DOMESTIC BUILDING CONTRACTS BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the legislation

The legislation is designed to help consumers avoid pitfalls in procuring building services.

For most consumers, signing a large building contract for a new home, extensions or renovations will be something experienced once or twice in a lifetime. For building contractors, it is an everyday occurrence. This disparity in knowledge and understanding of contractual principles between the parties frequently disadvantages consumers. This Bill seeks to address these market inequalities by—

- requiring building contractors to obtain and provide all necessary information about the building work and domestic building contracts generally;
- mandating fair standard contractual provisions;
- implying standard warranties into all domestic building contracts regulated by the Bill;
- outlawing and/or voiding unconscionable contractual provisions; and
- providing a cooling-off period during which a consumer may withdraw from a domestic building contract without significant penalty.

Reasons for the Bill

The Bill arises from a process of review of existing building industry regulatory arrangements that has been ongoing for some years. It achieves specific results for consumers in legislative implementation of the outcomes of this review process.

Hitherto, regulation of domestic building contracts has formed part of the *Queensland Building Services Authority Act 1991* ('the existing Act'). This location emphasised the role of the Queensland Building Services Authority ('QBSA') as industry regulator and in enforcement of consumer rights. This Bill, however, appropriately enshrines consumer rights as distinct and enforceable apart from the role played by the QBSA.

The Bill—

- removes regulation of domestic building contracts to a discrete legislative environment;
- recognises that contractual relationships in domestic building contracts include both bricks-and-mortar building work and management services;
- defines domestic building contracts subject to this Bill ("regulated contracts") as being those over $3,000 in value for the construction of single detached dwellings or duplexes and the repair, renovation or maintenance of any home—including units in high-rise complexes;
- sets out the mandatory elements of regulated contracts;
- sets out contractual and related documents that the building contractor must give to the consumer and defines when they must be given;
- defines implied warranties for all regulated contracts;
- sets out how prime cost items and provisional sums are to be treated;
- defines the cooling-off period—when it is to apply from, how withdrawal procedure is to be handled, and how it may be waived for certain contracts;
- sets out requirements for contract variations arising from the building contractor and from the consumer;

- establishes rights and responsibilities regarding access to building sites and prohibits caveats over the consumer's title;
- defines special requirements where display homes are shown by the building contractor;
- sets out conditions when the consumer may terminate a regulated contract; and
- prohibits and voids contracting out.

Consistency with fundamental legislative principles

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

Possible conflict 1

The cooling-off period provided in Part 6 of the bill may be inconsistent with LSA s.4(2)(a)—that legislation have sufficient regard to rights and liberties of individuals.

None of the specific examples in LSA s.4(3) are directly applicable to the bill, but LSA s.4(3)(g) states as a principle that legislation "does not adversely affect rights and liberties, or impose obligations, retrospectively". The cooling off period is not strictly speaking retrospective, although it can be argued it has a retrospective effect At present the law is that a contract can only be terminated in accordance with the contract itself, or the common law. Under the Bill an owner will have an additional right to terminate the contract during the specified cooling-off period.

Comment 1

Builders enter into domestic building contracts on a regular basis as part of the functions of carrying on their business. In most cases builders, and not owners, nominate the form which the contract takes. Consequently the builder is aware of the rights, obligations, duties and responsibilities contained in the contract. Owners however are only likely to enter into such contracts, on average, once or twice in their lifetime. It therefore follows that their understanding of the rights, obligations, duties and responsibilities under the contract are far inferior to those of the builder.

The cooling-off period attempts to elevate the bargaining power of the owner to that of the builder by giving the owner an opportunity to fully consider the rights, obligations, duties and responsibilities imposed by the contract, and to, at their discretion opt out of the contract.

Appropriate safeguards are built into the cooling off period including—

- the cooling off period does not apply in certain circumstances:
  - where the owner has previously entered into a contract substantially the same;
  - before entering into the contract the owner obtained independent legal advice; and
  - where the contract is a contract for repair—so that the owner may move to effect emergency repairs without delay—and the owner waives the right to withdraw from the contract.
- if the right to withdraw is exercised the builder is entitled to keep an amount equal to expenses reasonably incurred plus a flat charge of $100.

The cooling-off period supplements the power in the existing Act to withdraw from contracts relating to display homes.

Possible conflict 2

The right to end the contract if completion time extended or contract price increased under clause 90 may be inconsistent with LSA s.4(2)(a)—that legislation have sufficient regard to rights and liberties of individuals.

None of the specific examples in LSA s.4(3) are directly applicable, but LSA s.4(3)(g) provides "does not adversely affect rights and liberties, or impose obligations, retrospectively". Although this right is not strictly speaking retrospective, it can be argued it has a retrospective effect. At present the law is that a contract can only be terminated in accordance with the contract itself, or the common law. Under the Bill an owner will have an additional right to terminate the contract if the cost blows out or if it runs overtime.

Comment 2

This right gives the owner the ability to end a contract if the cost blows out by more than 15%. Quite often owners are on a tight and limited budget when building a house. If the cost of the house increase by more than 15%

the owner will have the right to withdraw from the contract. This will limit an owner's exposure in a contract which, because of reasons beyond their control, is no longer within their means.

The owner also has the ability to terminate the contract if the contract is not completed within 1.5 times its original expected completion time. This will limit the owner's exposure in a contract that runs substantially overtime

Safeguards are built into the right to end the contract because the power is only available where:

- the contract price increases because of increases in labour and materials, or increased costs caused by delays, which increases are not attributable to the owner; and
- the price rise or increase in time could have been reasonably foreseen by the building contractor when the contract was entered into

In addition the builder is entitled to a reasonable amount for the services provided at the time the contract is ended.

Possible conflict 3

The provision in clause 31 allowing a licensee who is prosecuted for an offence by virtue of being taken to be a party to a contract because the licensee's licence imprint appears on the contract a range of defences to such a prosecution may be in conflict with LSA s4(3)(d), namely that legislation 'does not reverse the onus of proof in criminal proceedings'.

Comment 3

This clause's deeming provision in regard to imprinted contracts is a necessary protection for consumers who might otherwise find themselves unable to proceed against a named person. It is also an important backup sanction to the licence lending offences contained in the *Queensland Building Services Authority Act 1991*. This provision is contained in the existing Act (s71). The defence is available in any case where the licensee's licence has been stolen or otherwise fraudulently used.

Possible conflict 4

The provisions in clause 94 deeming an act or omission by a person's representative, if within the scope of the representative's actual or apparent authority, to be the person's act or omission, and providing as a defence that the person could not, by reasonable diligence, have prevented the act or

omission, may be in conflict with LSA s4(3)(d), namely that legislation 'does not reverse the onus of proof in criminal proceedings'.

Comment 4

This provision attempts to redress the imbalance of power between individuals acting on their own behalf and those possessing sufficient resources to have representatives act on their behalf. It onerous upon the State and upon individual litigants to have to prove additional elements for an offence or civil proceedings under this legislation in the case of a corporate person.

Possible conflict 5

The provisions in clause 95 deeming each of a corporation's executive officers to commit an offence if the corporation commits an offence and providing a defence that the executive officer was not in a position to influence the corporation's conduct or exercised due diligence may be in conflict with LSA s4(3)(d), namely that legislation 'does not reverse the onus of proof in criminal proceedings'.

Comment 5

These provisions do not relieve the prosecution of proving the elements of the offence in every case. Rather, they attempt to mitigate the capacity of individuals to use corporate structures to avoid legal responsibility for their actions. Clause 90 relieves the prosecution, having proved the elements of an offence, from having to further prove conspiracy among or individual liability of a company's executive officers. The available defence is broad and would not be difficult to establish in cases where it is appropriate.

Possible conflict 6

Clause 96 treats partnerships as persons and imposes liability on partners for obligations imposed and amounts payable under this Act. A defence is provided for offences that the partner did not aid, abet, counsel or cause, and was not in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence. This may be in conflict with LSA s4(3)(d), namely that legislation 'does not reverse the onus of proof in criminal proceedings'.

Comment 6

Again, this provision is necessary to allow consumers and the State to be able to proceed against a person who may be able to pay for damage caused in contravention of this Act. In relation to offences, this provision recognises the capacity for serial offenders in the domestic building industry to arise as phoenixes in partnership with some new licensee. It also recognises the closer relations existing between partners than among corporate executive officers, hence the higher defence bar.

Possible conflict 7

The provision in clause 13(3)(i) allowing a regulation to exclude residential premises from the definition of "home" if there are reasonable grounds for considering the premises not to be a home may be in conflict with LSA 4(2)(b), namely that legislation 'has sufficient regard to the institution of Parliament'.

Comment 7

This may be seen as a Henry VIII clause, but is designed to operate in line with the general philosophy of the Bill to benefit commercial construction project proponents in instances where they are inadvertently caught by the legislation.

An extensive list of premises excluded from the definition of "home" is provided in clause 13(3). It can be seen from this list that the intention is for the definition of home to exclude premises essentially used for commercial or dormitory purposes for temporary or work-related or therapeutic accommodation. The application of this Bill to contracts in the commercial sphere may be onerous for both contracting and contracted parties and it is not intended that they be the subject of this Bill. Despite the extensive list provided, it is inevitable that some major commercial or institutional project will arise that is inadvertently caught by this Bill. This particularly arises in the case of refurbishments of flats in high-rise blocks, that are deliberately caught by the Bill in order to protect owners contracting for renovation works. It would not be intended to capture, for example, a developer completely renovating every unit in, say, the Brisbane landmark Torbreck. Providing a definition in the legislation itself that distinguished on the basis of a ceiling on the contract amount or on the contract being within the confines of an owner-occupied unit, say, would exclude unfairly classes of owners the legislation is intended to capture.

In the absence of a power to add to the list by regulation, considerable needless expense could be caused to project proponents while obtaining necessary Parliamentary approval for amendments to the principal legislation was awaited, or the project proceeded under the more onerous contractual requirements imposed by the Bill.

Possible conflict 8

The provision in clause 8(7)(b) allowing a regulation to include building work in the definition of "domestic building work" if there are reasonable grounds for considering the work to be domestic building work may be in conflict with LSA 4(2)(b), namely that legislation 'has sufficient regard to the institution of Parliament'.

Comment 8

This provision extends the list of matters to which the term applies, as opposed to providing for exclusions, and so does not appear to be a 'Henry VIII' clause. This provision will allow for quick reaction to new technologies and formats for accommodation, and the extension of the legislation to cover areas where its operation could be beneficial. It will also allow removal of doubt in certain cases that may arise from time to time.

Estimated Cost for Government Implementation

The Bill regulates contractual arrangements between private persons. No additional cost to Government is expected to arise from the Bill.

Consultation

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

NOTES ON PROVISIONS

Part 1—Preliminary

Clause 1 sets the short title of the Act as the *Domestic Building Contracts Act 1999*.

Clause 2 that the Act can be commenced by proclamation.

Clause 3 defines the objects of the Act as balancing the interests of owners and building contractors and maintaining appropriate standards of conduct in the industry.

Clause 4 provides that the Act binds the State, although a footnote directs attention to s7(2)(b), where contracts where the building owner is the State are excluded from the definition of 'domestic building contract'.

Part 2—Interpretation

Division 1—Dictionary

Clause 5 sets up the dictionary in the schedule that defines terms used in the legislation.

Division 2—Basic concepts

This division sets up the basic concepts underpinning the Bill that appear throughout the Bill.

Clause 6 sets up the concept of "contract price". The concept includes all moneys payable to the building contractor, including amounts payable to another person, but excludes associated third party amounts and increases brought about by foundation or slab problems encountered despite the obtaining of required foundations data. Variations have the effect of varying the contract price.

Clause 7 sets up the concept of "domestic building contract". Such a contract can be for either or both of actually carrying out domestic building work or managing the carrying out of domestic building work. Contracts between contractors and subcontractors, and contracts where the building owner is the State or a local government, even where the contract is for the carrying out of domestic building work, are excluded from the concept.

Clause 8 sets up the concept of "domestic building work".

8(1) confines the definition, where initial construction is involved, to detached dwellings. Where the work concerns renovations, alteration, improvement or repair, the definition extends to all homes.

8(2) limits the application of the definition for house removal work as defined for the section, confining it to removal work and resiting work where the house is removed and resited for use as a residence. Work done under the contract transporting the house, or work done en route to its destination such as storing it at a location other than its final destination, is not included as domestic building work.

8(3) sets up the definition of "associated work" as being included in the overall definition of domestic building work.

8(4) lists as work included within the definition of associated work landscaping, paving, and the erection or construction of a building or fixture associated with a home. A pergola or a carport might be examples of an associated building here.

8(5) includes provision of services and facilities within the definition of domestic building work, but—for construction—only of a detached dwelling.

8(6) provides that the provision of services and facilities—for renovation, alteration, improvement or repair—extends to all homes.

8(7) provides that site work is also included within the definition, as is any other work declared to be building work by regulation.

8(8) provides that "excluded building work", as defined in the Dictionary to the Bill, is not included in the definition of domestic building work.

8(9) clarifies references within section 8.

8(10) defines "removal work" and "relocation work" for this section.

Clause 9 sets up the concept of "regulated domestic building contract" as being a domestic building contract where the contract price is greater than an amount set by regulation, or, if there is no regulation, greater than $3,000. Regulated domestic building contracts are the contracts the Bill regulates.

Division 3—Secondary concepts

This Division sets up concepts that are significant across several provisions of the Bill.

Clause 10 sets up the concept of "associated third party amount" for domestic building contracts. The concept covers amounts payable to parties other than the parties to the building contract for the provision of services, including the issuing of permits. Examples are provided for some services covered by the provision, namely the connection or installation of gas, electricity, water and sewerage. S10(2) restricts the application of the concept to matters related to the carrying out of the building work under the contract.

Clause 11 sets up the concept of "cost escalation clause". Cost escalation clauses of domestic building contracts allow the contract price to increase caused by increased costs of labour or materials over the life of the contract or delays in carrying out the subject work. Cost increases resulting from relevant changes to taxation, or price variations for prime cost items and provisional sums, are excluded from the concept.

> 11(2) specifically regulates contractual provisions providing for price rises owing to the introduction of the Commonwealth's new tax arrangements applying from 1 July 1999, and excludes such provisions from the definition of "cost escalation clause".

Clause 12 sets up the concept of "foundations data" as the information a contractor needs to design and price footings and concrete slabs. 12(2) clarifies the concept to include information obtained from reports, test results, plans or computations or information specified under a regulation.

Clause 13 sets up the concept of "home" as any residential premises, even where this is a part of industrial or commercial premises. A range of premises where people may reside temporarily, such as prisons, motels, guesthouses and hostels, are excluded from the definition in s13(3), as are premises associated with health and educational institutions. Further

premises can be added to the list by regulation.

13(4) restricts the exclusion of premises associated with a hospital in 13(3) to premises used by patients or staff of the hospital that are not detached dwellings. This is to exclude, for example, dormitories, but include a detached dwelling provided for the use of a staff member or patients receiving periodic treatment.

13(5) makes similar provision regarding the exclusion of premises associated with an educational institution.

Clause 14 sets up the concept of "provisional sum" as being an estimated cost for an element of the contracted services for which the contractor, after having made all reasonable inquiries, cannot state a definite amount at the time when the contract is entered into.

Clause 15 sets up the concept of "repair contract" as being all work involved in or associated with the repair of any home, including the provision of services or facilities to the property where it is situated, and any necessary site works.

Clause 16 sets up the concept of a "variation" in a domestic building contract as being an addition or omission to or from the subject work.

16(2), in recognition that cost plus contracts contemplate a range of variations as part of the basic contract, provides that only additions or variations not reasonably contemplated by a cost plus contract are variations for such a contract.

Division 4—Other concepts

Clause 17 provides that, where domestic building work is carried out in stages under separate contracts, the separate contracts are taken to be a single contract and the contract price is the sum of the contract prices of the separate contracts. This provision prevents circumvention of the regulatory regime by conceiving of the work as a series of small contracts, each of which is less than the floor amount for a regulated domestic building contract.

Clause 18 defines the concepts of "effective completion date" and "effective completion period". The basis for the introduction of these concepts is that consumers should be provided with as far as is reasonable

accurate forecasts of when their work will be completed. This will enable them, for example, to arrange their affairs in regard to leased premises occupied while the building work is carried out with some confidence. Adjustments for matters outside the control of the building contractor are allowed. Essentially, the building contractor is required to calculate the number of working days required to complete the project, all things being equal, and to add in "calculable delays" as defined elsewhere, and make reference to reasonably foreseeable "incalculable delays". If the start date is known, the contract is required to contain an effective completion date. If not, the effective completion period provision is relevant.

18(3) allows the date or period to be adjusted for foreseeable delays (such as inclement weather) greater than those for which reasonable provision was made.

18(4) allows the date or period to be adjusted to take account of delays for which no reasonable forecast could have been made—for example a delay caused by an industrial dispute, or is an incalculable delay about which a warning was given in the contract.

18(5) allows the date or period to be adjusted to take account of variations agreed and made as set out in the Act.

18(6) allows the date or period to be adjusted downwards to take account of variations entered into other than as set out in the Act, or upwards only if the Queensland Building Tribunal so orders.

18(9) limits the ability to vary the completion date or period by a variation to the contract sought other than by the owner to unforeseen circumstances, so that the builder may not blow out the completion period by varying the contract when the need for the variation should have been foreseen.

18(10) further limits the builder's ability to blow out the completion date or period with non-complying variations to situations where an application is made to the Tribunal and it decides it would not be unfair to the owner to make such an allowance, and there are either exceptional circumstances (such as, for example, the owner being confined to hospital) or the builder would suffer exceptional hardship.

18(11) defines "unforeseen circumstances" for this section.

Clause 19 sets up the concept of "amounts referable to contracted services" in a mixed-purpose contract. This concept distinguishes how contracted services (domestic building work) are to be treated in a mixed-purpose contract, i.e. one that also includes other (non-domestic) building work, or other services entirely. Examples of a mixed-purpose contract would include a contract to supply house and land, to build a house and farm buildings, or to build a block of units and a detached dwelling. Only the contracted services are covered by the requirements of this Bill such as procedures for variation, progress payment limitations, and so forth. The amount referable to contracted services in a mixed-purpose contract includes the amount solely devoted to contracted services, together with an estimate based on a fair and reasonable apportionment of work that is jointly work for the contracted services and the additional element (the services other than the contracted services). For example, construction of an access road and general site works might be shared between a house (contracted services) and a farm building (additional element).

Division 5—References to particular terms

Clause 20 clarifies references to building contractors in the Bill.

Clause 21 makes similar clarification of references to building owners in the Bill.

Clause 22 sets up the concept of "contracted services" as including all things done under domestic building contracts, namely both carrying out domestic building work, and managing the carrying out of domestic building work.

Clause 23 excludes cost plus contracts from references to "contract price" other than sections where cost plus contracts are specifically dealt with.

Clause 24 further refines the concept of "contract price" to refer to the contract price as far as it is known at any time. For example, variations and adjustments due to prime cost items and provisional sums will affect the contract price but are only revealed when they occur.

Clause 25 sets up the concept of "subject work" as including only the domestic building work being carried out (the 'bricks and mortar') and not any managing of that work. A contract with a builder for the carrying out of

domestic building work would thus include the carrying out of both contracted services and subject work, whereas a contract for management or supervision would include the carrying out of contracted services but not the subject work itself (which would be under another contract).

Part 3—Contracts and Related Documents

Division 1—The Contract

Clause 26 requires contracts to be in writing when entered into or no more than 5 days after being entered into and before any subject work is carried out. Failure to comply is an offence carrying a maximum penalty of 20 penalty units.

Clause 27 sets up the formal content requirements for a regulated domestic building contract. Failure to comply is an offence carrying a maximum penalty of 20 penalty units.

27(2) lists the formal content requirements, including warranties, required matters and required things defined elsewhere, together with any plans and specifications forming part of the contract.

27(3) and (4) requires plans and specifications to be adequate to secure the necessary local government approval if relevant.

Clause 28 defines the required matters referred to in the formal contract requirements.

28(2) lists these matters. They include a number of mandatory and some alternative provisions. The alternative provisions include either start date if known, or how the date is to be decided if not known.

28(2)(h) requires a cost plus contract to show how the amount the contractor is to receive is to be calculated.

Clause 29 defines the required things referred to in the formal contract requirements.

29(2) lists the things. They include licence imprint if the subject work requires to be insured under the statutory insurance scheme, and a conspicuous notice regarding the cooling-off period.

Clause 30 provides that a contract has no effect unless it has been signed by the contractor and the owner or authorised agents.

Clause 31 deems the holder of the imprinted licence (where the subject work is required to be insured under the statutory insurance scheme) to be a party to the contract. This provision addresses the problems of licence lending and contracting by a business name or style other than that of the person who is the licensee. It protects the consumer by deeming a person to be litigated against or held liable.

> 31(4) sets up a defence for licensees that the card was used without authority and the licensee took all reasonable steps to ensure licence security.

Clause 32 allows the Authority to publish suggested contractual forms. It does not prohibit anyone else preparing and publishing suggested contractual forms.

Division 2—Details in contracts about delays affecting time estimates

Clause 33 requires contractors to make allowances in time estimates for reasonably foreseeable delays ("calculable delays"), notably inclement weather and non-working days, and for any other reasonably foreseeable delay. Failure to do so is an offence carrying a maximum penalty of 20 penalty units. Failure to show in the contract the number of days predicted is also an offence.

> 33(3) relieves the contractor of the requirement to show calculable delays if there is no likelihood of them being relevant. For example, if the building work is interior carpentry, inclement weather is not relevant.

Clause 34 requires the contractor to include in the contract details of any "incalculable delays" and to show their likely general effect. Incalculable delays are specific things reasonably foreseeable at the time the contract is entered into, such as delay in obtaining a specific imported material (such as marble cladding) specified in the contract that the builder knows is subject to the vagaries of international shipment. General risks, such as earthquake or meteorite strike, are not included in the definition of incalculable delays. Failure to make provision for incalculable delays in the contract, where relevant, is an offence carrying a maximum penalty of 40 penalty units.

Division 3—Contract price

Clause 35 requires fixtures and fittings shown in plans and specifications to be included in the contract price unless the owner specifically contracts out of this requirement.

Division 4—Handling of contracts and related documents

Clause 36 requires the contractor to give the owner a copy of the contract within 5 business days after it is entered into. Failure to do so is an offence carrying a maximum penalty of 20 penalty units.

Clause 37 requires the contractor to give the owner an imprinted contract or contract schedule before the subject work commences if the work is required to be insured under the statutory insurance scheme. Failure to do so is an offence carrying a maximum penalty of 20 penalty units.

Clause 38 is related to the statutory insurance scheme operated by the Authority under the existing Act. It requires the Authority to be provided with an imprinted copy of the contract or summary schedule prior to the building work being commenced. This is evidence of the extent of cover provided and is used as the basis of the insurance scheme's database about cover over a particular site.

Clause 39 sets out how and when contract-related documents are to be supplied to the owner by the contractor.

39(2) requires documents provided by an assessment manager (such as footing approvals) to be provided to the owner as soon as practicable after receipt. Failure to do so is an offence carrying a maximum penalty of 20 penalty units.

39(3) requires other documents (such as water connection plans) to be provided as soon as possible after completion of the subject work. Failure to do so is an offence carrying a maximum penalty of 20 penalty units.

39(4) relieves the contractor of obligations to supply documents where the contractor is aware the owner already has a copy.

Clause 40 requires the contractor to supply the owner with a copy of the contract information statement approved by the Authority either upon entering into the contract or within 5 business days thereafter. Failure to do so is an offence carrying a maximum penalty of 20 penalty units. This provision is also relevant to the cooling-off period provisions elsewhere.

Part 4—Warranties

Division 1—Incorporation of warranties

Clause 41 sets up the application of implied warranties to contracts—most apply to all contracts, and some to a limited class of contracts as specified in the relevant provision.

Division 2—Implied warranties for all contracts

Clause 42 implies a warranty that materials supplied by the builder will be good and (unless otherwise provided in the contract) new. The warranty is limited in that materials supplied by the owner or specified by an architect are not subject to the warranty. Materials supplied by the builder that are specifically nominated, without prompting or steering, by the owner are also not covered. In interpreting the warranty, regard is to be had to relevant industry standards and manufacturers' recommendations. For example, where a builder properly installs a hot water service recommended for the application by the manufacturer and regarded as suitable throughout the industry, this may be a relevant factor relieving the builder of liability if it fails after expiry of the manufacturer's warranty.

Clause 43 implies a warranty that the subject work will be carried out in accordance with all relevant legal requirements.

Clause 44 implies a warranty that subject work will be carried out in an appropriate and skilful manner and with reasonable care and skill.

Division 3—Implied warranties for particular contracts

Clause 45 implies a warranty that the subject work will be carried out in accordance with any plans and specifications.

Clause 46 implies a warranty, where relevant, that the dwelling will be suitable for occupation when the work is finished.

Clause 47 implies a warranty to cost-plus contracts where no completion date or period is specified—that work will be carried out with reasonable diligence.

Clause 48 implies a warranty, where relevant, that provisional sums in a contract are calculated with reasonable care and skill, using all relevant information reasonably available. This provision would require for example a contractor to make some inquiry about price and availability of a material, but does not obligate the contractor to make inquiries of every possible supplier.

Division 4—General

Clause 49 provides that warranties run with the building, except where the breach of warranty was known to the new owner at the time of transfer.

Clause 50 voids contracting out of statutory warranties.

Clause 51 provides that warranties run for 6.5 years from completion of the subject work (or stated completion date or period if the work is not completed).

> 51(2) provides that in any proceeding brought against the contractor for breach of statutory implied warranties under this Act, it is a defence for the defendant to prove that deficiencies arose from instructions given by the building owner contrary to the contractor's written advice.

Part 5—Restrictions Relating to Contracts

Division 1—Entering into contracts

Clause 52 requires building contractors to hold any licence required under any law in order to enter into a regulated domestic building contract. Entering into a contract when not holding the appropriate licence is an offence carrying a maximum penalty of 80 penalty units.

Clause 53 requires building contractors to obtain necessary foundations data, having regard to the Building Code of Australia and site-specific circumstances, prior to entering into a regulated domestic building contract. Entering into a contract without having obtained the necessary foundations data is an offence carrying a maximum penalty of 100 penalty units.

53(4) provides that the contractor must give the owner a copy of any foundations data obtained by the contractor. Failure to do so is an offence carrying a maximum penalty of 10 penalty units.

53(6) removes any right the contractor may otherwise have to claim additional amounts under the contract if the need for these amounts could have been foreseen based on the foundations data.

53(7), however, allows the contractor to claim additional amounts if, despite proper foundations data, unforeseeable problems are encountered (such as a large subterranean boulder not discovered by site tests). This provision is specifically exempted from the concept of 'contract price' in Part 2, Division 2.

Clause 54 states additional requirements for mixed-purpose contracts . The contract is required to clearly describe the contracted services (domestic building work), to clearly distinguish between the contracted services and the additional element (the other work), and to state the total amount referable to the contracted services. Failure to include the required contractual provisions is an offence carrying a maximum penalty of 20 penalty units.

Clause 55 regulates cost-plus contracts.

55(1) limits entering into cost-plus contracts to those contracts prescribed in a regulation or those where it is not possible to estimate costs because work has first to be carried out. Examples would

include restoration of an old timber building, where the condition of the structure cannot be adequately gauged until a substantial amount of demolition work is first carried out. Entering into a cost-plus contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 100 penalty units.

55(2) requires the contract to contain a fair and reasonable estimate of the amount the contractor is likely to receive under the contract. Entering into a cost-plus contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 100 penalty units.

55(3) renders a cost-plus contract in contravention of this section unenforceable by the contractor.

55(4), however, allows the Tribunal, on the application of the contractor, to award the costs of carrying out the work plus reasonable profits to the contractor if it is not unfair to the owner to do so.

Clause 56 regulates cost escalation clauses in regulated domestic building contracts. The provision states that a cost escalation clause is void unless the owner has initialled the clause, and the contract is over $200,000 or administered by an architect, or the cost escalation clause itself is limited to cost increases caused by certain delays. Allowable delays are those not caused by the building contractor that are longer than four weeks, or delays caused by the owner or the owner's architect. The amount of cost escalation allowed is the lesser amount of the actual costs, or an amount set by formula based on the contract price.

Clause 57 regulates all price change contractual provisions other than cost escalation clauses- for example prime cost items and provisional sums. All contracts containing price change clauses must contain a warning near the contract price that the price may be changed by the relevant clauses, and specify the clauses. Entering into a contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 20 penalty units. Moreover, price change clauses in any non-complying contract can only be enforced insofar as they allow a decrease in price.

Clause 58 voids any contractual term providing that disputes under the contract be referred to arbitration. Agreements to settle by arbitration entered into after a dispute arises, however, are permissible.

Division 2—Prime cost items and provisional sums.

Clause 59 requires the building contractor to state in the contract reasonable estimates for prime cost items and provisional sums. Entering into a contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 50 penalty units.

Clause 60 removes doubt that the previous clause does not act to void any provision of a non-complying contract. Owners may apply to the Tribunal, however, to have their liability reduced if the estimates in the contract are not reasonable or not provided.

Clause 61 requires contracts to contain a separate schedule showing descriptions, estimates of cost and methods of calculation for each prime cost item and provisional sum. Entering into a contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 50 penalty units.

Clause 62 requires contractors to support claims for prime cost items or provisional sums under a contract with receipts and suchlike documentation. Entering into a contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 20 penalty units.

Clause 63 requires contracts to relate payment for prime cost items and provisional sums to progress payments, where they must be allowed for as an increase or decrease in the progress payment. For example, if an oven is a prime cost item, it would normally be related to the fixing stage progress payment. Entering into a contract by a contractor in contravention of this provision is an offence carrying a maximum penalty of 20 penalty units.

Division 3—Payments relating to contracts

Clause 64 limits deposits under regulated domestic building contracts to no more than 5 percent (or 10% if the contract is under $20,000) of the contract price. A contractor who demands or receives more than this amount commits an offence carrying a maximum penalty of 100 penalty units.

64(2) treats the estimated amount for a cost plus contract as being the same as a contract price for a fixed price contract for the purposes of this section.

Clause 65 regulates progress payments for contracts without designated stages (such as cost-plus contracts and most trade contracts). A contractor who demands or receives more than an amount directly related to work progress commits an offence carrying a maximum penalty of 100 penalty units, unless the parties contract out of this requirement and the contracting out satisfies any requirements under a regulation. This might allow, for example, a painting contractor to receive an amount sufficient for hire of scaffolding and purchase of paint, even though work had not commenced.

Clause 66 defines progress payments as maximum percentages of the original contract price for contracts to build a dwelling. The original contract price is used as reference point because allowable adjustments (such as prime cost items) and variations are entirely acquitted at each progress payment step. Allowance is made in the provision for contracts to build to stages short of complete for occupation. In the case of a contract to build a house to all stages, the amount payable on completion is required to be no less than 20 percent of the original contract price, with higher percentages on completion payments for contracts to build to intervening stages. A contractor who demands or receives more than set progress payment percentages commits an offence carrying a maximum penalty in each case of 50 penalty units.

Clause 67 prohibits contractors from claiming a completion payment under a contract unless practical completion has been reached—i.e. that the subject work has been completed in accordance with the contract and all statutory requirements. A contractor who demands or receives a completion payment in contravention of this provision commits an offence carrying a maximum penalty of 100 penalty units.

67(2) states an exemption from the general requirement. This is when the contract is for work short of completion for occupation or it is for renovation only, and that defects or omissions are only minor, and that the dwelling is reasonably suitable for occupation, and that the owner has retained some funds from the contract to make good the omission or defect.

Clause 68 requires contracts to contain a warning that any associated third party amounts, such as electricity connection charges, are not included in the contract price. A contractor who enters into a contract in contravention of this provision commits an offence carrying a maximum penalty of 40 penalty units.

Division 4—Consequences of contravening requirements relating to payments

Clause 69 provides that if a court finds a contractor has committed an offence and that offence has involved receipt of an amount in excess of an amount allowed, or an amount prohibited by this Act, that the court may order the contractor to refund that amount with interest, in addition to any penalty imposed.

Clause 70 allows the owner to terminate a contract if the contractor does not comply with a payment order made by a court or the Tribunal. Termination is effected by notice in writing.

Clause 71 provides that where a contract is terminated by the owner under this Division, the contractor is entitled to recover a reasonable amount for the contracted services performed prior to termination, provided that that amount is no more than the contractor would have been entitled to receive under the contract.

Part 6—Cooling-off period

Clause 72 sets up the right conferred by this part—the right of an owner to withdraw from a contract without penalty other than as provided under this Part. The cooling-off period commences on the later of these two events—the day a copy of the signed contract is provided to the owner by the contractor, or the day on which the approved contract information statement is provided to the owner by the contractor. From that day, the cooling-off period lasts five days.

Clause 73 lists exemptions to the general cooling-off period provision.

73(2) exempts contracts where the owner and the contractor have previously entered into a contract for substantially the same work.

73(3) exempts contracts where the owner has obtained independent, formal legal advice on the contract and tells the contractor that such advice has been obtained. The legal advice is defined for this section so as to rule out casual advice given, say, by a friend who happens to be a lawyer.

Clause 74 allows an owner to withdraw from a contract within seven days at any time if the contract did not contain the required notice about cooling-off rights and the owner becomes aware that the contract should have contained such a notice. This provision complements the general cooling-off provision by recognising that a cooling-off period is ineffective unless the owner knows about it and is able to take advantage of it. This provision is expected to ensure that contracts contain the required notice.

Clause 75 provides that withdrawal under cooling-off provisions is effected by written notice served on the contractor.

Clause 76 allows the contractor to keep $100 plus any reasonable out-of-pocket expenses if an owner withdraws under the cooling-off period provisions. The contractor may keep this amount, while refunding the balance, if a deposit has been paid, or may recover this amount from the owner if no deposit has been paid or if the amount of the deposit is less than the amount payable.

Clause 77 allows the contractor, where the owner withdraws under section 69 (withdrawal where the contract did not contain the required notice about cooling-off period rights) to receive a reasonable amount for contracted services provided up to the time of withdrawal, but not more than was payable under the terminated contract.

Clause 78 allows an owner to waive the cooling-off period, but only for a repair contract. This provision allows an owner to arrange for urgent repairs to be carried out immediately, without the contractor needing to be concerned about the cooling-off period. In order to effect a waiver, the owner must give the contractor a waiver notice in writing.

Part 7—Variations of Contracts

Clause 79 requires all contract variations to be put in writing as soon as possible—but before any work the subject of the variation is carried out—after being agreed between the owner and the contractor. A contractor who carries out a variation in contravention of this provision commits an offence carrying a maximum penalty of 20 penalty units.

> 79(2) allows urgent building work to be carried out before the variation has been put into writing where the work the subject of the variation is urgent and it is not reasonably practical to put it in writing before carrying out the work. An example might be where the electrician is on site and the owner requests (by phone) an additional power point to be installed in a room.

Clause 80 sets out the mandatory contents of a variation document. A contractor who fails to comply with this provision commits an offence carrying a maximum penalty of 20 penalty units.

> 80(2) lists the elements of a variation document, all of which are mandatory. 80(2)(e) and (h), however, only apply to variations that may delay contract completion, or that affect progress payments under the contract if the contract contains progress payments, respectively.

Clause 81 shows how a variation is acquitted in a contract that provides for progress payments. It is recognised that variations may consist of additions or omissions, resulting in additional or reduced cost, and the work the subject of the variation may take place all at once or over the whole period of the contract. Some variations may also be so significant as to expose the contractor to significant additional commercial risk, and so require special payment arrangements. To take account of this range of possibilities, variations are split into four types. These are

1. additions that may be acquitted in one progress payment period, such as the addition of a sink garbage disposal unit in the kitchen fit-out;
2. additions that take effect over all, or a number of, progress payments, such as the addition of an extra room;
3. omissions that may be acquitted in a single progress payment, such as replacement of fancy colonial doors with plain pine doors;

4. omissions that affect all, or a number of, progress payments, such as deletion of a room.

Types 1 and 3 require variation documents to be to the effect that the increase or decrease is to be allowed for in the first progress payment occurring after the work is done or would reasonably have been expected to have been done under the contract, as the case may be.

Type 2 variations require variation documents to stipulate that additional work is paid for in the progress payments relating to the additional work. Type 4 variations require variation documents to specify that progress payments that would reasonably have been expected to relate to omitted work be adjusted downward by the reasonably calculated value of the omitted work.

> 81(10) deals with major variations—namely those over $10,000 or a proportion of the contract value set by regulation, whichever is the greater—and allows other terms of payment to be included in the variation document. These might include, for example, a deposit, and special progress payment arrangements.

Clause 82 requires a contractor to, as soon as possible after a variation document is made, sign it and take all reasonable steps to secure the owner's signature on it. A contractor who contravenes this provision commits an offence carrying a maximum penalty of 20 penalty units.

Clause 83 requires the contractor to give the owner a copy of the variation document within five business days of the variation being agreed. If the contractor has complied with the previous clause regarding taking all reasonable steps to secure the owner's signature, then the variation document need not have been signed by the owner. A contractor who contravenes this provision commits an offence carrying a maximum penalty of 20 penalty units.

Clause 84 specifies the circumstances in which a contractor can recover an amount for a variation. Distinction is made between variations sought by the owner and variations sought other than by the owner.

> 84(2) concerns variations sought by the owner. The contractor can recover amounts for the variation if the contractor has complied with all the preceding provisions of this part, or if the Tribunal makes an order allowing recovery, on application to the Tribunal by the contractor.

84(3) concerns variations sought other than by the owner. The contractor can recover amounts for the variation if the contractor has complied with all the preceding provisions of this part and the need for the variation could not have been foreseen by the contractor at the time the contract was entered into, or if the Tribunal makes an order allowing recovery, on application to the Tribunal by the contractor.

84(4) limits the Tribunal's discretion in proceedings under the foregoing two subsections to cases where there are exceptional circumstances (for example, excusing the contractor's non-compliance with the clauses governing generation, signing and transmission of variation documents) or the contractor would suffer unreasonable hardship by not allowing recovery; and it would not be unfair to the owner to award recovery.

84(6) provides that the amount a contractor is entitled to recover for a variation is the amount stated on or calculated according to the variation document, or the cost of carrying out the variation plus a reasonable profit.

Part 8—Building Sites

Clause 85 prohibits a domestic building contract from allowing a contractor to lodge a caveat over land title.

Clause 86 limits the building contractors occupation rights to those of any other contractual lessee.

Clause 87 gives owners and their representatives the right of supervised access to the building site to view any part of the subject work. A contractor who contravenes this provision commits an offence carrying a maximum penalty of 20 penalty units. If the owner or representative interferes with the work and this interference causes delay or additional cost, then the contractor can recover any additional costs from the owner, provided that the contractor provides the owner with an appropriate written notice within five days after the interference becomes known to the contractor.

Part 9—Other Matters Relating to Contracts

Clause 88 requires plans, specifications and draft sample domestic building contracts to be prominently displayed in any display home. A contractor who contravenes this provision commits an offence carrying a maximum penalty of 100 penalty units.

Clause 89 concerns building work based on a display home. The work must be carried out in accordance with the same plans and specifications, to at least the same standards of work and quality, and use materials of at least the same quality as those used in the display home. A contractor who contravenes this provision commits an offence carrying a maximum penalty of 100 penalty units.

Clause 90 allows the owner to terminate a building contract if the contract price rises by 15 percent or over because of a cost escalation clause, or the subject work is not finished within one and a half times the originally estimated time.

90(2) limits the right to terminate to cases where the increase in price or the delay could have reasonably been foreseen by the contractor, and to those price rises causes by delays for which the building owner is not responsible.

90(3) and (4) allow the owner to effect termination by signed notice in writing, including the grounds for termination.

Clause 91 limits the contractor's ability to recover amounts for a contract terminated under the previous clause to a reasonable amount for the work done up to the point of termination, provided that that amount is no more than the contractor would have been entitled to recover under the contract.

Clause 92 provides that only where a provision of this Act expressly provides that a contractual provision is void, illegal or unenforceable does a contractor's non-compliance with a provision of this act have the effect of making that contractual provision void, illegal or unenforceable.

Clause 93 prohibits contracting out of any provision of this Act, other than to impose greater or more onerous conditions on the contractor.

Part 10—Miscellaneous

Clause 94 is designed to help meet evidentiary requirements when prosecuting or otherwise attempting to penalise a person for a breach of a requirement of the Act. The section enables a prosecuting authority to establish a person had a particular state of mind if it can prove that the person's representative had that state of mind.

94(1) specifies that the evidentiary provision applies in proceedings for offences.

94(2) states that in any such proceeding, if it is necessary to prove a person had a certain state of mind, it is enough to prove the person's representative, acting within the representative's actual or apparent authority, had that state of mind.

94(3) provides that the person is liable for the act or omission of the person's representative

94(4) provides a defence for the liability imposed by the previous subsection that the person (not the representative) can prove that the person could not reasonably have prevented the act or omission.

94(5) defines "representative" to include executive officers, employees or agents of a company, and employees or agents of an individual.

Clause 95 provides that an executive officer commits an offence if the company commits an offence, namely the offence of failing to ensure the company complies with the Act. The overall aim of this section is to make directors and other executive officers of a company personally responsible for the acts of the company, thereby preventing them from escaping personal liability by hiding behind a company structure.

95(1) imposes a duty on executive officers to ensure that their company complies with this Act.

95(2) provides that an offence by a company is taken to have been committed by the company's executive officers, with penalties to apply as for commission of the relevant offence by an individual.

95(3) allows evidence that a company commits an offence under the Act to be used as evidence that each and every executive officer committed the offence.

95(4) provides a defence for executive officers in regard to this section, namely that the executive officer exercised reasonable diligence, or was not in a position to influence the relevant conduct of the company.

Clause 96 deals with partnerships, generally applying provisions that apply to persons to partnerships as if they were persons.

96(2) allows any partner to a partnership to discharge an obligation placed on a person that is a partnership under this Act.

96(3) imposes the requirement to pay any amount under this Act jointly and severally on all partners.

96(4) takes any offence committed by a partnership to have been committed by each of the partners.

96(5) provides a defence for a partner taken to have committed an offence because of this section, namely that the partner did not assist in the commission of the act or omission that is the offence and was not in any way knowingly involved in the relevant act or omission.

Clause 97 provides that fines under this Act are paid to the Authority, other than any part of the fine the court orders paid to the person prosecuting.

Clause 98 excludes the operation of the *Commercial Arbitration Act 1990* to domestic building work unless an arbitration agreement is entered into after a dispute arises and does not form part of a domestic building contract. The *Subcontractors' Charges Act 1974* is also excluded for all domestic building work carried out for an individual other than work carried out for a business carried on by the individual.

Clause 99 requires the Authority to approve contract information statements required to be provided to owners under this Act. The statement is to contain information about the rights and duties of owners and contractors, and dispute resolution procedures. It is also expected the statement would contain a range of other information such as relevant contact numbers for the Authority and the Tribunal.

Clause 100 requires the Authority to have approved contract information statements available for sale on the payment of a fee prescribed by regulation.

Clause 101 gives the Governor in Council a regulation-making power under this Act.

Part 11—Transitional Provisions

Clause 102 limits the application of this Act to domestic building contracts entered into after commencement.

Clause 103 continues the application of the existing Act to contracts entered into before commencement.

Part 12—Consequential and Other Amendments

Clause 104 provides that Schedule 1 amends Acts as mentioned.

Schedule 1—Consequential and Other Amendments

Commercial Arbitration Act 1990

Clause 1 omits section 3(1) and inserts a new section 3(1) to give effect to the provision of this Bill relating to its relationship with the *Commercial Arbitration Act 1990*.

Clause 2 omits an obsolete reference and inserts a relevant reference.

Queensland Building Services Authority Act 1991

Clause 1 omits Part 4 (Domestic Building Contracts), that is replaced by this Act.

Clause 2 inserts a new subsection 72(5)(e) to update references to persons who are taken to have carried out building work.

Clause 3 inserts a new subsection 72(5A) to update the reference to a contract for the carrying out of building work.

Clause 5 omits definitions relevant to the omitted Part 4.

Clause 6 inserts a relevant definition.

Clause 7 omits an obsolete definition.