

QUEENSLAND BUILDING TRIBUNAL BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the legislation

The Bill establishes, empowers and regulates the operations of the Queensland Building Tribunal ('the Tribunal').

In particular, the Bill extends the jurisdiction of the Tribunal to cover various disputes in areas of the construction industry other than the home owner-builder interface, and provides greater clarity and guidance for members and users of the Tribunal in setting out the available procedures and means of resolving proceedings. It fleshes out the basic structure provided by the *Queensland Building Services Authority Act 1991* ('the existing Act') with a wide range of provisions detailing available methodologies, procedures and powers.

The Bill makes changes to arrangements under the existing Act including—

- establishing and empowering a statutory registrar for the tribunal to manage the administration and take certain administrative steps in proceedings;
- provision for decision by default for debt;
- procedures for service of documents;
- general powers:
 - to make orders;
 - the join parties to proceedings;
 - to consolidate proceedings;

- to deal with vexatious proceedings and conduct of proceedings by one party causing disadvantage to other parties;
- to award costs;
- to order security for costs;
- to summons witnesses;
- to order inspection of documents or things;
- to refer matters to an expert for report;
- to authorise entry to and inspection of a property; and
- to correct mistakes and re-open an order;
- definition of circumstances where the Tribunal has discretion regarding legal representation;
- a new jurisdiction to deal with minor commercial building disputes (defined as disputes where neither the claim nor counterclaim exceeds \$50,000);
- a new jurisdiction to deal with major commercial building disputes (over \$50,000) where the parties consent to the matter being dealt with by the Tribunal;
- removing conflict and overlap between activities of the Queensland Building Services Authority, ('the Authority') and proceedings in the Tribunal;
- a new jurisdiction to conduct inquiries on application by the Authority where witnesses may be compelled to answer questions; and
- detailed provisions defining procedures for dealing with proceedings by:
 - mediation;
 - summary decision;
 - case appraisal;
 - pre-hearing conferences;
 - hearings; and
 - settlement offers.

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.

The Tribunal has been since 1992 the main forum for—

- resolution of disputes between home owners and builders;
- review of decisions by the Authority in relation to construction industry regulation; and
- hearing of disciplinary matters involving licences issued by the Authority.

The Tribunal has been a pioneering venture in public administration that has been copied by other States. The experience of seven years' operation, however, has yielded a range of criticisms and suggestions for improvement from the various users of its services. This Bill takes up many of these suggestions and addresses criticisms.

In general, it is agreed the Tribunal has operated effectively to provide just outcomes at an affordable cost. As a specialist forum, it has been able to understand the jargon of the construction industry and to recognise and deal with common problems in a timely fashion. The extension of jurisdiction to new areas of dispute resolution and disciplinary proceedings seeks to exploit these positive attributes.

The Bill also remedies perceived deficiencies of the Tribunal under the existing Act in regard to—

- vague definition of procedural steps;
- lack of powers to deal with certain matters effectively;
- lack of clarity in discretionary factors for orders and directions; and
- poor definition of the administrative structure of the Tribunal.

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 compulsion under clause 73 in certain circumstances to answer questions when required to do so by the Tribunal even though they may tend to incriminate is *prima facie* in conflict with LSA s4(3)(f), namely that legislation 'provides appropriate protection against self-incrimination'.

Comment 1

The need to afford protection to persons answering questions which tend to incriminate is acknowledged. Such a power should only be conferred in circumstances where its absence will demonstrably lead to a greater harm than is done by its use. In this instance, the harm that the power seeks to avoid is the damage done to consumers, suppliers, subcontractors, employees and public confidence in the building industry by the collapse of building contractors. It is useful in this context to draw an analogy with the deployment of similar (although more extensive) powers under Commonwealth law. The power here is limited to questions concerning the person's financial affairs.

In *Spedley Securities Ltd v Bond Brewing Investments Pty Ltd* (1991) [9 ACLC 522] Cole J of the Supreme Court of New South Wales called for reform of s.597 of the *Corporations Law* (Cth) so that directors and senior officers of companies would not be able to claim privilege from incrimination when the transactions of their companies were being examined. Cole J, in relation to the public examination of company directors, added his voice to those calling for reform:

In my view, the public interest requires that those receiving moneys of the public, or administering companies in which the public invest, should be obliged to explain transactions. I see no public interest in such persons being able to escape either civil or criminal responsibility, if such exists, because parties injured by the conduct of such persons, or prosecuting authorities on behalf of the community, are unable to establish factual matters which because of the nature of the companies, or the conduct of such persons, is known only to such persons. The law, at present, protects the interests of the civil and criminal wrongdoers. It should protect the interests of the public.

Cole J went on to say that if there be conflict between the private rights of individuals in the conduct of companies and in the rights of members of the public that conflict should be resolved in favour of the members of the public. A person who is responsible for the direction or administration of a company can have little cause for complaint if he be obliged to tell the truth regarding the application of funds or management of a business.

The inquiry power conferred on the Tribunal under this Bill is similar to those conferred on regulatory authorities under the *Corporations Law* and for similar reasons—although, again, limited only to questions concerning the person’s financial affairs. Deployment of the power will enable the Authority to require the production of accounts and documents and to conduct public examinations of company employees and officers in situations where there are strong suspicions of unlawful conduct in the handling of financial affairs.

Under the *Corporations Law*, to protect persons examined, an answer to which the claim of privilege would normally be made is not admissible in criminal or quasi-criminal proceedings. In addition the Court has the power to decide the appropriateness of questions.

There is also good judicial authority for these powers in the exact circumstances envisaged by this Bill. In his judgement on *Queensland Building Services Authority v Australian Securities Commission* [unreported, Federal Court, General Division, QG3018 of 1996, 28 February 1997 at pages 21 to 22] Spender J remarked:

The public interest in rooting out from the building industry by way of disciplinary proceedings, those unfit to hold or be connected with a building licence is accepted. One can sympathise with the Queensland Building Services Authority in its complaint that it lacks the power under the Queensland Building Services Authority Act to obtain information relevant to those matters.

To seek authorisation from the [Australian Securities Commission] to use the powers of public examination conferred for the purpose of the external administration of corporations under Chapter 5 of the [*Corporations Law*] is not the remedy for this deficiency. The remedy, if it thought fit so to do, is for the Queensland Parliament to confer those appropriate powers on the Queensland Building Services Authority.

Initially it was proposed that the amendments would be based on the similar power in the *Corporations Law*. Under the *Corporations Law*, application is made to the Supreme Court for an order for public

examination and the production of documents. The examination proper is held in the Magistrates Court. The procedure in the Magistrates Court usually takes in excess of three months.

In this context it is more appropriate for the power to be exercised by the Tribunal for sound reasons of administrative efficiency including—

- the Tribunal already has the power to conduct an inquiry, summons witnesses and order the production of documents;
- the Tribunal, as a construction industry specialist jurisdiction, is familiar with arrangements and jargon in the industry, saving valuable time for all concerned;
- lower overall costs mean it is cheaper to apply for and run the examination in the Tribunal for all parties involved;
- more timely outcomes will be achieved; and
- only minimal amendment to provisions in the existing Act is required, as the Tribunal already has an inquiry power.

As with the *Corporations Law*, it is fundamental to the exercise of public inquiry powers that self-incrimination is not an excuse for refusing to answer a question. It is helpful in this context to rehearse the history of the development of these powers in the Commonwealth.

In the early 1990s the public examination power in the *Corporations Law* came under considerable criticism from the public and the judiciary due to its ineffectiveness.

When questions started to draw near matters that subjects were uncomfortable answering, they simply refused to answer questions on the grounds that the answer would tend to incriminate them. In order to argue the validity of a self-incrimination privilege claim, it would of course be necessary to reveal the incriminating matter in order to test its evidentiary weight. This leads to the logical dead end that, unlike other claims of privilege, such as legal professional privilege, self-incrimination cannot be refuted. This rendered public examinations barren exercises.

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examined. Cole J, in relation to the public examination of company directors, added his voice to those calling for reform—

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Cole J went on to say that conflict between the private rights of individuals in the conduct of companies and the rights of the public should be resolved in favour of the public. A person who is responsible for the direction or administration of a company can have little cause for complaint if obliged to tell the truth regarding the application of funds or management of a business.

The situation in the building industry is similar. Indeed the propensity for criminal and civil wrongdoing in the building industry is perhaps greater than in corporate life generally. And, because of the high labour content of construction work, the complex contractual relations among industry participants and the low margins at all levels, the mischief wrought by wrongdoers is all the more devastating.

Two examples below show how the absence of powers similar to those contained in the *Corporations Law* to compel answers have led to substantial losses to creditors and an inability on the part of the Authority to protect the public.

EXAMPLE 1

The Authority commenced an investigation into a licensee, Trent Manor P/L trading as Beauville Homes in 1995. The Authority received information from the licensee in relation to its financial capacity. This information was reviewed by an accountancy / liquidation practitioner retained by the Authority who expressed concern over the validity of the information. In the absence of specific powers, the Authority was unable to gather further evidence relating to the company's financial position and it went into liquidation in mid 1997.

A public examination under the *Corporations Law* was subsequently conducted by the liquidator for the company. At the examination, it was revealed that internal accounts of the company showed that the company had not shown an operating profit during a period when the information provided to the Authority

showed an operating profit of approximately \$1 million. It was ultimately revealed that the company had misrepresented its financial position by almost \$2 million.

The introduction of audit powers allowing Authority to require provision of specific information would undoubtedly have assisted in obtaining certain accounts necessary to evaluate the true position of the company. However, the examination ensured that the actual financial position of the company and its earlier misrepresentation was fully revealed and was crucial in the Authority taking action against the personal licence of a director the company on the grounds of failing to be fit and proper.

The liquidator estimated that the company's debt to unsecured creditors "blew out" by \$1 million in the relevant 18 month period. This figure could have been reduced substantially if the power to obtain immediate evidence relevant to the company's financial position and the conduct of the directors had been available at the earliest point in the Authority's investigations.

EXAMPLE 2

In similar circumstances to example 1, Paramount Homes went into liquidation in 1997. While the Authority had been investigating the position of the company for approximately 12 months, it had again been provided with false information, a fact which was only confirmed upon a public examination conducted by the liquidator.

The examination revealed a number of crucial factors including evidence relating to the fitness and propriety of a company director. The Authority again relied on this information in cancelling the individual licence of the relevant director.

In short, the power to compel answers to questions is fundamental to the effectiveness of the inquiry power as envisaged.

Possible conflict 2

The restrictions under Part 4 Division 7 on the right to legal representation may be in conflict with LSA s4(3)(b), namely that legislation 'is consistent with the principles of natural justice'.

Comment 2

There is a tension between the policy goals of just processes and outcomes on the one hand and access and low cost on the other. This tension is resolved by giving the Tribunal discretion, under the general supposition that parties will represent themselves, to allow parties to be represented by lawyers or other persons.

The Bill gives the Tribunal discretion to order legal representation in any case, and legal representation exists as of right in appropriate circumstances. A main policy goal is to give parties equal rights of access to the Tribunal despite wide disparity in resources and sophistication in understanding of the law. Although it is appreciated that, because of their understanding of the law and of procedure, lawyers may in fact assist the Tribunal in efficient resolution of proceedings, the Bill also recognises that unsophisticated parties may be intimidated by lawyers and be unable to afford equivalent representation.

Possible conflict 3

The provision in clause 86 allowing a licensee who has failed to comply with an order or direction of the Tribunal an opportunity to show cause why the licence should not be cancelled or suspended may be seen to be in conflict with LSA s4(3)(d), namely that legislation ‘does not reverse the onus of proof in criminal proceedings’, or LSA s4(2)(a), that legislation ‘must have sufficient regard to rights and liberties of individuals’.

Comment 3

There is no conflict with fundamental legislative principles here, as these are not criminal proceedings and the provision in fact enhances the rights of defaulters. The provision exists as an extra protection for licensees who may have some excuse for failure to comply with an order or direction, or may be able to advance some arguments in mitigation that the Tribunal may take into account.

Possible conflict 4

The provision in clause 114 allowing a licensee who has been the subject of a stop order opportunity to show cause why the order should not be confirmed may be seen to be in conflict with LSA s4(3)(d), namely that legislation ‘does not reverse the onus of proof in criminal proceedings’, or LSA s4(2)(a), that legislation ‘must have sufficient regard to rights and liberties of individuals’.

Comment 4

Stop orders are by nature emergency proceedings, available where an offence has not yet been committed. The power allows an order that has the effect of preventing the offence occurring. Where, for example, the work the subject of a stop order involves the demolition of a building, or environmental vandalism, it may be too late once the offence has occurred

for the damage to be made good by any order of the Tribunal or of a court. The reversed onus of proof in this instance is the only practical way of implementing the power. These are not, of course, criminal proceedings.

Possible conflict 5

The provision in clause 115 allowing a licensee who has been the subject of a suspension order opportunity to show cause why the order should not be confirmed may be seen to be in conflict with LSA s4(3)(d), namely that legislation ‘does not reverse the onus of proof in criminal proceedings’, or LSA s4(2)(a), that legislation ‘must have sufficient regard to rights and liberties of individuals’.

Comment 5

The power of the Tribunal to suspend a licence mirrors the power available to the Authority under s49A of the existing Act to effect immediate suspension of a licence administratively. The power is given to the Tribunal to use in circumstances where the Authority is unable to act because of its limited discretion, but urgent action is needed. As a quasi-judicial, rather than merely administrative, body, the Tribunal is given appropriately more discretion. In the case where the Authority has acted within its own powers, the suspended licensee may apply to the Tribunal for review of the decision. This reversed onus of proof thus effectively duplicates the remedies available to a suspended licensee under the existing Act.

Possible conflict 6

The provision in clause 168 voiding contractual provisions in conflict with the Act in contracts already entered into at the commencement of the Act may be in conflict with LSA s4(3)(g), namely that legislation ‘does not adversely affect rights and liberties, or impose obligations, retrospectively’.

Comment 6

The Bill is designed to establish a dispute settlement regime applying to all building contractual disputes for which the Tribunal has jurisdiction. Contracting out of the existing Act’s dispute settlement regime is already prohibited for domestic building contracts, so this provision only has real effect for minor commercial building contracts. In view of the low cost to users of Tribunal services, this retrospective effect is only of benefit to those affected.

Possible conflict 7

The provision in clause 169 providing a defence for an executive officer of a corporation to the offence of failing to ensure the corporation complies with the Act may be in conflict with LSA s4(3)(d), namely that legislation ‘does not reverse the onus of proof in criminal proceedings’, or LSA s4(2)(a), that legislation ‘must have sufficient regard to rights and liberties of individuals’.

Comment 7

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 167 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.

Estimated Cost for Government Implementation

The Bill both extends the Tribunal’s jurisdiction and provides it with both procedures and definitional clarity that should lead to unit savings. It is not possible to calculate any additional costs accurately. Provisions already made by Parliament in the *Queensland Building Services Authority Amendment Act 1999* making available additional revenue sources for the Authority are expected, however, to absorb any additional operational costs.

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

Division 1—Introduction

Clause 1 sets the short title of the Act as the *Queensland Building Tribunal Act 1999*.

Clause 2 that the Act can be commenced by proclamation.

Division 2—Operation of Act

Clause 3 provides that the Act binds the State and, where the jurisdiction exists, other States and the Commonwealth.

Division 3—Objects of Act

Clause 4 sets up the objects of the Act as being the establishment of the Tribunal's jurisdictions, subject to justice, fairness and cost efficiency as guiding principles. The jurisdiction is defined as inhering in 4 broad areas: resolution of building disputes, review of the Authority's decisions, and applications by the Authority about disciplinary, and other applications allowed under this Act or the *Domestic Building Contracts Act 1999*. Within the broad ambit of building disputes, the jurisdiction covers all domestic building disputes, all minor commercial building disputes, and major commercial building disputes only by consent of the parties.

Clause 5 describes how the objects of the Act are to be achieved, by listing a series of guiding principles to be observed by the Tribunal in its operations. These principles include justice, fairness and transparency, cost minimisation, speed, comprehensibility, responsiveness, and self-representation where appropriate.

Division 4—Interpretation

Clause 6 refers to the dictionary in the schedule to the Act for definitions of terms used in the Bill.

Clause 7 defines the term “building work” as consisting of a range of elements set out in 7(1), and excluding a range of elements set out in 7(3). Work not expressly excluded by 7(3) may be expressly included by regulation as being building work. The definition reflects the definition in the existing Act, but has a more restricted list of exclusions. These exclusions are set out by regulation under the existing Act. The reason for the divergence in definitions between the Bill and the existing Act is that the definition of building work in the existing Act prescribes the work for which a licence must be obtained, whereas the definition here affects the jurisdiction of the Tribunal to hear and decide building disputes. Disputes arising from some work for which a licence is not required—such as electrical work—are nonetheless appropriately dealt with by the Tribunal.

7(4) makes it clear that work is not regarded as excluded—work carried out by the State for the State under 7(3)(l)—if it is carried out for the State by an independent contractor.

7(5) makes a similar clarification regarding work carried out for local government as excluded by 7(3)(m).

Clause 8 clarifies that a person carries out building work for the purposes of this Bill whether or not the person physically handles tools and materials. A person providing advisory, administration, supervisory or management services in relation to the building work also carries out building work for the purposes of the Bill. Moreover, entering a contract, submitting a tender or making an offer to carry out building work is within the ambit of undertaking to carry out building work.

Part 2—Establishment and Membership of Tribunal

Clause 9 establishes the Tribunal.

Clause 10 requires the Tribunal to have a seal and deals with custody and judicial notice of the seal.

Clause 11 defines the membership, method of appointment, qualifications for membership, basis of appointment and term of appointment of members of the Tribunal. There is no specified number of members. All members, including the chairperson, may be appointed on a full-time or part-time basis.

Clause 12 sets out the requirements for remuneration and conditions of appointment of members of the Tribunal.

Clause 13 generally empowers the chairperson to direct the business of the Tribunal, including the professional development and training of members and the implementation of policies, procedures and practice directions.

Clause 14 allows the chairperson to delegate the chairperson's administrative powers to another member or to the registrar.

Clause 15 allows the appointment of a deputy chairperson who may act as chairperson if the chairperson is absent or otherwise unavailable, or if the position is vacant.

Clause 16 makes express provision for resignation of members.

Clause 17 allows for the termination of members in certain circumstances. These include incapacity, conviction of an indictable offence, misconduct and taking advantage of the laws of bankruptcy.

Clause 18 makes provision for circumstances where a member may have a conflict of interest relating to a proceeding before the Tribunal.

18(1) requires disclosure to the parties to the proceeding, and, for members other than the chairperson, to the chairperson.

18(2) allows a member to disqualify himself or herself after making the disclosure required by 18(1).

18(3) allows a member to continue hearing or otherwise dealing with the proceeding if the chairperson and the parties agree to this course.

18(4) adds further definitional clarity to the concept of conflict of interest.

Clause 19 provides the same immunity for members of the Tribunal as applies to judges of the District Court.

Part 3—Registrar

Clause 20 establishes the registrar of the Tribunal, clarifies the registrar's status as a member of staff of the Tribunal, and sets out minimum mandatory qualifications of the registrar.

Clause 21 defines the minimum functions and powers of the registrar.

21(1) makes the registrar responsible for the administrative affairs of the tribunal subject only to the chairperson.

21(2) provides a non-exclusive list of mandatory duties of the registrar.

21(3) allows the registrar to decide whether or not a proceeding should be subject to a timed mediation and expedited hearing under Part 6, and to carry out the necessary administrative procedures to bring this into effect, such as fix the time and place for mediations and hearings and appoint mediators. 21(3)(b) also allows the registrar to enter decisions by default under Part 4.

21(4) makes it clear that the registrar may exercise powers given to the registrar by this legislation or other legislation.

Clause 22 empowers the chairperson to direct the registrar, except where to do so would conflict with legislative provisions about the registrar's powers.

Clause 23 allows the registrar to engage consultants on behalf of the Tribunal.

Clause 24 allows the chairperson to appoint an appropriately qualified person as acting registrar if the registrar is not available or if the registrar's office is vacant.

Clause 25 allows the registrar to delegate powers to another appropriately qualified member of the Tribunal's staff.

Clause 26 provides that the registrar and other Tribunal staff are appointed and employed under the *Public Service Act 1996*.

Part 4—Organisation and Operation of Tribunal

Division 1—Constitution and general jurisdiction of tribunal

Clause 27 provides that a single member constitutes the Tribunal for hearing a proceeding.

Clause 28 provides that the Tribunal may hear and decide all matters it is required or permitted to hear and decide under legislation.

Division 2—Start of proceedings

Clause 29 describes how a proceeding is started in the Tribunal. This procedure is used for all proceedings, including applications by the Authority for disciplinary action and for public examinations. The applicant seeking to start proceedings is required to pay a fee and file an application on an approved form. The approved form provisions will prompt an unrepresented and unsophisticated applicant to provide the necessary information for proceedings. The application must also be served all respondents—defined as persons against whom a claim is made or an outcome or order sought.

29(5) allows the Tribunal to require service on others whom it considers are affected by the application and who should be joined as parties.

Clause 30 requires a respondent to file in the tribunal and serve on the applicant any defence and counterclaim in response to the application. This provision, unlike start of proceedings, only applies to certain proceedings as set out in 27(1)—building disputes, debt recovery applications by the Authority, and matters for which the Tribunal has jurisdiction under the *Domestic Building Contracts Act 1999*. Such a defence or counterclaim must be filed and served within 14 days, but provision is made for the Tribunal to extend this period. This allows for a longer period to draft a defence where the application relates to complex matters or where the respondent is for some other reason unable to file within the 14 days. As with applications, the defence and counterclaim must be in an approved form.

30(6) allows the Tribunal to require service on others whom it considers are affected by the defence or counterclaim and who should be joined as parties.

30(8) allows the Tribunal to deal with a matter in the absence of the respondent where no defence or counterclaim is filed (such as decision by default for debt).

Division 3—Business names

Clause 31 allows a proceeding to be started against a registered business name or an unregistered business.

Clause 32 allows a proceeding to be started against a person in relation to a registered business name and for orders to be enforced against the person in the proceeding.

Clause 33 allows a proceeding to be started against a person carrying on business under an unregistered name and for orders to be enforced against the person in the proceeding.

Clause 34 requires the respondent where a proceeding is started under 30 or 31 to file any defence or counterclaim in the name of a person and not in the business name, and for service with the defence a statement showing the names and addresses of all persons carrying on the business. Non-compliance with the requirement to serve the statement showing names and addresses can lead to the tribunal setting a defence aside.

Clause 35 requires the applicant where a proceeding is started under this Division to take all reasonable steps to find out the names of persons carrying on business under the unregistered business name. The proceeding must be continued as against named respondents, although the tribunal may allow further procedural steps to be taken. The tribunal must be satisfied that named respondents are aware of the proceedings before allowing continuation as against those named respondents.

Division 4—Service

Clause 36 provides that service of documents may be effected as directed by the Tribunal, as set out in this Bill, or (for licensed building contractors) by service at the address listed as a licensee's address on the register of licences kept by the Authority. Other service provisions set out in the *Acts Interpretation Act 1954* also apply.

Clause 37 provides that for proceedings started under Division 3 of this Part, service of the application may be effected by leaving it at the respondent's place of business with a person who appears to be in control at that place.

Clause 38 provides that a solicitor may accept service for a party to a proceeding. If a solicitor accepts service, the solicitor must annotate the served documents, and service is then taken to have been effected.

Clause 39 allows the Tribunal to decide that, where a document has not been served but has come into the possession of a party some other way, service has been effected.

Division 5—Case management

Clause 40 requires the Tribunal to fix a time and place for whatever proceedings the Tribunal considers necessary to resolve matters to which an application and any counterclaim relate. For building disputes, debt recovery proceedings and matters arising from the *Domestic Building Contracts Act 1999*, the Tribunal may not take action under this provision until relevant times for filing defences have elapsed.

Clause 41 sets out the general way that the Tribunal is to conduct all proceedings. Procedures are, subject to this Act and the rules of natural justice, at the discretion of the tribunal. Proceedings are to be as informal and expeditious as this Act and the subject matter of proceedings allow. The Tribunal is not bound by evidentiary rules applying to courts and may inform itself as it deems appropriate.

41(5) allows the Tribunal to use electronic means to conduct proceedings, if appropriate.

41(6) allows the Tribunal to decide all or part of a proceeding on the papers if parties agree and the Tribunal considers it appropriate to do so.

Clause 42 gives the Tribunal broad powers to make whatever orders and directions it deems necessary to bring a proceeding to a swift and fair resolution.

42(3) explicitly provides that the Tribunal may set time limits for the completion of anything in relation to a proceeding and may require parties to provide documents or other evidence.

42(4) requires compliance with orders and directions but allows parties to apply for extensions of time to comply with an order or direction.

42(5) allows the Tribunal to vary or revoke an order or direction at any time on its own initiative as well as on the application of a party.

42(6) limits the Tribunal's discretion under 42(5) so that the Tribunal may not vary or revoke an order where to do so would adversely affect a party in a way that could not be remedied by financial compensation.

Clause 43 limits the Tribunal's power to order disclosure of documents, providing that privileged documents, credit documents and additional copies of documents do not have to be disclosed.

43(2) removes doubt that an expert report is not privileged.

Clause 44 allows the Tribunal to extend time limits and waive compliance with procedural requirements in certain circumstances.

44(1) allows time limit extension for the commencement of a proceeding under this Act or under the *Queensland Building Services Authority Act 1991*.

44(2) allows the Tribunal where it is relevant to the conduct of a proceeding to extend time limits for any procedural requirement contained within this Act, the *Queensland Building Services Authority Act 1991* or the *Domestic Building Contracts Act 1999*, or waive compliance with the doing of anything under this Act.

44(3) removes doubt that time limit extension and compliance waiver under this section applies even if time has already expired.

44(4) limits the 44(3) discretion regarding extensions of time for filing a defence to an application made within the initial 14 day period allowed.

44(5) limits the Tribunal's discretion under this section so that the Tribunal may not extend time or waive compliance where to do so would adversely affect a party (or potential party) in a way that could not be remedied by financial compensation.

Clause 45 provides a broad power of joinder where the Tribunal forms the view, based on an application or on its own initiative, that a person ought to be joined as a party to a proceeding. The power is limited only by 43(3) where the special joinder provisions under section 99 covering the consent jurisdiction for major commercial building disputes apply.

Clause 46 allows the Tribunal to consolidate several proceedings into the one proceeding where they involve the same question or will affect each other.

Clause 47 further allows the Tribunal to direct that several proceedings be heard together or in any sequence the Tribunal directs.

Clause 48 allows the Tribunal to make any directions it considers necessary in consequence of a decision to consolidate or sequence proceedings.

Clause 49 allows the Tribunal to vary any order to consolidate or sequence proceedings.

Clause 50 allows the Tribunal to deal with proceedings brought vexatiously by summarily dismissing the proceeding and ordering costs to be paid including compensation for inconvenience and embarrassment to the party against whom the proceeding is brought.

Clause 51 allows the Tribunal to deal with a proceeding that is being conducted by a party so as to cause disadvantage to another party including by causing delays. Proceedings may be dismissed as against the party causing disadvantage and order payment of any costs incurred unnecessarily.

51(3) specifically empowers the Tribunal to refuse to continue the proceeding until an order regarding payment of costs is complied with.

Clause 52 regulates withdrawal by the applicant in a proceeding, requiring leave of the Tribunal where unsophisticated unrepresented parties may disadvantage themselves by withdrawal, such as when a counterclaim is still on foot.

52(1) allows the authority to withdraw an application for disciplinary proceedings or for a public examination at any time without leave.

52(2) allows an applicant to withdraw without leave before service of any defence or counterclaim.

52(3) requires an applicant to obtain the leave of the tribunal to withdraw following service of a defence or counterclaim.

52(4) requires the tribunal's leave for withdrawal by an applicant where there is more than one applicant in a proceeding.

52(5) requires the tribunal's leave for an applicant to withdraw against one respondent without withdrawing against others in a proceeding with more than one respondent.

Clause 53 requires the Tribunal's leave for withdrawal by a respondent of all or part of a defence or counterclaim.

Clause 54 requires the Tribunal's leave if, after withdrawal, an applicant seeks to make a further application relying upon the same facts or grounds.

Clause 55 allows the Tribunal to award costs against a withdrawing applicant.

Clause 54 requires a notice of withdrawal to be served on the other parties where withdrawal is effected without leave. Where withdrawal requires leave, the order giving leave effects the withdrawal.

Clause 56 allows the Tribunal to stay other proceedings started by a particular applicant until an order for costs is complied with.

Clause 57 allows a respondent (defined as a party against whom a claim is made) in a proceeding at any time to seek an order that another party provide security for costs. Failure to comply with an order to provide such security may lead to the Tribunal dismissing the proceeding as against the respondent.

Clause 58 lists discretionary factors the Tribunal may have regard to in deciding whether to make an order for security for costs. These include means and whether a party's lack of means may be attributable to the

actions of another party; the conduct of parties in the proceeding such as prospects of success and genuineness; and whether an order for security for costs would be oppressive or would stifle the proceeding.

Clause 59 allows the Tribunal to determine the form, timing and conditions of security for costs.

59(2) allows the Registrar to make such a determination where the Tribunal has not otherwise made provision.

59(3) requires the party the subject of an order to provide security for costs to serve on the applicant for security details of compliance with an order.

Clause 60 regulates the application and discharge of security for costs.

60(2) allows the Tribunal to apply the security in satisfaction of an award of costs where costs are awarded against the party supplying security.

60(3) requires the discharge of security where costs are not awarded against the party supplying security, where the Tribunal orders discharge, where the party entitled to the benefit of the security consents to discharge, and where there is a balance left after application in satisfaction of costs.

Division 6—General power of the Tribunal to award costs

Clause 61 gives the Tribunal a general power to award costs in a proceeding on the application of a party or on its own initiative at any stage during a proceeding or after a proceeding.

61(3) allows the Tribunal to make an order for costs during a proceeding but provide that costs not be assessed until after the proceeding ends.

61(4) provides a non-exclusive list of discretionary factors the Tribunal may take into account in awarding costs, including the outcome of the proceeding, conduct of parties, relative strengths of claims and any contravention of a relevant Act. If the Authority is a party, its adherence to the principles of natural justice is also a relevant factor.

61(5) removes doubt that legal representation and being the beneficiary of an order do not of themselves entitle a party to an award of costs.

61(6) removes doubt that provisions elsewhere in the Act to award costs are additional to this section.

Clause 62 allows the Tribunal to order a stay of proceedings as against a party until costs from another proceeding awarded against that party are paid.

Division 7—Representation

Clause 63 states the general philosophy that parties should represent themselves to save legal costs unless justice dictates otherwise.

Clause 64 requires that parties represent themselves at a mediation or case appraisal unless the mediator or case appraiser allows representation in the interests of justice.

Clause 65 allows representation by a lawyer or another person at a pre-hearing conference. This is an interlocutory step in proceedings and it may be oppressive to parties to refuse representation rights—for example, a party who is a builder working on a site in Jimboomba may incur costs to attend at Brisbane for a step that may only take a few minutes to set a hearing date, and may be able to arrange for a relative or other person to attend on his or her behalf.

Clause 66 regulates the representation of parties at proceedings other than mediations, case appraisals and pre-hearing conferences.

66(1) generally requires parties to represent themselves.

66(2) allows representation by lawyers if parties agree; and by lawyers or other persons in disciplinary proceedings, public examinations and debt recovery applications brought by the Authority, or where the Tribunal directs that representation be allowed. A range of discretionary factors is provided for the Tribunal to have regard to in deciding whether to order that representation be allowed.

66(3) removes doubt that a person summonsed to attend a disciplinary proceeding or a public examination is entitled to legal representation as of right.

Clause 67 allows a corporation to be represented by a person other than a lawyer in every case.

Division 8—Other provisions about proceedings

Clause 68 gives the Tribunal a general power to summons witnesses and produce documents or things and regulates the application of this power.

68(1) allows the Tribunal to summons a witness on the application of a party or on its own initiative to attend at a time and place notified in the summons, to be examined on oath and to produce documents of things stated in the summons.

68(2) regulates payment of witness fees to those prescribed by regulation or, if there is no prescription, to reasonable fees decided by the Tribunal.

68(3) removes doubt that, where a witness is summonsed on the application of a party, the party must pay the relevant witness fees.

Clause 69 creates an offence punishable by up to 100 penalty units for a witness giving false or misleading evidence.

69(2) clarifies the intention that, for the offence created by this section, it is not necessary to prove whether the relevant evidence was one or the other of false or misleading.

Clause 70 creates an offence punishable by up to 100 penalty units for a witness appearing before the Tribunal producing a document the person knows is false or misleading in a material particular.

70(2) provides that a person does not commit the offence if, when giving the document, the person tells the Tribunal that it is false or misleading and gives the correct information.

70(3) relieves prosecution in this offence of the burden of proving whether the document is either false, or misleading, or both.

Clause 71 regulates the Tribunal's dealings with documents or things produced to the Tribunal.

71(1) allows inspection, copying and photographing if relevant.

71(2) allows the Tribunal to keep possession while necessary for the proceeding.

71(3) allows the owner to have access to, and to inspect, copy and photograph the document or thing while it is in the Tribunal's possession.

Clause 72 creates offences for witnesses disobeying directions of the Tribunal. All the offences in this section have maximum penalties of 80 penalty units.

72(1) creates the offence of failing, without reasonable excuse, to attend in response to a summons and to remain as required by the Tribunal.

72(2) creates the offence of failing to take an oath as required by the Tribunal.

72(3) creates the offence of failing, without reasonable excuse, to answer questions or produce documents or things required by the Tribunal. Reasonable excuses in this context would include answers or documents protected by legal professional privilege.

72(4) clarifies that it is a reasonable excuse for the offence in 72(3) that an answer or a document or thing required by the Tribunal might tend to incriminate the person.

72(5) allows the Tribunal to excuse a person from attending at the time and place notified in a summons for any reason at all.

72(6) subjects this section to the following section.

Clause 73 removes self-incrimination privileges in relation to answering questions asked at a public examination under part 5 division 5 and applies if a person refuses to answer a question at a public examination.

73(2) requires the Tribunal to advise the person that if the answer may tend to incriminate the person, the person may make a claim that the answer may be incriminating, and the effect of making such a claim under this section.

73(3) creates the offence of refusing to answer a question in these circumstances, unless the person has a reasonable excuse, such as legal professional privilege. The offence carries a maximum penalty of 500 penalty units.

73(4) makes it clear that self-incrimination is not a reasonable excuse in terms of the offence created by 73(3).

73(5) sets up the effect of a claim of self-incrimination set out in 73(6), if the claim is made before giving the answer and the answer does in fact tend to incriminate the person.

73(6) restricts the admissibility of the answer in proceedings against the person to proceedings in which the truth or falsity of the answer itself are relevant, such as proceedings for the offence of perjury.

73(7) notes that public examinations and proceedings for the review of a decision by the Authority are not proceedings against the person, and so the answer may be admitted in evidence in such proceedings. This will allow the person to start review proceedings against the Authority if it takes any administrative action, such as licence suspension, on the basis of the answer.

Clause 74 allows the Tribunal to issue a warrant for the arrest of a person summonsed to attend who fails to attend and to adjourn proceedings until the person is produced.

Clause 75 allows the Tribunal to take evidence on oath and to administer oaths.

Clause 76 allows the Tribunal to refer technical matters to an expert for investigation and report. Such reports are to be provided to the parties, but do not bind the Tribunal.

76(4) provides that the parties are responsible for the costs of an expert as decided by the Tribunal.

76(5) provides the appointed expert with the same immunities as a member of the Tribunal in carrying out the investigation and in reporting.

Clause 77 allows a member of the Tribunal, and persons authorised by the Tribunal, to enter and inspect a building or land relevant to the proceedings. In most instances, this will be the building or land where the building work the subject of the proceedings are located. There may be some instances, however, where other buildings or land are relevant, such as adjoining premises where access is required to inspect building work the subject of proceedings.

77(2) creates the offence, punishable by up to 200 penalty units, of obstructing a member or person authorised to enter under this section.

Clause 78 sets out the procedure to be followed in effecting entry under section 77. It is intended that coercion to effect entry be reduced to the absolute minimum. To this end, before entry the authorised person or member must make a reasonable attempt to give the owner or occupier notice so that a mutually convenient time can be arranged. Identification and authority documents must be produced to assure an owner or occupier that the person is the authorised person. A copy of these documents must also be given to the owner or occupier to keep.

Clause 79 lists matters that are contempts of the Tribunal. These include obstructing, interrupting, or disturbing proceedings, disobeying lawful orders or directions, obstructing a person authorised to enter buildings or land, and anything else that would be a contempt of a court if the Tribunal were a court.

79(2) allows the Tribunal to order that a person in contempt of the Tribunal be excluded from the place where the proceeding is conducted.

79(3) allows the staff of the Tribunal to use reasonable force to effect exclusion if so ordered by the Tribunal.

Clause 80 sets up procedures for the punishment of contempt.

80(1) provides that this section does not limit the Tribunal's power to exclude a person under the previous section.

80(2) requires the chairperson of the Tribunal to provide written certification of the contempt to the Supreme Court.

80(3) limits the evidentiary requirement of 80(2) to the chairperson's being satisfied that there is evidence.

80(4) allows the chairperson to issue a warrant for the arrest of the person to be brought before the court.

80(5) brings certification under this section into line with provisions of the *Bail Act 1980* regarding charges for offences.

80(6), (7) and (8) require the court to inquire into the alleged contempt, and, if satisfied that the person has committed the contempt, require the court to deal with the matter as if the contempt had related to proceedings in that court.

80(9) applies the *Uniform Civil Procedure Rules 1999* to the court's procedures and powers under this section.

80(10) is an evidentiary aid for the court regarding the chairperson's certificate under this section.

Clause 81 prevents a person being charged for an offence and dealt with for a contempt regarding the same conduct.

Clause 82 gives persons representing persons before the Tribunal, and witnesses, the same immunities and protections as barristers and witnesses appearing before the District Court.

Division 9—Tribunal decisions and enforcement

Clause 83 requires decisions of the Tribunal that finally decide matters the subject of the proceeding to be in writing, to state the reasons for the decision, and allows them to be published.

Clause 84 defines the date of effect of decisions of the Tribunal. Where parties are present, it takes effect immediately. Where only one party is absent, it takes effect when service is effected on that party. Where two or more are absent, it takes effect on the day the last party is served.

Clause 85 sets up a procedure for a beneficiary of the Tribunal's decision to have the decision enforced by a court if it is not complied with. The person is required to lodge with a court a certified copy of the decision, and an affidavit regarding the non-compliance. No fee is to be charged for this registration. Upon registration, the decision has the same effect as a decision of the court and may be enforced accordingly.

Clause 86 allows the Tribunal to order cancellation or suspension of a building contractor's licence if the licensee fails to comply with an order or direction of the Tribunal. Other than for disciplinary proceedings, where the Tribunal's power to suspend or cancel is unfettered, such an order must not take effect until the licensee has had a reasonable opportunity to show cause why the licence should not be suspended or cancelled (86(2)).

Clause 87 allows the Tribunal to correct mistakes in decisions and prescribes procedural requirements for correction of mistakes. Corrections can be made on the application of a party or on the initiative of the Tribunal, and must be on the basis of evidence before the Tribunal when the decision

was made. If a party applies for a correction, the application must be made within 14 days of the date of the decision (87(3)) and must refer to the basis of the mistake as defined in 87(1). Any Tribunal member may make a correction.

Clause 88 makes available the opportunity for relief from an order of the Tribunal where a person did not attend (and was not represented) when the order was made and had a reasonable excuse for absence. An application for a review of the order on this basis must be made within 14 days of service of the order. The Tribunal has power to confirm, vary or revoke the order on the basis of this provision.

Clause 89 makes similar provision for the Tribunal to vary an order on the application of a party where it is ambiguous or where there are practical difficulties with implementation. To prevent injustice, all parties must be given an opportunity to be heard on an application under this provision.

Clause 90, to avoid jurisdictional overlap, prevents the Tribunal from re-opening an order under sections 88 or 89 when an appeal has already been filed in the District Court under section 92.

Clause 91 allows the Tribunal on its own initiative or on the application of a party to ask the District Court for its opinion on a question of law arising in the proceeding. Proceedings in relation to the question stated are stayed until the court makes its decision.

Clause 92 sets up a merits-based appeal mechanism from decisions of the Tribunal. Appealable decisions under this provision do not include interlocutory or procedural orders or directions, but only final decisions in proceedings. An appeal must be filed in the District Court within 28 days of the Tribunal's decision and must be based on, and be accompanied by, the decision. Appellants must also serve a copy of the appeal and supporting documents on the Tribunal within seven days of filing. The District Court may confirm, annul, vary or reverse the Tribunal's original decision. The Court may also remit a case for further hearing or re-hearing by the Tribunal or make consequential or ancillary orders or directions. A provision requiring the court to provide the Tribunal with reasons for its decision on appeal has been added to remove doubt that the Tribunal is entitled to a copy without charge.

Part 5—Jurisdiction of the Tribunal

Division 1—Building Disputes

Clause 93 establishes the Tribunal’s jurisdiction over building disputes.

93(1) allows a person involved in a building dispute to apply to the Tribunal to have the dispute heard and decided (this being the highest level of proceeding available).

93(2) provides a non-exclusive list of available powers to resolve building disputes, including payment of an amount, award of damages, relief of payment, restitution, variation of contracts to avoid injustice, avoidance of insurance policies under the statutory insurance scheme, orders for rectification or completion, and award of costs.

Clause 94 limits the Tribunal’s power to hear and decide building disputes in the case of major commercial building disputes to those where all parties consent to the Tribunal’s jurisdiction.

Clause 95 sets up a procedure to implement the intention of the previous section. Written consent of all parties, that must accompany the application starting the proceeding for a major commercial building dispute, must also include explicit acknowledgment that consent can not be withdrawn. The Tribunal is then, if it wishes, able to take the procedural step of holding a pre-hearing conference to establish if there are any other persons who should be joined as parties. Existing parties are then able to obtain the other person’s written consent and, only if consent is given, the Tribunal must use its power of joinder. No other steps may be taken in the proceeding until the consent is obtained.

Clause 96 deals with cases where it emerges subsequently that another person should be joined as a party. The Tribunal must order that the proceeding be removed to a court.

Clause 97 forbids withdrawal of consent, once given, for a major commercial building dispute to be heard by the Tribunal.

Clause 98 provides a range of interim orders to the Tribunal that are available for use to relieve a party during the course of a proceeding. These include rectification or completion of building work as defined by the Tribunal, and orders that an owner or a building contractor pay money into a

trust account, provide security, or pay the other party an amount.

98(3) requires the Tribunal to order application of security or payment of monies held in the trust account under an interim order when the relevant building work has been satisfactorily completed.

98(6) allows the discharge of security under 98(3) where an equivalent amount is paid to the contractor.

Clause 99 deals with jurisdictional overlap between the Authority and the Tribunal. Generally, starting a proceeding in the Tribunal stops the Authority using its powers to direct rectification of defective or incomplete building work.

Where the Authority has acted in a matter, say, by inspecting work, but has not yet used its powers, it may apply to the Tribunal (101(2)) for an order that the work be rectified or completed where it considers this urgently needs to be done. This addresses the possibility that a defaulting building contractor might start proceedings in the Tribunal deliberately to prevent the Authority using its powers to direct rectification.

99(2) clarifies the intent that directions issued by the Authority prior to a proceeding being started are not affected by this section.

Clause 100 provides that, if asked by the Tribunal, the Authority must provide the Tribunal with a report about a building dispute.

100(2) provides that a report under this section must be provided within the reasonable time stated by the Tribunal.

Clause 101 deals with matters where the Authority has taken action, but not issued a direction, and a proceeding is started. Where the Authority issues a direction, this fact is recorded on a publicly available register of licensees. It is desirable to prevent licensees from using proceedings in the Tribunal as a device to prevent notification of defective work on the Authority's register. This clause therefore requires the Tribunal to decide whether, in all the circumstances, the Authority should have issued a direction to rectify were it not for proceedings being started in the Tribunal.

101(3) requires applications by the Authority under 101(2) to be heard as expedited hearings, in order that interim orders can be made without delay.

Clause 102 removes doubt that the Tribunal can act to resolve a building dispute even though a contract is in operation.

Clause 103 allows the Tribunal to act to resolve a building dispute even though a party may be undergoing related disciplinary action or criminal proceedings.

Division 2—Proceedings for review

Clause 104 is an exclusive list of decisions of the Authority that are reviewable by the Tribunal under this division. Persons aggrieved at decisions other than reviewable decisions have access to judicial review under the *Judicial Review Act 1991*.

104(1) lists reviewable decisions.

104(2) lists decisions that are not reviewable. In respect of the Authority's powers to direct rectification of building work, access to the Tribunal's review jurisdiction is progressively inhibited, such that an application later in time cannot review all previous decisions, but only the most recent. It should be noted that, although the Authority has power to issue a direction to rectify requiring work to be undertaken sooner than 28 days, the decision remains reviewable out to 28 days.

Clause 105 sets out the procedure for filing and serving an application for review.

105(4) provides that the Tribunal may confirm, annul, vary or reverse a decision of the authority under this jurisdiction, and award costs.

Clause 106 allows the Tribunal to stay the operation of a decision the subject of a review application.

106(3) allows the Tribunal, as part of a stay order, to require the applicant in a review proceeding to give undertakings as to costs if appropriate in the circumstances. The intention of this provision is to prevent building contractors from using review applications merely as a device to delay the effect of the Authority's order for monetary gain.

Clause 107 allows the Tribunal to adjourn proceedings for review to allow the Authority and the applicant to reach an accommodation.

Division 3—Disciplinary proceedings

Clause 108 provides the Tribunal with a disciplinary jurisdiction on application by the Authority.

Clause 109 lists the grounds the Authority must establish for the Tribunal to take disciplinary action against a licensee. Most of the grounds do not involve the exercise of discretion by the Tribunal, being objectively either true or false. Grounds (c) and (d), however, require the Tribunal to be satisfied that the licensee is carrying on business with a person who is not a “fit and proper” person either to be in control of a licensed corporation, or in partnership with a licensee. Although there is no specific guidance for the Tribunal in assessing the establishment of this ground, the context provides a range of grounds to which the Tribunal may make reference. Ground (i) also concerns negligence or incompetence, although these carry objective meaning.

Clause 110 lists the grounds the Authority must establish for the Tribunal to take disciplinary action against a person other than a licensee, for example, an unlicensed builder. All grounds can be established on an objective basis.

Clause 111 sets out the disciplinary actions the Tribunal may take if the Authority is able to establish grounds.

111(2)-(4) list the orders the Tribunal may make against a person when grounds for disciplinary action have been established. These orders include penalties for amounts whose maxima are set as penalty unit equivalents (200 for an individual and 1,000 for a corporation), as well as orders to complete or rectify building work and licence limitations or cancellation.

111(3)(c) allows the Tribunal to order that the respondent for the order pay a building owner an amount sufficient to rectify or complete building work. This covers situations where neither an order to rectify or to have someone else rectify can redress the situation, such as emotionally charged situations involving a bitter dispute of long standing.

111(5) shows how the penalties are to be enforced—as debts to the Authority.

Division 4—Public Examinations

This Division sets out grounds and special procedures for the conduct of public examinations.

Clause 112 sets out the matters about which a public examination may be conducted. The Authority would need to state which among these are to be pursued in its application starting proceedings. In a public examination, the Authority as applicant is a party, and the persons summonsed to attend (the subjects of the examination) are also parties.

112(a) deals with the subject's past behaviour in broad terms. The Authority's application would need to indicate as specifically as possible the particular building work or contracting behaviour to be the subject of the examination.

112(b) deals with specific present conditions affecting licensees.

Clause 113 sets out the procedures to be followed before a public examination may be conducted.

113(1) sets out special service provisions for documents setting up the public inquiry. Although generally subject to the basic approved form provisions as applications starting other proceedings, the Tribunal must satisfy itself that the grounds for the proceeding, and the substance of any complaints upon which the proceeding is based are adequately set out. A higher standard of service than for other proceedings is also required—the Tribunal must be satisfied that documents have been received. Note: the Tribunal is also bound by section 41 to be bound in all its procedures by the rules of natural justice.

113(2) requires the Tribunal then to decide a time and place for the public examination. Because no outcome other than the public examination itself is sought by the Authority in its application, this is, for this proceeding, the final decision of the Tribunal and so may be subject to appeal.

113(4) then requires the Tribunal to serve on each person the subject of the proceeding, and on the Authority, a notice showing time and place and inviting any written submissions.

Division 5—Stop orders and suspension orders

Clause 114 allows the Tribunal, on application by the Authority, to issue an order prohibiting the carrying out of illegal building work. The work may be under way, or may not yet have commenced. This provision is akin to an injunctive power and would allow the Tribunal to stop, for example, an illicit demolition taking place. The person the subject of a stop order may show cause why the order should not continue in force and the order may be rescinded if the Tribunal is not satisfied that it should remain. Breach of a stop order is an offence carrying a maximum penalty of 500 penalty units.

Clause 115 allows the Tribunal to suspend a licence without notice to the licensee. This provision mirrors the Authority's power under its Act to suspend a licence with immediate effect, but properly allows greater discretion in terms of the grounds and duration of suspension. If a suspension is made without notice, the Tribunal must give the suspended person reasonable opportunity to show cause why the suspension order should be rescinded. If the Tribunal orders the surrender of the licence, failure to comply is an offence carrying a maximum penalty of 80 penalty units.

Division 6—Decisions about debts arising from the statutory insurance scheme

Clause 116 sets out orders the Tribunal may make on application by the Authority to recover debts arising under the statutory insurance scheme. The Authority is not stopped by this provision from bringing such a proceeding in a court, but it would expose itself to delay by doing so if the debtor applied at any stage for removal to the Tribunal. Orders available to the Tribunal include orders for interest and costs, and orders allowing payment by instalments. Such orders would be made in practice on the application of parties. The Authority would of course have a right to oppose instalment payment orders.

Division 7—Transfer of proceedings

Clause 117 deals with jurisdictional overlaps between the Tribunal and courts. Where the Tribunal has jurisdiction, any party to a proceeding before a court can apply for the proceeding to be removed to the Tribunal and the court must so order. For major commercial building disputes, that is where the consent jurisdiction applies, all parties must consent to any application for removal before a court can make such an order. The Tribunal may also order that all or part of a proceeding be removed to a court where it is of the view that it does not have jurisdiction. If a proceeding is removed to a court from the Tribunal, the court must deal with the matter and not remove it back to the Tribunal. This distinction applies because of the Tribunal's lower costs and specialist understanding of building disputes.

Part 6—Dispute Resolution Procedures Available to Tribunal***Division 1—General***

Clause 118 allows the Tribunal to conduct a hearing to decide any matter within its jurisdiction.

Clause 119 requires the Tribunal to give parties a reasonable opportunity to call and cross-examine witnesses, give evidence and make written submissions to hearings. The special provisions for expedited hearings apply despite this Division.

119(2) allows the Tribunal to limit or give directions about evidence and cross-examination at a hearing, and about time, as appropriate in the interests of justice and economy. This provision recognises that parties may be unsophisticated and have limited understanding of procedures.

119(3) allows a hearing to proceed even if a party has not appeared.

Clause 120 notes that the remaining Divisions of this Part set out alternatives available to the Tribunal to resolve proceedings.

Division 2—Decision by default

Clause 121 empowers the Tribunal to make default decisions for debts for liquidated amounts where an application has been made and the respondent has not filed a defence or counterclaim.

121(2) requires a request for default decision to be filed in the approved form and limits the amount to the amount originally claimed, plus the application fee, and legal costs and interest as prescribed by regulation.

121(3) and (4) allow the registrar to give a decision by default.

121(5) requires proof of service before a default decision can be given.

Clause 122 allows the Tribunal to set aside a default decision. This will allow a proceeding to continue where, for example, the respondent has a reasonable excuse for not filing a defence and counterclaim.

Division 3—Mediation

Clause 123 allows the Tribunal to appoint a mediator for building dispute and review proceedings. The mediator attempts to secure a negotiated settlement of the matters in dispute and may make no orders or decisions on behalf of the Tribunal. The registrar may exercise the Tribunal's power to appoint a mediator.

123(2) and (5) allow the parties to nominate a particular mediator and for that mediator to be appointed at the discretion of the Tribunal. If a nominated mediator is appointed, however, the parties are responsible for the costs of that mediator over and above the costs normally paid to a mediator appointed by the Tribunal on its own account. Mediators appointed other than under these provisions are paid by the Tribunal as a service to parties.

123(7) allows a mediator, including a mediator nominated by the parties, to be appointed only if the mediator has suitable qualifications and experience.

Clause 124 gives a discretion to the Tribunal to allow a mediation to be conducted by electronic means where appropriate.

Clause 125 forbids the admission of anything said or done in the course of a mediation in any other proceeding of the Tribunal.

125(2) requires the mediator to report to the Tribunal the issues each party considers are the issues in dispute, and the orders each party seeks.

125(4) requires the mediator to report to the Tribunal the terms of any settlement reached between the parties in the course of mediation.

125(5) provides a discretion for the Tribunal to make orders giving effect to the settlement. This discretion is provided as a safeguard against unsophisticated parties gravely disadvantaging themselves in mediation.

125(6) requires the Tribunal to keep the terms of a settlement confidential if requested by the parties.

Clause 126 debars a member of the Tribunal who has been appointed as mediator for a proceeding from doing anything else in the proceeding other than presiding at a pre-hearing conference.

Clause 127 limits the maximum time allowed for a mediation where a proceeding is listed for an expedited hearing to two and a half hours. This allows for same day hearing of minor domestic and relevant minor commercial building disputes as set out below.

Division 4—Expedited hearings

Clause 128 sets out the requirement to conduct an expedited hearing of minor domestic building disputes where mediation has not been successful.

128(2) gives the Tribunal discretion to conduct a hearing other than an expedited hearing on a minor domestic building dispute where it involves issues too complex for an expedited hearing to deal with adequately.

128(3) allows the Tribunal discretion to decide that a domestic building dispute other than a minor domestic building disputes may be dealt with at an expedited hearing where all parties so apply.

Clause 129 allows the Tribunal discretion to conduct an expedited hearing of a minor commercial building dispute for payment of a subcontractor in circumstances where no claim in the dispute is more than \$10,000 and the subcontractor files an affidavit stating (inter alia) that there is no complicating factor in the dispute, such as a claim about the standard of work to which the payment relates.

129(2) requires that all relevant documents be served and filed at least five days prior to any expedited hearing under this provision.

Clause 130 sets out procedures for an expedited hearing.

130(1) requires the filing and exchange of all relevant documents as directed by the Tribunal prior to a hearing.

130(2) sets out special procedures for expedited hearings. These are that cross-examination is allowed only at the discretion of the Tribunal; that the parties themselves must arrange the attendance of any witnesses supporting their cases; and that the time for the hearing may be limited at the direction of the Tribunal and allocated equally between the parties.

Division 5—Summary decision for applicant

Summary decision procedures allow matters not in dispute to be dealt with, and necessary decisions made, at an early stage in proceedings. Parties must therefore only wait for the Tribunal to decide matters actually in dispute.

Clause 131 allows the Tribunal to give summary decision for an applicant in a proceeding where the respondent has no defence other than a dispute about the amount of the claim, and the Tribunal decides there is no need for a hearing about that part of the proceeding where decision is sought.

131(3) allows the Tribunal to direct that the amount of a claim be calculated in a way it specifies, and to provide that that amount, when calculated, and costs, be given as decision.

131(4) allows, with the leave of the Tribunal, any number of applications for summary decision in a proceeding.

Clause 132 allows the Tribunal to give summary decision for a respondent in a proceeding where the application has no merit or the respondent has an adequate defence.

Clause 133 removes doubt that all matters in a proceeding not dealt with by summary decision continue.

Clause 134 requires evidence in any application for summary decision to be given by affidavit, and sets out standard affidavit requirements for summary decision.

Clause 135 requires service of affidavits and supporting documentation on the other party at least four business days before a matter can be dealt with by summary decision.

Clause 136 removes doubt that the Tribunal may order the attendance of parties, witnesses and other relevant persons and the production of documents in deciding an application for summary decision.

Clause 137 allows the Tribunal to give consequential directions if an application for summary decision is refused, or claims remain unresolved in a proceeding.

Clause 138 allows the Tribunal to award costs against an applicant for summary decision where the applicant was aware that another party had a case that would defeat the application.

Clause 139 removes doubt that the Tribunal may order a stay of enforcement of a summary decision, such as where other issues remain unresolved.

Clause 140 removes doubt that the Tribunal may vary or set aside a summary decision given against a party who did not appear.

Division 6—Case appraisals

Case appraisals are another tool for accelerating the resolution of a proceeding at minimum costs by allowing the matter to be dealt with “on the papers” without reducing the rights of parties to “have their day” in the Tribunal. Incentives are provided for parties to accept the decision of a case appraiser, however.

Clause 141 allows the Tribunal to refer a proceeding to a case appraiser to decide all issues in dispute where all parties apply for referral.

141(3) and (4) allow the parties to nominate a particular case appraiser and for that case appraiser to be appointed at the discretion of the Tribunal. If a nominated case appraiser is appointed, however, the parties are responsible for the costs of that case appraiser over and above the costs of a case appraiser appointed by the Tribunal on its own account. Case appraisers appointed other than under these provisions are paid by the Tribunal as a service to parties.

141(6) allows a case appraiser, including a case appraiser nominated by the parties, to be appointed only if the case appraiser has suitable qualifications and experience.

Clause 142 gives the case appraiser full power to decide all issues in dispute in place of the Tribunal.

Clause 143 sets up the general procedure that case appraisers follow, namely reliance upon the documents filed and served in a proceeding. The case appraiser may, however, consider oral evidence and allow cross-examination if necessary.

Clause 144 allows the case appraiser to obtain any additional information deemed necessary, with the Tribunal's leave or if the parties agree to pay the necessary costs. Where the Tribunal gives leave, the Tribunal is also to order the parties to pay the costs. Additional information obtained by a case appraiser must be disclosed to the parties.

Clause 145 allows the case appraiser to direct that the case appraisal be recorded.

Clause 146 requires that a case appraiser's decision be in writing, but need not state reasons, and that it be given to the parties.

146(2) allows a case appraiser to withdraw from the proceeding and refer it back to the Tribunal.

Clause 147 gives the case appraiser the same powers as the Tribunal in awarding costs, but requires the case appraiser in every case to include a decision on costs.

Clause 148 provides that the case appraiser's decision decides the proceeding unless a party elects to have the matter decided at a hearing as set out below.

Clause 149 deals with handling by the Tribunal of the case appraiser's decision, report and any records—they are to be sealed in a container and kept sealed unless ordered opened by the Tribunal.

Clause 150 allows a party dissatisfied with a decision of a case appraiser to elect to have the matter decided at a hearing of the Tribunal, in which case the case appraiser's decision ceases to have effect and the dispute is decided afresh.

Clause 151 requires the Tribunal, if a dissatisfied party elects to go to a hearing, to award costs against that dissatisfied party where the eventual decision is not more favourable to that party than was the case appraiser's decision.

Division 7—Pre-hearing conferences

This division sets up under one rubric the various interlocutory conferences the Tribunal may conduct to enable it to make procedural directions.

Clause 152 establishes the basis of a pre-hearing conference.

152(1) makes it clear that the Tribunal may direct any number of pre-hearing conferences.

152(2) provides a wide range of matters able to be dealt with at a pre-hearing conference. In particular, it removes doubt that the Tribunal may make interim orders about a proceeding at a pre-hearing conference.

152(4) requires pre-hearing conferences to be in private unless the Tribunal specifically directs otherwise.

152(5) makes it clear that all other procedures to be followed at a pre-hearing conference are at the discretion of the Tribunal.

Clause 153 allows the Tribunal to require the attendance of a party personally or a plenipotentiary representative at a pre-hearing conference.

Clause 154 prohibits the admission of anything said or done at a pre-hearing conference in other proceedings other than where parties agree, where the evidence is a direction given at the pre-hearing conference, or where the evidence relates to an offence or contempt.

Clause 155 requires a member who has presided at a pre-hearing conference to disqualify him or herself from hearing the proceeding where a party objects or otherwise at the member's discretion.

Clause 156 allows the Tribunal to make adverse directions against a party not attending a pre-hearing conference.

Division 8—Settlement offers

This Division encourages parties to make and accept reasonable settlement offers early in proceedings through incentives to accept offers. The discretion of the Tribunal regarding withdrawal acts as a safeguard against unsophisticated parties accepting unjust settlements without understanding the effects of withdrawal.

Clause 157 allows a party to make an offer to settle a proceeding as against any other party at any stage of a proceeding and to make as many offers as the party wishes. Offers for payment must, however, specify timing and terms of payment.

157(5) provides that payment offers may include terms that payment is made into the Tribunal's trust account.

Clause 158 provides that all offers are made without prejudice to the proceeding, and that the Tribunal is not to be told of any offer until after its final decision.

Clause 159 requires offers to be open to be accepted until just before the Tribunal's decision is delivered, or for them to state a shorter period for acceptance.

Clause 160 provides that the Tribunal may make a range of adverse orders against a party whose offer is accepted but who does not comply with its terms.

Clause 161 sets up incentives for acceptance of offers.

161(1) establishes that this section applies where an offer has been made and rejected, and the decision of the Tribunal is not more favourable to the rejecting party than the offer.

161(2) requires the Tribunal to award costs against the rejecting party.

161(3) limits the application of this section in proceedings involving more than two parties to settlement offers resolving all matters at issue.

161(4) limits the way the Tribunal calculates whether an offer was or was not more favourable than its decision in a proceeding to costs incurred up to the time the offer was made.

Part 7—Miscellaneous

Clause 162 declares the Tribunal to be part of the administering department for the purposes of the *Financial Administration and Audit Act 1977*, and provides that running costs are to be paid by the Queensland Building Services Authority at the written direction of the Minister.

Clause 163 allows the Tribunal to maintain a trust account for the purposes of holding funds for proceedings. Interest on the account is payable annually to the the Authority.

Clause 164 requires an annual report to be prepared by the chairperson for each fiscal year and forwarded to the Minister for tabling in the Legislative Assembly.

Clause 165 allows offences under this Act to be dealt with as summary offences.

Clause 166 limits the time for summary offence proceedings.

Clause 167 requires all penalties for offences under this Act to be paid to the Authority.

Clause 168 prohibits contracting out. This provision has effect on all contracts, even those entered into before this Act comes into effect.

Clause 169 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.

169(1) imposes a duty on executive officers to ensure that their company complies with this Act.

169(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.

169(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.

169(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 170 provides a limited exemption from the operation of the *Judicial Review Act 1991* for the Tribunal's exercise of powers in minor domestic building disputes. Merits appeal rights remain intact, however.

Clause 171 allows the Tribunal to accept the purported signature of the registrar or of a member as being the actual signature.

Clause 172 allows the Tribunal to accept certificates from the registrar as evidence of the things certified.

Clause 173 indemnifies officials for acts and omissions made in good faith under this Act. For this provision, officials include persons authorised by the Tribunal to enter and inspect property.

Clause 174 allows the chairperson to approve forms.

Clause 175 establishes a regulation-making power.

Clause 176 establishes a rule-making power.

Part 8—Transitional provisions

This Part deals with proceedings on foot when the Act commences, and what happens to members and records of the Tribunal as previously established under the existing Act.

Division 1—Definitions

Clause 177 sets up definitions for this Division.

Division 2—Transitional matters

Clause 178 requires proceedings started in a court or in the Tribunal before commencement to continue under the existing Act.

Clause 179 allows a member of the former Tribunal to continue to hear a proceeding on foot at commencement.

Clause 180 removes doubt that proceedings in a court where the Tribunal under this Act has jurisdiction continue under the existing Act.

Clause 181 allows proceedings about matters arising before commencement to be started under this Act, but not for proceedings started before commencement to be re-started under this Act.

Clause 182 deems records of the former Tribunal to be records of the Tribunal under this Act.

Part 9—Consequential and other amendments

Clause 183 provides that Schedule 1 amends the existing Act.

Schedule 1—Consequential and other amendments of Queensland Building Services Authority Act 1991

Clause 1 omits reference to dispute resolution from the objects of the Act.

Clause 2 renumbers the objects of the Act consequent on the above.

Clause 3 inserts a relevant reference.

Clause 4 omits references to repealed provisions from the section relating to matters to be included on the register of licensees, and substitutes relevant references.

39(3)(c) gives practical effect to the provision of the *Queensland Building Tribunal Act 1999* requiring the Tribunal to decide in certain circumstances whether the Authority should, but for start of proceedings in the Tribunal, have issued a direction to rectify or complete building work.

Clause 5 omits a repealed reference and substitutes a relevant reference.

Clause 6 updates a reference to include the terms used in the Tribunal Act.

Clause 7 omits a repealed reference and substitutes a relevant reference.

Clause 8 defines the Tribunal for the purposes of section 42, which has retrospective application, as being the Tribunal under the former Act.

Clause 9 amends a provision to conform with drafting style.

Clause 10 amends a provision to conform with drafting style.

Clause 11 amends a provision to conform with drafting style.

Clause 12 gives practical effect to the Tribunal's powers to issue a stay order on a review application, and to the provisions dealing with jurisdictional overlap between the Authority and the Tribunal.

Clause 13 omits those Parts of the existing Act dealing with the establishment and jurisdiction of the Tribunal.

Clause 14 omits a repealed reference and substitutes a relevant reference.

Clause 15 omits a repealed reference and substitutes a relevant reference.

Clause 16 omits a repealed reference and substitutes a relevant reference.

Clause 17 omits an obsolete reference.

Clause 18 omits obsolete definitions.

Clause 19 establishes necessary definitions for the existing Act.