (d) an offence against the *Queensland Building and Construction Commission Act 1991* or a law of another State or the Commonwealth that provides for the same matter as that Act or a provision of that Act; or
- (e) an offence against the repealed *Domestic Building Contracts Act 2000* or a law of another State or the Commonwealth that provides for the same matter as that Act or a provision of that Act; or
- (f) an offence, relating to the provision of services as an adjudicator, against a law applying, or that applied, in the State, the Commonwealth, another State or a foreign country.

## 162 Request for further information

- (1) The registrar may, by written notice given to the applicant, require the applicant to give the registrar further information

or a document the registrar reasonably requires to decide the application.

- (2) The requirement—
  - (a) must state the period, of at least 28 days, within which the applicant must give the registrar the information or document; or
  - (b) may require the information or document be verified by statutory declaration.
- (3) The registrar may, before the end of the stated period, extend the time for complying with the requirement.
- (4) Unless the registrar extends the time to comply with the requirement, the applicant is taken to have withdrawn the application if he or she does not comply with the requirement with the stated period.

### **163 Decision on application for registration**

- (1) If the registrar decides to grant the application, the registrar must issue a certificate of registration to the applicant.
- (2) If the registrar decides to impose conditions on the registration, the registrar must immediately give the applicant an information notice for the decision.
- (3) If the registrar decides to refuse to grant the application, the registrar must immediately give the applicant an information notice for the decision.

### **164 Term of registration**

Registration as an adjudicator becomes effective on the day the certificate of registration is issued or on the day of the registration's renewal and ends either—

- (a) 3 years after that day; or
- (b) on the earlier day decided by the registrar and stated in the certificate of registration.

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## 165 Conditions of registration

- (1) Registration as an adjudicator is subject to the following conditions—
  - (a) the adjudicator must comply with this chapter and chapter 3;
  - (b) the adjudicator must complete continuing professional development as prescribed by regulation;
  - (c) the adjudicator must complete the mandatory training as prescribed by regulation;
  - (d) other reasonable conditions the registrar considers appropriate to give effect to this chapter and that are stated in the certificate of registration or in an information notice given under subsection (3).
- (2) Conditions may be imposed on an adjudicator's registration—
  - (a) when registration first happens or is renewed or amended; or
  - (b) at another time if the registrar considers the conditions are necessary to ensure that an adjudicator effectively performs the adjudicator's functions under this chapter.
- (3) If the registrar decides to impose conditions on the registration under subsection (1)(d)—
  - (a) the registrar must immediately give the adjudicator an information notice for the decision; and
  - (b) the conditions take effect when the information notice is received by the adjudicator or the later day stated in the notice.
- (4) The mandatory training that may be prescribed under subsection (1)(c) may include training about—
  - (a) the difference between processes under this Act and the equivalent processes under the repealed *Building and Construction Industry Payments Act 2004*; or
  - (b) amendments of this Act.

## **166 Form of certificate of registration**

A certificate of registration must state the following particulars—

- (a) the adjudicator's name;
- (b) the day the registration becomes effective;
- (c) the day the registration expires;
- (d) the registration number;
- (e) the registration conditions.

## **Division 3 Renewals of registrations of adjudicators**

### **167 Applications for renewal of registration**

- (1) An adjudicator may apply to the registrar for the renewal of the adjudicator's registration.
- (2) The application must be made at least 1 month before the registration ends and must—
  - (a) be in the approved form; and
  - (b) be signed by or for the applicant; and
  - (c) be accompanied by the fee prescribed by regulation for the application.
- (3) The registrar must consider the application and renew, or refuse to renew, the registration.
- (4) In deciding whether to grant the application, the registrar may have regard to the matters mentioned in section 161(2).
- (5) The registrar must not renew the registration if—
  - (a) the applicant would not be eligible to be registered as an adjudicator under section 161(1); or

- (b) the applicant has not completed the required continuing professional development prescribed under section 165(1).
- (6) If the registrar decides to refuse to renew the registration, the registrar must give the applicant an information notice for the decision.
- (7) If the registrar decides to impose conditions on the registration, the registrar must give the applicant an information notice for the decision.
- (8) A registration may be renewed by—
  - (a) endorsing the existing certificate of registration; or
  - (b) cancelling the existing certificate and issuing another certificate.

## **168 Request for further information**

- (1) The registrar may, by written notice given to the applicant, require the applicant to give the registrar further information or a document the registrar reasonably requires to decide the application.
- (2) The requirement—
  - (a) must state the period, of at least 28 days, within which the applicant must give the registrar the information or document; or
  - (b) may require the information or document be verified by statutory declaration.
- (3) The registrar may, before the end of the stated period, extend the time for complying with the requirement.
- (4) Unless the registrar extends the time for complying with the requirement, the applicant is taken to have withdrawn the application if he or she does not comply with the requirement within the stated period.

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

- (1) If an application is made under section 167, the adjudicator's registration is taken to continue in force from the day that it would, apart from this section, have ended until the application is decided under section 167 or is withdrawn.
- (2) However, if the application is refused, the registration continues in force until the information notice for the decision is given to the applicant.
- (3) Subsection (1) does not apply if the registration is earlier suspended or cancelled.

**Division 4 Suspension or cancellation of registrations of adjudicators**

**170 Grounds for suspension or cancellation**

- (1) Each of the following is a ground for suspending or cancelling an adjudicator's registration—
  - (a) the adjudicator is not, or is no longer, a suitable person to hold the registration;
  - (b) the adjudicator has contravened a requirement of the code of conduct made by the registrar under section 181;
  - (c) the adjudicator has contravened a condition of the registration;
  - (d) the registration was issued because of a materially false or misleading representation or declaration.
- (2) For forming a belief that the adjudicator is not, or is no longer, a suitable person to hold registration, the registrar—
  - (a) must have regard to section 161(1); and
  - (b) may have regard to the matters mentioned in section 161(2).

## 171 Show cause notice

- (1) This section applies if the registrar believes a ground exists to suspend or cancel an adjudicator's registration.
- (2) The registrar must give the adjudicator a notice under this section (a *show cause notice*).
- (3) The show cause notice must state—
  - (a) the action (the *proposed action*) the registrar proposes taking under this division; and
  - (b) the grounds for the proposed action; and
  - (c) an outline of the facts and circumstances forming the basis for the grounds; and
  - (d) if the proposed action is suspension of the registration—the proposed suspension period; and
  - (e) an invitation to the adjudicator to show within a stated period (the *show cause period*) why the proposed action should not be taken.
- (4) The show cause period must be a period ending at least 21 days after the show cause notice is given to the adjudicator.

## 172 Representations about show cause notices

- (1) The adjudicator may make written representations about the show cause notice to the registrar in the show cause period.
- (2) The registrar must consider all representations (the *accepted representations*) made under subsection (1).

## 173 Ending show cause process without further action

- (1) This section applies if, after considering the accepted representations for the show cause notice, the registrar no longer believes a ground exists to suspend or cancel the registration.

- (2) The registrar must not take any further action in relation to the show cause notice.
- (3) The registrar must give the adjudicator written notice that no further action is to be taken in relation to the show cause notice.

## **174 Suspension or cancellation**

- (1) This section applies if—
  - (a) there are accepted representations for the show cause notice and, after considering the representations, the registrar still believes a ground exists to suspend or cancel the registration; or
  - (b) there are no accepted representations.
- (2) If the registrar believes suspension or cancellation of the registration is warranted, the registrar may—
  - (a) if the proposed action stated in the show cause notice was to suspend the registration for a stated period—suspend the registration for not longer than the stated period; or
  - (b) if the proposed action stated in the show cause notice was to cancel the registration—either cancel the registration or suspend it for a period.
- (3) The registrar must immediately give an information notice for the decision to the adjudicator.
- (4) The decision takes effect on the later of the following days—
  - (a) the day the information notice is given to the adjudicator;
  - (b) the day stated in the information notice for that purpose.

## **175 Immediate suspension of registration**

- (1) The registrar may suspend an adjudicator's registration immediately if the registrar believes—

- (a) a ground exists to suspend or cancel the registration; and
  - (b) it is necessary to suspend the registration immediately because there is an immediate and serious harm to the effectiveness of the adjudication of payment claims under chapter 3.
- (2) The suspension—
- (a) must be effected by an information notice for the decision given by the registrar to the adjudicator to suspend the adjudicator's registration together with a show cause notice; and
  - (b) begins when the notices are given to the adjudicator; and
  - (c) continues until the earliest of the following happens—
    - (i) the registrar cancels the remaining period of the suspension;
    - (ii) the show cause notice is finally dealt with;
    - (iii) 28 days have passed since the notices were given to the adjudicator.

## **176 Effect of suspension or cancellation of registration of adjudicator**

- (1) This section applies if—
- (a) the registration of an adjudicator is suspended or cancelled or otherwise ends; and
  - (b) an adjudication application has been referred to the adjudicator for adjudication of a payment claim; and
  - (c) the adjudicator has not yet made a decision under section 88 for the adjudication application.
- (2) Within 4 business days after the registration is suspended, cancelled or ends, the registrar must refer the adjudication application to a person eligible to be an adjudicator under section 80.
- (3) No fee is payable for the referral.

- (4) The adjudicator is not entitled to any fees or expenses in relation to the adjudication application.

## **Division 5                      Internal review of registration decisions**

### **177      Applying to registrar for internal review**

- (1) A person who is given, or is entitled to be given, an information notice for a decision under divisions 1 to 4 (the *original decision*) may apply to the registrar for an internal review of the original decision.
- (2) The application must be made within 28 days after—
  - (a) if the person is given an information notice for the decision—the day the person is given the information notice; or
  - (b) if paragraph (a) does not apply—the day the person otherwise becomes aware of the decision.
- (3) The registrar may, at any time, extend the time for applying for the internal review.
- (4) The application must be in writing and state fully the grounds for making the application.

### **178      Internal review of original decision**

- (1) This section applies if a person applies for an internal review of an original decision under section 177.
- (2) After reviewing the original decision, the registrar must make a further decision (the *review decision*) to—
  - (a) confirm the original decision; or
  - (b) amend the original decision; or
  - (c) substitute another decision for the original decision.

- (3) The registrar must immediately give the applicant notice of the review decision (the *review notice*).
- (4) The review notice must comply with the QCAT Act, section 157(2).
- (5) If the registrar does not give the notice within 28 days after the application is made, the registrar is taken to have made a review decision confirming the original decision on the 28th day after the application is made.
- (6) If the review decision confirms the original decision, for the purpose of an application to QCAT for an external review, the original decision is taken to be the review decision.
- (7) If the review decision amends or substitutes the original decision, for the purpose of an application to QCAT for an external review, the original decision as amended or substituted is taken to be the review decision.

### **179 Stay of operation of original decision**

- (1) If an application is made for an internal review of an original decision, the applicant may immediately apply, as provided under the QCAT Act, to QCAT for a stay of the decision.
- (2) QCAT may stay the decision to secure the effectiveness of the review and any later review by QCAT.
- (3) The stay—
  - (a) may be given on conditions QCAT considers appropriate; and
  - (b) operates for the period fixed by QCAT; and
  - (c) may be revoked or amended by QCAT.
- (4) The period of the stay must not extend past the time when the registrar makes a review decision about the original decision and any later period QCAT allows the applicant to enable the applicant to apply to QCAT for a review of the review decision.

- (5) The application affects the decision, or carrying out of the decision, only if the decision is stayed.

## **Division 6                      External review of registration decisions**

### **180      Applying to QCAT for external review**

A person who has applied for an internal review of an original decision under division 5 and is dissatisfied with the review decision may apply, as provided under the QCAT Act, to QCAT for an external review of the review decision.

*Note—*

The QCAT Act requires the application to be made within 28 days after the day the applicant is notified of the reviewable decision. If the registrar did not notify the applicant of the reviewable decision within 28 days (the *first 28 days*) after the applicant applied for a review of an original decision, the applicant would have 28 days to apply to QCAT for an external review starting at the end of the first 28 days.

## **Division 7                      Code of conduct**

### **181      Code of conduct for adjudicators**

- (1) The registrar may make a code of conduct for adjudicators.
- (2) The code of conduct, or an amendment or replacement of the code, does not take effect until approved by regulation.
- (3) The Minister must, within 14 sitting days after the code of conduct, or an amendment or replacement of the code, takes effect, table a copy of the code in the Legislative Assembly.
- (4) A failure to comply with subsection (3) does not invalidate or otherwise affect the code of conduct.
- (5) The commissioner must—

- (a) publish the code of conduct on the commission's website; and
- (b) keep copies of the code of conduct available for inspection, without charge, at the commission's office at any time that office is open to the public; and
- (c) if asked, advise where copies of the code of conduct may be obtained.

## **Division 8            Other provisions about adjudicators**

### **182    Adjudicator must comply with registration conditions**

- (1) An adjudicator must not contravene a condition of the registration.

Maximum penalty—200 penalty units.

- (2) The penalty under subsection (1) may be imposed whether or not the registration is suspended or cancelled because of the contravention.

### **183    Surrender of registration**

- (1) An adjudicator may surrender the adjudicator's registration by giving the registrar written notice of the surrender.
- (2) The surrender takes effect on the later of the following—
  - (a) the day the notice is given;
  - (b) the day specified in the notice.

### **184    Replacement of certificate of registration**

- (1) An adjudicator may apply to the registrar for replacement of the adjudicator's certificate of registration if the certificate has been damaged, destroyed, lost or stolen.
- (2) The application must—

- (a) include information about the circumstances in which the certificate was damaged, destroyed, lost or stolen; and
  - (b) be accompanied by the fee prescribed by regulation for the application.
- (3) The registrar must consider the application and either grant, or refuse to grant, the application.
  - (4) The registrar must grant the application if the registrar is satisfied the certificate of registration has been damaged, destroyed, lost or stolen in a way that requires its replacement.
  - (5) If the registrar decides to grant the application, the registrar must, as soon as practicable, issue another certificate of registration to the applicant.
  - (6) If the registrar decides to refuse to grant the application, the registrar must immediately give the applicant an information notice for the decision.

### **185 Adjudicator must give information to registrar**

- (1) An adjudicator must inform the registrar, in the approved form, of any of the following matters within 10 business days after it happens—
  - (a) the adjudicator changes any of the following addresses—
    - (i) the address of the adjudicator;
    - (ii) the address in Queensland at which documents may be served on the adjudicator;
  - (b) the adjudicator is convicted of a relevant offence;
  - (c) the adjudicator's registration with a professional association is cancelled because of disciplinary action.

Maximum penalty—40 penalty units.

- (2) In this section—

*relevant offence* see section 161(3).

## **186 Protection from liability for adjudicators**

An adjudicator is not personally liable for anything done or omitted to be done in good faith—

- (a) in performing the adjudicator’s functions under this chapter; or
- (b) in the reasonable belief that the thing was done or omitted to be done in the performance of the adjudicator’s functions under this chapter.

## **187 False or misleading statements**

A person must not, for an application made under this part, state anything to the registrar the person knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

## **188 False or misleading documents**

- (1) A person must not, for an application made under this part, give a document to the registrar that includes information the person knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

- (2) Subsection (1) does not apply to a person if the person, when giving the document—
  - (a) tells the registrar, to the best of the person’s ability, how it is false or misleading; and
  - (b) if the person has, or can reasonably obtain, the correct information—gives the correct information to the registrar.

## Part 3                      Audits

### 189      **Approved audit program**

- (1) The commissioner may approve a program (an *approved audit program*) under which the commission may audit a person to establish whether the person has been complying with this Act.
- (2) An approved audit program must state—
  - (a) the purpose of the program; and
  - (b) when the program starts; and
  - (c) the period over which the program is to be carried out; and
  - (d) objective criteria for selecting trustees and persons who are to be the subject of audit.
- (3) If the commissioner approves an approved audit program, the commissioner must publish the program on the commission's website.
- (4) In this section—

*trustee* means a person who is or was the trustee of a project trust or retention trust.

### 189A    **Supply of financial records and other documents under approved audit program or for other reason**

- (1) This section applies to a person if—
  - (a) the person is selected to be audited under an approved audit program; or
  - (b) the commissioner is satisfied, because of information received by the commission, there are reasonable grounds for concern that the person has not complied, or is not complying, with this Act; or

- (c) the person is a beneficiary of a project trust or retention trust and the commissioner reasonably believes the person has information that may assist the commissioner with an audit or investigation.
- (2) The commissioner may give a written notice to the person requiring the person to give the commissioner copies of, or access to, documents in the person's control that the commissioner reasonably requires to decide whether a person is, or has been, complying with this Act.
- (3) The person must comply with the requirement within the period stated in the notice, unless the person has a reasonable excuse.

Maximum penalty—100 penalty units.

- (4) It is not a reasonable excuse for the person to fail to comply with the requirement on the basis that complying with the requirement might tend to incriminate the person or expose the person to a penalty.
- (5) In this section—  
*approved audit program* see section 189(1).

### **189B Evidential immunity for individuals complying with commissioner's requirement**

- (1) This section applies if an individual gives the commissioner copies of, or access to, a document as required under section 189A.
- (2) Evidence of the document, and other evidence directly or indirectly derived from the document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual, or expose the individual to a penalty, in the proceeding.
- (3) Subsection (2) does not apply to a proceeding about the false or misleading nature of any information in the document or in which the false or misleading nature of the information or document is relevant evidence.

## Chapter 6      Legal proceedings

### Part 1              Offences

#### 190      Proceedings for offences

- (1) A proceeding for an offence against this Act may be started only within 1 year after the offence comes to the complainant's knowledge, but no later than 2 years after the commission of the offence.
- (2) A statement in a complaint for an offence against this Act that the matter of the complaint came to the complainant's knowledge on a stated day is evidence the matter came to the complainant's knowledge on that day.
- (3) A proceeding for an offence against this Act may be started only by a person authorised in writing by the commissioner, either generally or in a particular case, to start the proceeding.
- (4) The written authorisation is evidence that the person is authorised to start the proceeding.

#### 191      Enforcement action to comply with prescribed guidelines

- (1) An entity considering taking enforcement action must consider a guideline, about taking enforcement action, prescribed by regulation.
- (2) A failure to comply with subsection (1) does not invalidate or otherwise affect the enforcement action.
- (3) Nothing in subsection (1)—
  - (a) affects the functions of Director of Public Prosecutions under the *Director of Public Prosecutions Act 1984*, section 10; or
  - (b) affects the power of the Director of Public Prosecutions to act under the *Director of Public Prosecutions Act 1984*, section 11; or

- (c) prevents a person from complying with a guideline made by the Director of Public Prosecutions under the *Director of Public Prosecutions Act 1984*, section 11(1).
- (4) To the extent of any inconsistency between a guideline prescribed under subsection (1) and a guideline mentioned in subsection (3)(c), the latter guideline prevails.
- (5) In this section—
- enforcement action*** means a proceeding for an offence against this Act or issuing an infringement notice for an offence against this Act.

***infringement notice*** see the *State Penalties Enforcement Act 1999*, schedule 2.

## 192 Payment of penalties and fines

- (1) A penalty recovered because of a proceeding for an offence against this Act prosecuted by a person authorised by the commissioner must be paid to the commission.
- (2) A fine recovered because of an infringement notice for an offence against this Act and for which the commission is the administering authority must be paid to the commission.
- (3) In this section—

***administering authority***, for an infringement notice, see the *State Penalties Enforcement Act 1999*, schedule 2.

***infringement notice*** see the *State Penalties Enforcement Act 1999*, schedule 2.

## Part 2 Evidence

### 193 Application of part

This part applies to a proceeding under this Act.

### **194 Appointments and authority**

The registrar's appointment must be presumed unless a party to the proceeding, by reasonable notice, requires proof of it.

### **195 Evidentiary aids**

- (1) A certificate signed by the registrar certifying anything about the contents of the register is evidence of the thing stated.
- (2) A certificate signed by the registrar stating any of the following is evidence of the matters stated—
  - (a) that an individual was or was not at a time or during a period, or is or is not, an adjudicator;
  - (b) that a stated document is a record or document, a copy of a record or document, or an extract from a record or document, kept under this chapter.

### **196 Proof of signature unnecessary**

A signature purporting to be the signature of the registrar is evidence of the signature it purports to be.

## **Part 3 Civil liability for officials**

### **197 Protection from liability**

- (1) The commissioner, registrar and staff of the registry do not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.
- (2) If subsection (1) prevents a civil liability attaching to a person, the liability attaches instead to the State.

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## Chapter 7      Miscellaneous

### 198      **Approved forms**

- (1) The chief executive or commissioner may approve forms for use under this Act.
- (2) Information in an approved form must, if the approved form requires, be verified by a statutory declaration.
- (3) An approved form has no effect if information in the form must be verified by a statutory declaration and it is not.

### 198A    **Approved ways to give particular documents to commissioner or registrar**

- (1) This section applies if, under a provision of this Act—
  - (a) a person may or must give a document to the commissioner or registrar using an approved way; or
  - (b) a person may apply to the commissioner using an approved way.
- (2) The person may give the document to the commissioner or registrar, or make the application, in 1 of the ways approved by the commissioner for that purpose.
- (3) If the commissioner approves a way for giving a document or making an application under this Act, the commissioner must publish the details of the approved way on the commission's website.

### 199      **Delegations**

- (1) The commissioner may delegate the commissioner's functions or powers under this Act to an appropriately qualified officer of the commission.
- (2) In this section—

*appropriately qualified* includes having the qualifications, experience or standing appropriate to perform the function or exercise the power.

## **200 Contracting out prohibited**

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.
- (2) A provision of a contract, agreement or arrangement is of no effect to the extent to which it—
  - (a) is contrary to this Act; or
  - (b) purports to exclude, limit or change the operation of this Act; or
  - (c) has the effect of excluding, limiting or changing the operation of this Act; or
  - (d) may reasonably be construed as an attempt to deter a person from taking action under this Act.

## **200A Review of Act**

- (1) The Minister must ensure a review of the operation and effectiveness of the 2017 suite of building and construction reforms.
- (2) The review must be conducted by a panel of not more than 4 appropriately qualified persons appointed by the Minister.
- (3) The Minister must prepare, and give to the panel, terms of reference to guide the conduct of the review.
- (4) The review must be started no later than 1 September 2018.
- (5) The Minister must table in the Legislative Assembly a report on the outcome of the review as soon as practicable after the review is completed.
- (6) In this section—

*2017 suite of building and construction reforms* means—

- (a) this Act; and
- (b) the amendments to other Acts made under this Act as passed; and
- (c) the other Acts prescribed by regulation.

### **200B Act does not prevent early payment**

Nothing in this Act prevents a person paying an amount due under a contract before the latest date allowed under the contract for payment of that amount.

### **200C Giving official false or misleading information**

- (1) A person must not, in relation to the administration of this Act, give an official information the person knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

- (2) Subsection (1) applies to information whether or not the information was given in response to a specific power under this Act.
- (3) Subsection (1) does not apply to a person if the person, when giving information in a document—
  - (a) tells the official, to the best of the person’s ability, how the document is false or misleading; and
  - (b) if the person has, or can reasonably obtain, the correct information—gives the correct information.
- (4) In this section—

*official* means the commissioner, the registrar of titles or a special investigator.

### **200D False or misleading information in particular documents**

- (1) This section applies to the following documents—

- (a) a notice of a deposit or withdrawal given under section 23A or 40A;
  - (b) a supporting statement accompanying a payment claim under section 75.
- (2) A person must not give a document to another person that includes information the person knows is false or misleading in a material particular.
- Maximum penalty—100 penalty units.
- (3) Subsection (2) does not apply to a person if the person, when giving the document—
- (a) tells the recipient, to the best of the person’s ability, how it is false or misleading; and
  - (b) if the person has, or can reasonably obtain, the correct information—gives the correct information to the recipient.

## **200E Confidentiality of information**

- (1) This section applies if a person obtains information, or gains access to a document, in exercising a power or performing a function under this Act.
- (2) A person must not do any of the following—
- (a) disclose to anyone else—
    - (i) the information; or
    - (ii) information contained in the document;
  - (b) give access to the document to anyone else;
  - (c) use the information or document for any purpose.
- Maximum penalty—100 penalty units.
- (3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—
- (a) about a person, with the person’s consent; or

- (b) that is necessary for the exercise of a power or performance of a function under this Act; or
- (c) that is made or given by the commission or a person authorised by the commission if the commission reasonably believes the disclosure, access or use—
  - (i) is necessary for administering, or monitoring or enforcing compliance with this Act or the *Queensland Building and Construction Commission Act 1991*; or
  - (ii) is necessary for the administration or enforcement of another Act prescribed by regulation; or
  - (iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent a serious risk to public safety; or
- (d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
- (e) to a Minister.

## **201 Regulation-making power**

- (1) The Governor in Council may make regulations under this Act.
- (2) A regulation may—
  - (b) for an adjudication qualification, prescribe the following—
    - (i) the name of the qualification;
    - (ii) the bodies that may issue the qualification;
    - (iii) the name of the adjudication competency to be achieved to gain the qualification;
    - (iv) the elements that must be successfully completed to achieve the competency; and

- (c) prescribe the grading of adjudicators; and
- (d) prescribe the continuing professional development that must be undertaken by adjudicators; and
- (e) prescribe the limits on fees payable to adjudicators; and
- (f) prescribe procedures for—
  - (i) the lodgement of adjudication applications with the registrar, including the last time during a day that applications may be lodged; and
  - (ii) the processing of adjudication applications by the registrar; and
- (g) prescribe limitations on submissions and accompanying documents for adjudication applications and adjudication responses; and
- (h) provide for fees payable under this Act.

## **Chapter 8      Transitional and repeal**

### **Part 1A            Provisions for transitional arrangements before repeal**

#### **201A    References in ch 2 relating to progress payments**

- (1) This section applies until the repeal of the *Building and Construction Industry Payments Act 2004*.
- (2) A reference in chapter 2 to a payment claim is taken to be a reference to a payment claim made under the *Building and Construction Industry Payments Act 2004*.
- (3) A reference in chapter 2 to a payment schedule is taken to be a reference to a payment schedule made under the *Building and Construction Industry Payments Act 2004*.

- (4) A reference in chapter 2 to a progress payment is taken to be a reference to a progress payment under the *Building and Construction Industry Payments Act 2004*.
- (5) A reference in chapter 2 to an adjudication under chapter 3, part 4 is taken to be a reference to an adjudication under the *Building and Construction Industry Payments Act 2004*, part 3, division 2.

### **201B No subcontractors' charges over money held in trust**

- (1) This section applies until the repeal of the *Subcontractors' Charges Act 1974*.
- (2) No entitlement to a subcontractor's charge exists to the extent it relates to money held in trust under a project bank account.
- (3) In this section—

*subcontractor's charge* means a charge within the meaning of section 3 of the *Subcontractors' Charges Act 1974*.

### **201C Repeal of transitional regulation**

The Building Industry Fairness (Security of Payment) (Transitional) Regulation 2018, SL No. 17 is repealed.

## **Part 1 Repeal**

### **202 Acts repealed**

- (1) The Building and Construction Industry Payments Act 2004, No. 6 is repealed.
- (2) The Subcontractors' Charges Act 1974, No. 37 is repealed.



- (4) An existing appointment of the registrar under section 37 of the repealed Act continues on the same terms and conditions as the appointment made under the repealed Act.
- (5) An appointment continued under subsection (4) ends when a person is appointed as registrar under section 150.

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

- (1) This section applies if a payment claim was given to a respondent before the commencement and, at the commencement, there are unfinished matters for the payment claim.
- (2) Despite the repeal of the *Building and Construction Industry Payments Act 2004*, the repealed Act continues to apply for the payment claim and any unfinished matters for the claim.
- (3) In this section—  
*unfinished matter*, for a payment claim, includes a matter under the repealed Act that has yet to be started or completed, including, for example, the following—
  - (a) replying to the payment claim by serving a payment schedule on the claimant;
  - (b) the consequences of not paying any or all of the claimed amount for the progress payment to which the payment claim relates;
  - (c) making an adjudication application for adjudication of the payment claim;
  - (d) the adjudication of the payment claim under the repealed Act, including—
    - (i) the giving of an adjudication response; or
    - (ii) the adjudication procedures; or
    - (iii) the adjudicator’s decision; or

- (iv) correcting a clerical mistake in an adjudicator's decision; or
  - (v) the consequences of not paying the claimant the adjudicated amount; or
  - (vi) the filing of an adjudication certificate as a judgment debt; or
  - (vii) an adjudicator's entitlement to be paid for adjudicating the payment claim, including accepting, considering and deciding the application;
- (e) the claimant suspending work under the construction contract relevant to the payment claim.

## **205A References in ch 2 relating to progress payments**

- (1) This section applies from the commencement.
- (2) A reference in chapter 2 to a payment claim includes a reference to a payment claim made under the repealed Act, including as preserved under section 205.
- (3) A reference in chapter 2 to a payment schedule includes a reference to a payment schedule made under the repealed Act, including as preserved under section 205.
- (4) A reference in chapter 2 to a progress payment includes a reference to a progress payment the right to which arose under the repealed Act, including as preserved under section 205.
- (5) A reference in chapter 2 to an adjudication under chapter 3, part 4 includes a reference to an adjudication under the repealed Act, part 3, division 2, including as preserved under section 205.

## **206 References to repealed Act**

A reference in an Act or document to the repealed Act may, if the context permits, be taken to be a reference to this Act.

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## Part 3                      **Transitional provisions for the repealed Subcontractors' Charges Act 1974**

### **207      Definitions for part**

In this part—

*repealed Act* means the repealed *Subcontractors' Charges Act 1974*, as in force immediately before its repeal.

*repealed*, in relation to a provision, means that provision of the repealed Act.

*subcontractor's charge* means a charge within the meaning of section 3 of the repealed Act.

### **208      Preservation of existing entitlement to subcontractors' charges**

- (1) This section applies if, before the commencement, a subcontractor became entitled to a subcontractor's charge under the repealed Act and the entitlement had not been extinguished or otherwise ended before the commencement.
- (2) The entitlement to the subcontractor's charge continues under this Act until it is extinguished or otherwise ends under this Act.

### **209      Unfinished matters for existing subcontractors' charges to be dealt with under the repealed Act**

- (1) This section applies if, before the commencement, a subcontractor gave a person a notice of claim of charge for a subcontractor's charge and, at the commencement, there are unfinished matters for the charge.
- (2) Despite the repeal of the *Subcontractors' Charges Act 1974*, the repealed Act continues to apply for the notice of claim and

subcontractor's charge, and any unfinished matters for the charge.

(2A) However, a reference to a subcontractor's charge in section 117 includes a reference to a subcontractor's charge mentioned in subsection (2).

(3) To remove any doubt, it is declared that if a subcontractor became entitled to a subcontractor's charge before the commencement, but had not given a person a notice of claim of charge in relation to the charge, the person must secure the charge in accordance with this Act.

(4) In this section—

***notice of claim of charge*** means a notice complying with repealed section 10(1)(a).

***unfinished matter***, for a subcontractor's charge, includes a matter under the repealed Act that has yet to be started or completed, including, for example, the following—

- (a) giving a person who holds a security a notice under repealed section 10(1)(aa);
- (b) giving a person a notice of having made a claim under repealed section 10(1)(b);
- (c) a person given a notice of claim of charge retaining money under repealed section 11;
- (d) the giving of a contractor's notice under repealed section 11(3).
- (e) the use of securities for the subcontractor's charge under repealed section 11A to 11D;
- (f) the giving of information under repealed section 9A or 11E;
- (g) the paying of money for the subcontractor's charge;
- (h) the enforcement of the subcontractor's charge.

## 210 References to repealed Act

A reference in an Act or document to the repealed Act may, if the context permits, be taken to be a reference to this Act.

## Part 4 Other transitional provision

# Chapter 8A Transitional provisions for Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020

### 211A Definitions for chapter

In this chapter—

*amendment Act* means the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*.

*former*, for a provision of this Act, means the provision as in force immediately before amendment by the amendment Act.

### 211B Continued application of former chapter 2 for particular building contracts

- (1) This section applies in relation to a building contract—
  - (a) if the contract was entered into because of a tender process—for which the tender process was started before the replacement of chapter 2 by the amendment Act; or

- (b) otherwise—entered into before the replacement of chapter 2 by the amendment Act.
- (2) Chapter 2, as in force on the commencement, does not apply in relation to the building contract.
- (3) Former chapter 2 continues to apply in relation to the building contract despite its repeal.

*Note—*

While former chapter 2 continues to apply to the building contract, the requirement to establish a project bank account under former section 13 might not apply to the building contract until an amendment of the contract. See former section 15.

- (4) However, former chapter 2, part 5 applies in relation to the building contract, after the replacement of chapter 2, only if a principal was appointed as trustee for the relevant project bank account under former section 54 before the replacement of chapter 2.

## **211C Transitioning to new scheme**

- (1) This section applies in relation to a building contract—
  - (a) if the contract was entered into because of a tender process—for which the tender process was started before the replacement of chapter 2 by the amendment Act; or
  - (b) otherwise—entered into before the replacement of chapter 2 by the amendment Act.
- (2) If a project bank account is required for the building contract under former section 13 as applied under section 211B and the head contractor has not yet opened accounts at a financial institution for the project bank account, the head contractor may transition to the new scheme by opening a project trust account and, if necessary, a retention trust account for the contract as required under chapter 2.

*Note—*

The requirement to establish a project bank account under former section 13 might not apply to the building contract until an amendment of the contract. See section 211B and former section 15.

- (3) If a project bank account is required for the building contract under former section 13 as applied under section 211B and the head contractor opened accounts at a financial institution for the project bank account before the commencement, the trustee for the project bank account may transition to the new scheme by complying with the following requirements within 6 months after the commencement—
- (a) for the general trust account—
    - (i) the trustee must close the general trust account and transfer all funds held in the account to a project trust account at an approved financial institution; and
    - (ii) when opening the project trust account, the trustee must comply with section 18A; and
    - (iii) the transfer of the general trust account to the project trust account must comply with section 18B and, if necessary, section 18C; and
    - (iv) the transfer of the general trust account to the project trust account must be recorded in the trust records for the project trust account; and
  - (b) for the retention trust account—
    - (i) the trustee must close the retention trust account (the *old retention trust account*) and transfer all funds held in the account to a new retention trust account at an approved financial institution; and
    - (ii) when opening the new retention trust account, the trustee must comply with section 34A; and
    - (iii) the transfer of the old retention trust account to the new retention trust account must comply with section 34B and, if necessary, section 34C; and

- (iv) the transfer of the old retention trust account to the new retention trust account must be recorded in the trust records for the project trust account; and
  - (c) for the disputed funds trust account—the trustee must close the disputed funds trust account.
- (4) However, the trustee must not close the disputed funds trust account if—
- (a) there are funds held in trust in the account; or
  - (b) there is a payment dispute relating to the building contract.

*Note—*

If a trustee can not close a disputed funds trust account, the trustee will not be able to transition to the new scheme.

- (5) If the trustee transitions to the new scheme, the trustee must give notice of the transition, including the information prescribed by regulation, to each beneficiary affected by the transition.

Maximum penalty—200 penalty units.

- (6) If a trustee transitions to the new scheme—
- (a) section 211B ceases to apply in relation to the building contract from transition; and
  - (b) the trustee is not liable for any failure to comply with former chapter 2 to the extent the failure relates to the trustee complying with subsection (3) or (5).
- (7) Despite former section 37(1) the trustee (as head contractor) may dissolve the project bank account to transition to the new scheme.
- (8) Nothing in this section enables a trustee to deposit an amount into a retention trust account or project trust account that may not be deposited into the account under section 19A or 35A.
- (9) In this section—

***new scheme*** means project trusts and retention trusts under chapter 2 as replaced by the amendment Act.

## **211D Project trusts and contracts entered into before the commencement of new phases**

- (1) This section applies in relation to a contract entered into before the commencement of a new phase.
- (2) Unless a project trust was required for the contract before the commencement of the new phase, the contract continues to not require a project trust despite the amendment of this Act for the new phase.
- (3) However, section 14A still applies for any amendment of the contract.
- (3A) If section 14A applies to an amendment of the contract, a reference in that section to section 14 is taken to be a reference to section 14 as in force when a project trust would have, apart from subsection (2), first been required for the contract.

*Note—*

For a contract entered into before the replacement of chapter 2 by the amendment Act, see section 211B.

- (4) In this section—  
*new phase* means an amendment of chapter 2, part 2—
  - (a) made by chapter 9, part 1; and
  - (b) that has the effect of expanding the requirement to establish a project trust for a contract.

## **211E Transitional regulation-making power**

- (1) A regulation (a *transitional regulation*) may make provision about a matter for which—
  - (a) it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of this Act, as in force before its amendment by the amendment Act, to the operation of this Act, as in force after its amendment by the amendment Act; and
  - (b) this Act does not make provision or sufficient provision.

- (2) A transitional regulation may have retrospective operation to a day not earlier than the day of the commencement.
- (3) A transitional regulation must declare it is a transitional regulation.
- (4) A transitional regulation expires 1 year after the day of the commencement.

## **Chapter 9            Amendment of this and                                  other Acts**

### **Part 1                    Amendment of this Act**

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

##### **214    Amendment of s 12 (When project trust required for a contract)**

*Section 12(6) and (7)—  
omit.*

##### **215    Amendment of s 14 (Particular contracts for project trust work)**

(1) *Section 14(1)—  
omit, insert—*

- (1) *A contract is eligible for a project trust if—  
          (a) the contracting party is the State, a state  
              authority, a local government, an individual,*

*a private entity or a hospital and health service; and*

*(b) more than 50% of the contract price is for project trust work; and*

*(c) the contract price is—*

*(i) if the contracting party is the State or a hospital and health service—\$1 million or more; or*

*(ii) otherwise—\$10 million or more.*

*(2) Section 14(3)—*

*insert—*

***private entity—***

*(a) means a company or other entity that is owned by any entity other than the State; but*

*(b) does not include a State authority.*

### **Division 3**

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

#### **216 Amendment of s 14 (Particular contracts for project trust work)**

*Section 14(1)(c)(ii), ‘\$10 million’—*

*omit, insert—*

*\$3 million*

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

**217**    **Amendment of s 14 (Particular contracts for project trust work)**

*Section 14(1) to (3)—*

*omit, insert—*

*A contract is eligible for a project trust if—*

- (a) more than 50% of the contract price is for project trust work; and*
- (b) the contract price is \$1 million or more.*

**218**    **Amendment of s 32 (When retention trust required)**

*(1) Section 32(1)—*

*omit, insert—*

*(1) A retention trust is required for a retention amount withheld from payment under a contract (the **withholding contract**) if—*

- (a) the contracting party withholds the retention amount in the form of cash; and*
- (b) a project trust is required for—*
  - (i) if the withholding contract is a subcontract—the head contract for the subcontract; or*
  - (ii) otherwise—the withholding contract.*

*(2) Section 32(5)—*

*omit, insert—*

*(5) In this section—*

**head contract** means a contract that is not also a

*subcontract for another contract.*

## Schedule 2 Dictionary

### section 5

***accepted representations***, for chapter 5, see section 172(2).

***account review report***, for chapter 2, part 4, see section 57A(2).

***adjudicated amount***, for chapter 3, see section 88(1).

***adjudication application*** see section 79(1).

***adjudication certificate*** see section 91(1).

***adjudication response*** see section 82(1).

***adjudicator*** means an individual registered under chapter 5, part 2, division 2 as an adjudicator.

***approved financial institution***, for chapter 2, see section 8.

***approved form*** means a form approved by the chief executive or the commissioner under section 198.

***approved way***, for giving particular documents or making particular applications, means giving the documents, or making the applications, in a way approved by the commissioner under section 198A.

***building***, for chapter 2, see section 8.

***building contract***, for chapter 2, part 3, see section 30.

***business day*** does not include—

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done; or
- (c) any day occurring within any of the following periods—
  - (i) 22 to 24 December;
  - (ii) 27 to 31 December;

(iii) 2 to 10 January.

**carry out construction work**, for chapter 3, see section 64.

**claimant**, for chapter 3, see section 75(1).

**code of conduct** means a code of conduct for adjudicators made by the registrar under section 181.

**commission** means the Queensland Building and Construction Commission established under the *Queensland Building and Construction Commission Act 1991*, section 5.

**commissioner** means the commissioner appointed under the *Queensland Building and Construction Commission Act 1991*, section 20D.

**complex payment claim**, for chapter 3, see section 64.

**construction contract**, for chapter 3, see section 64.

**construction work** see section 65.

**contract administration**, for chapter 2, see section 8.

**contracted party**, for chapter 2, see section 8.

**contracted work**, for chapter 2, see section 8.

**contracting party**, for chapter 2, see section 8.

**contractor**, for chapter 4, see section 104.

**contract price**—

(a) for chapter 2—see section 10; or

(b) for chapter 4—see section 104.

**conviction**, for chapter 5, part 2, see section 158.

**corresponding law**, for chapter 5, part 2, see section 158.

**court**, for chapter 4, see section 104.

**defects liability period**, for a contract, means—

(a) the period worked out under the contract as being the period that—

(i) starts on the day of practical completion for the work carried out under the contract; and

- (ii) ends on the last day any omission or defect in the work, carried out under the contract, may be required or directed to be rectified under the contract; or
- (b) if the contract does not provide for a period mentioned in paragraph (a)—the statutory defects liability period under the *Queensland Building and Construction Commission Act 1991*, section 67NA(2).

***domestic building work*** see *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 1.

***due date***, for a progress payment, for chapter 3, see section 64.

***financial institution*** means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cwlth).

***first tier subcontract*** see section 6(5).

***head contract***, for chapter 2, part 2, see section 10.

***head contractor***—

- (a) for chapter 3, part 4A, see section 97A; or
- (b) for chapter 3, part 6A, see section 100A.

***higher subcontract*** see section 6(7).

***hospital and health service***, for chapter 2, see section 8.

***information notice***, for chapter 5, see section 158.

***land***, for chapter 4, see section 104.

***mechanical services work*** see section 8.

***minimum contract price***—

- (a) for chapter 2, part 2, see section 10; or
- (b) for chapter 2, part 3, see section 30.

***notice of claim*** see section 122.

***original decision***, for chapter 5, see section 177(1).

***payment claim*** see section 68(1).

**payment instruction** means an instruction to a financial institution for the payment of an amount from an account.

**payment schedule** see section 69.

**payment withholding request** see section 97B(2).

**person**, for chapter 4, see section 104.

**practical completion**, for work carried out under a contract, means—

- (a) the day practical completion of the work is achieved, as worked out under the contract; or
- (b) if the contract does not provide for the day practical completion of the work is achieved—the day the work is completed—
  - (i) in compliance with the contract, including all plans and specifications for the work and all statutory requirements applying to the work; and
  - (ii) without any defects or omissions, other than minor defects or minor omissions that will not unreasonably affect the intended use of the work.

**progress payment** see section 64.

**project trust** see section 11.

**project trust account** see section 10.

**project trust work**, for chapter 2, see section 8A.

**proposed action**, for chapter 5, see section 171(3)(a).

**protected work**, for chapter 2, see section 8B.

**recognised financial institution** means a bank, or other financial institution prescribed by regulation.

**reference date**, for chapter 3, see section 67.

**registered company auditor**, for chapter 2, part 4, see section 50.

**registrar** see section 150(1).

**registrar of titles** means the registrar of titles under the *Land Title Act 1994*.

**registry**, for chapter 5, see section 149(1).

**registry staff**, for chapter 5, see section 149(2).

**related entity** see section 10A.

**related goods and services**, for chapter 3, see section 66.

**relevant construction contract**, for chapter 3, see section 64.

**respondent**, for chapter 3, see section 75(1).

**retention amount** means an amount that—

- (a) is payable under a contract, but may, under that contract, be withheld from payment—
  - (i) during the progress of the work to be carried out under the contract; or
  - (ii) during the defects liability period for the contract; or
  - (iii) both during the progress of the work to be carried out under the contract and during the defects liability period; and
- (b) is withheld from payment under a contract for the purpose of giving financial protection to the person making the payment in relation to the need to correct defects in the work to be carried out under the contract, or otherwise to secure, wholly or partly, the performance of the contract.

**retention trust** see section 31.

**retention trust account** see section 30.

**review decision**, for chapter 5, see section 178(2).

**review notice**, for chapter 5, see section 178(3).

**second tier subcontract** see section 6(6).

**security**, for chapter 4, see section 104.

**show cause notice**, for chapter 5, see section 171(2).

**show cause period**, for chapter 5, see section 171(3)(e).

***special investigator*** means a person appointed as a special investigator under section 53D.

***spent conviction***, for chapter 5, see section 158.

***standard payment claim***, for chapter 3, see section 64.

***State authority***, for chapter 2, see section 8.

***structure***, for chapter 4, see section 104.

***subcontract*** see section 6(1).

***subcontracted work*** see section 6(3)(c).

***subcontractor*** see section 6(3)(b).

***subcontractor beneficiary***, for chapter 2, see section 8.

***subcontractor's charge***, for chapter 4, see section 109(4).

***trust account***, for chapter 2, part 4, see section 50.

***trust records***, for chapter 2, see section 52(1).

***valuable instrument***, for chapter 4, see section 104.

***variation***—

(a) of a building contract, for chapter 2, see section 8; and

(b) of a contract, for chapter 4, see section 104.

***work***, for a contract, for chapter 4, see section 105.