Building and Other Legislation Amendment Bill 2022

Explanatory Notes

Short title

The short title of the Bill is the Building and Other Legislation Amendment Bill 2022 (the Bill).

Policy objectives and the reasons for them

Queensland's $47 billion construction industry employs around 230,000 people and is integral to the state's economy, employment market and training apprenticeship programs. Amendments are needed to clarify and modernise Queensland's building and plumbing laws to assist in delivering Queensland's forward program of building reform, reflect the outcomes of recent court decisions and implement initiatives outlined in the Queensland Building Plan.

The objectives of the Bill are to:

- support contemporary consumer expectations about efficiency of buildings through amendments to legislative provisions regarding:
    - 'ban the banners' – solar hot water systems and solar panels
    - expanded use of greywater
    - holding tanks for sewage and greywater
- enhance the efficacy and transparency of the regulatory framework through amendments to legislative provisions regarding:
    - head contractor licensing
    - sharing information on investigation outcomes
    - decision making
- improve the operation of building-related legislation through minor technical amendments.

Contemporary consumer expectations about efficiency of buildings

Ban the banners – solar hot water systems and solar panels

The original policy intent of the 'ban the banners' policy was to ensure developer covenants and body corporate by-laws could not inhibit the installation of solar hot water systems or solar panels, including by restricting where the panels or hot water systems could be located, on the roof of a home or garage, solely on the basis of aesthetics. A court decision has affected the efficacy of the provisions, making it necessary to amend the provisions to clarify the original policy intent.

It is proposed that the 'ban the banners' provisions will be amended to clarify the original policy intent for the provisions, so a homeowner may install a solar hot water system or solar panels on the roof, or other external surface, of their home or garage, without regard to aesthetics. This will encourage homeowners to use solar energy.

Expanded use of greywater

Factors such as population growth, which increases demand on existing water supplies; climate change; recognition of the need for more sustainable buildings; and increased demand for green star commercial developments, require more responsible and innovative ways to use resources such as water.

Amendments in the Bill are required to allow treated greywater to be used in cooling towers for air conditioning that serves large building developments. Amendments are also required to allow the treated water to be used for other purposes, including for flushing toilets.

The amendments are intended to facilitate the proposed uses of treated greywater while ensuring public health outcomes are maintained through appropriate regulatory oversight.

Holding tanks for sewage and greywater

If premises are located in an area served by a sewerage system, sewage from the premises must be discharged into the sewerage system. This requirement can be costly and impractical for temporary premises, such as toilets on a construction site.

Where premises are not in an area served by a sewerage system, sewage and greywater from the premises must be discharged into a facility that treats the matter before it can be held in a holding tank for collection and disposal off-site. This requirement is problematic where there is insufficient space on the property to accommodate such a treatment facility.

The Bill will enable an owner of premises, under a permit issued by the local government, to discharge untreated waste and water from a toilet or soil fixture (sewage), or greywater, or both types of waste, directly into a holding tank for collection and disposal off-site. For holding tanks installed in sewered areas it is proposed that such a permit would state the period for which the holding tank could be used for the discharge and disposal of untreated matter.

The option to discharge untreated matter directly into a holding tank, under a permit issued by the local government, will provide a safe, practical and cost-effective solution to the problems mentioned above.

Efficacy and transparency of the regulatory framework

Head contractor licensing

Section 42 of the *Queensland Building and Construction Commission Act 1991* (QBCC Act) provides that, unless exempt under schedule 1A, a person must not carry out, or undertake to carry out, building work unless they hold an appropriate licence. However, under section 8, schedule 1A, an unlicensed head contractor may enter into building contracts and arrange for building work to occur (i.e. procure building work), provided the work is not residential construction work or domestic building work and is carried out by an appropriately licensed contractor.

Section 125A of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (BIFOLA Act) repeals this licensing exemption for head contractors. This section was included to implement a recommendation made by the then Transport and Public Works Parliamentary Committee during consideration of the BIFOLA Bill, following feedback about alleged misuse of the licensing exemption.

On 8 July 2021, following further stakeholder feedback, a postponement regulation was made to extend the automatic commencement of this provision from July 2021 to 24 July 2022 and enable consultation on the issue and ensure a smooth transition to the new requirements.

Subsequent consultation has showed reliance on the exemption in commercial contracting, including development agreements, agreement for lease, and numerous projects and contracts that involve a minor element of building work. If the repeal were to proceed, such businesses would likely face increased administrative and cost burdens to undertake work which is ancillary to their business.

However, concerns remain that the licensing exemption may allow entities to circumvent Queensland's licensing system, e.g. minimum financial requirements and security of payment protections. Concerns also exist that when unlicensed persons or entities assume the role of head contractor, they may not have sufficient skills and experience to administer and manage the procurement of building work, particularly in complex projects or high-risk work that impacts life safety, such as mechanical services or fire protection.

These concerns and potential impacts of the repeal are addressed through reinstating the section 8 exemption. However, where the exemption should not apply, due to the circumstances outlined above, the Bill provides that a regulation under the QBCC Act may require particular head contractors to obtain a licence, for example, those who engage in high-risk work. These amendments will provide Government with flexibility to respond to emerging issues, as they arise, while also facilitating commercial contracting by allowing most unlicensed head contractors to continue entering building contracts that offer to procure building work.

Sharing information on investigation outcomes

Section 110 of the QBCC Act provides that if a person obtains information in exercising a power or performing a function under the Act, they must not disclose these to any person, for any purpose. Current drafting suggests that the Queensland Building and Construction Commission (QBCC) cannot advise complainants of the outcome of their complaint, which hinders subsequent actions that may be contingent on the outcome.

Complainants may include homeowners, unit owners, neighbours, subcontractors and employees, with complaints relating to a wide range of potential offences under legislation administered by QBCC including the QBCC Act, *Building Act 1975* (Building Act), *Plumbing and Drainage Act 2018* (Plumbing and Drainage Act) or the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act).

Complainants may seek information regarding their complaint for a variety of reasons. For example, the outcome of QBCC's investigation may directly impact the complainant's decision to pursue the matter in court, or it may involve structural or safety concerns. Presently, complainants must lodge an application under the *Right to Information Act 2009* (RTI Act) to obtain further detail about their complaint.

As the RTI process is intended to be a method of last resort, it is considered that complainants should not need to use the RTI process to discover the outcome of their complaint. Other government agencies, including local governments, are required to provide complainants with information relating to the outcome of complaints, and it is considered that this should also apply to QBCC. It is also anticipated that providing QBCC with the ability to disclose complaint outcomes to complainants, particularly those directly affected by the subject matter once it is finalised will also reduce regulatory burden.

Decision making

Power for the QBCC to commence prosecutions for offences relating to the combustible cladding checklist

QBCC and local governments can issue an Infringement Notice for combustible cladding checklist offences. However, where local governments can also commence court proceedings, under the Building Act, QBCC requires express permission from the relevant local government to commence a proceeding. As the administrator of the cladding checklist and industry regulator, QBCC is considered better placed to take enforcement action for breaches of offences relating to the combustible cladding checklist process.

Immediate suspension of a QBCC licence

Currently, QBCC can only immediately suspend a QBCC licence under section 49A of the QBCC Act if it reasonably believes there is a real likelihood that serious financial loss or other serious harm will happen to any of the following: other licensees, employees of other licensees, consumers, and suppliers of building materials or services.

Amendments are needed to promote public safety and consumer protection by expanding the power of QBCC to immediately suspend a licence, so that it can effectively respond to risks of serious harm or financial loss to all persons, not just those currently listed under section 49A.

Circumstances that may enliven the QBCC's power to immediately suspend a QBCC licence, may include risks posed to an employee of a licensee when undertaking building work, risk of a brick wall falling onto passing pedestrians, or significant damage sustained to a neighbouring property as a result of building work being undertaken.

Security of payment

The BIF Act commenced in 2017 and sought to provide effective, efficient and fair processes for securing payment, particularly for subcontractors. This was achieved by consolidating, modernising and simplifying provisions and implementing new and revised processes, including for progress payments and adjudication.

The *Building Industry Fairness and Other Legislation Amendment Act 2020* (BIFOLA Act) introduced several key measures on 1 October 2020, which immediately strengthened protections for subcontractors at a time when industry was particularly vulnerable. These included supporting statement requirements for head contractors, payment withholding requests, charges over property and a new offence for failing to pay a scheduled amount.

A new streamlined trust account framework (the framework) also commenced on 1 March 2021, initially applying to the Project Bank Account (PBA) cohort (i.e. eligible building and construction contracts valued between $1 million and $10 million). The framework will progressively expand to all eligible public and private sector contracts.

The Bill will ensure that the head contractor licensing exemption under section 8, Schedule 1A, of the QBCC Act is not repealed by the BIFOLA Act. This circumstance may result in a more complex contractual chain and subcontractors being pushed out of the normal protections afforded. Amendments to the BIF Act and Building Industry Fairness (Security of Payment) Regulation 2018 (BIF Regulation) are required to ensure subcontractors are protected by a project and retention trust account when the exemption is used. Therefore, the Bill amends the BIF Act to include a regulation-making power to prescribe additional contracts and subcontracts that require a retention trust account. This will address circumstances when a head contractor relies on the licensing exemption. It will operate in the same manner as an existing BIF Act provision for prescribing contracts that require a project trust account by regulation.

Section 41 of the BIF Act requires the trustee of a retention trust account or another person(s) nominated by the trustee to complete the retention trust training prescribed by regulation within the period required by regulation. The trustee is required to inform QBCC of each nomination and the trustee may change the nominee at any time such as where the previous nominee is no longer responsible for administering the retention trust account. The trustee is also liable for all costs associated with the trustee or a nominated person completing the retention trust training.

The retention trust training requirement commenced on 1 January 2022 and QBCC provides the training free of charge. However, the training will be subject to an evaluation after full implementation of the framework. If the training model changes following the evaluation, for example becomes more complex, it may be necessary for QBCC to charge the trainee a suitable fee. The current provision, section 41 of the BIF Act, does not provide a regulation-making head of power to prescribe a fee for providing the training.

To provide flexibility, the Bill amends section 41 of the BIF Act to provide that QBCC may charge a training fee prescribed by regulation, if required in future. The Bill also amends the heading of section 41 of the BIF Act to be ‘retention trust training’. This is because the current heading (Training before withholding retention amount) does not reflect the policy intention. The legislation currently requires the trustee to complete the training within certain timeframes after withholding the first retention amount (e.g. 20 business days after the first retention amount is withheld).

The BIF Act also contains requirements for the administration of a trust account and other obligations on the trustee in relation to compliance with the trust framework. The trustee is responsible for ensuring these requirements and obligations are met.

A trustee is required to obtain external review of a trust account in certain circumstances, through an account review report prepared by a registered company auditor. Feedback has indicated that it would be desirable to clarify the ambit of the account review report and expectations on the auditing profession. This includes making clear that the review will only assess compliance as it relates to the administration of the trust account, and not the broader obligations that the trustee must meet under the BIF Act, for example, whether a withdrawal from an account aligns with contractual entitlements.

Auditors must prepare and provide account review reports to QBCC and the trustee. The auditor must currently provide a statement as to whether or not "the trustee has complied with all the requirements for the relevant trust account under this Act". The auditor will conduct the review based on a methodology as outlined in ASAE 3100 (Compliance Engagements) for conducting a reasonable assurance engagement on compliance.

There is currently some inconsistency between the use of certain terms in the BIF Act compared to the same terms in the applicable Auditing and Assurance Standards Board (AUASB) standards. This has led to some initial confusion by the auditing professional bodies which has required clarification. For example, when the BIF Act refers to a 'review', it is intended to represent a 'reasonable assurance engagement' or audit under the applicable AUASB standards. However, the auditing profession's historical understanding of the standards is that a 'review' represents a 'limited assurance engagement' and that an 'audit' represents a 'reasonable assurance engagement'. This is just a difference in terminology between the Queensland legislation, the Commonwealth standards and industry understanding, but it is appreciated this difference could be confusing for the auditing profession.

Additionally, the requirements of the BIF Act in combination with the 'review' terminology may confuse an auditor on what type of compliance engagement they are performing. This is because the BIF Act requires a certification that provides the auditor's 'opinion' on whether the trustee has complied (i.e. expressed in the positive form). The AUASB standards define the 'limited assurance engagement' as one with a conclusion about whether a matter has come to their attention to cause them to believe the compliance requirements have not been met (i.e. expressed in the negative form). If an auditor believes, based on the word 'review', that a limited assurance engagement is intended, they may not be clear how they can provide an opinion expressed in the positive form.

The amendments of the BIF Act clarify that the "review" is expected to be a "reasonable assurance engagement." They also make it clear that an account review report is one that says whether or not the trustee has complied with the relevant requirements of the BIF Act.

The Bill also amends auditing provisions of the BIF Act to refer to the relevant trustee requirements in relation to the administration of the trust account under Chapter 2 of the BIF Act rather than the broader terminology of 'all requirements for the trust/account under this Act'.

The amendments also clarify what the reporting threshold is for auditors and what breaches may constitute a 'serious breach' that must be promptly reported to QBCC within 5 business days of finding the breach. The amendments outline what are serious breaches and clarify that it includes a wilful breach by the trustee of a chapter 2 requirement that has or is likely to cause financial loss to a beneficiary of the trust; or a repeated failure by the trustee to comply with one or more chapter 2 requirements. The amendments intend to differentiate between promptly reporting serious breaches directly to QBCC versus highlighting minor breaches and contraventions in the account review report required under the Act.

Rights of review of decisions on pool safety management plans

Minor amendments of the Building Act, complemented by amendments of the QBCC Act, are required to address inconsistencies that exist in both the Building Act and the QBCC Act in relation to review rights for decisions made by QBCC about pool safety matters.

The amendments are required to allow a person who is dissatisfied with a decision made by QBCC about a pool safety management plan, under the Building Act, to apply for an internal or external review of the decision under the QBCC Act. Review rights for decisions by QBCC about other pool safety matters are already available under the QBCC Act.

Enforcement notices under the Planning Act 2016

Under the Plumbing and Drainage Act, a local government may give a plumber an enforcement notice requiring the plumber to rectify plumbing or drainage work. Under the Act, a local government also has the power to give an enforcement notice to a homeowner requiring them to rectify defective plumbing or drainage on their premises. Under the *Planning Act 2016* (Planning Act), an enforcement notice may be issued requiring a person to refrain from committing a development offence or remedy the effect of a development offence. The Planning Act provides for appeals against decisions to give enforcement notices.

Amendments of the Planning Act are required to clarify and expand provisions in that Act that deal with appeals against decisions to give enforcement notices under the Plumbing and Drainage Act. The proposed amendments will ensure the Planning Act adequately provides for appeals against decisions to give enforcement notices under the Plumbing and Drainage Act as well as decisions to give enforcement notices under the Planning Act.

Failure to decide application or other matter under the Building Act

Decision makers under the Building Act include local governments, QBCC (including the QBCC Commissioner), the Chief Executive, building certifiers and pool safety inspectors.

A person who is dissatisfied with a decision made by QBCC may apply for an internal or external review of the decision under the QBCC Act. By contrast, a person who is dissatisfied with a decision under the Building Act, other than a decision made by QBCC, may appeal against the decision to a development tribunal, under the Planning Act.

Further, under the Planning Act, a person who is dissatisfied by a failure of a local government to decide an application under the Building Act, within the period required under that Act, may appeal against the failure under the Planning Act. However, a person who is dissatisfied by a failure of another type of decision maker, other than QBCC, to make a decision within the required period does not currently have the right to appeal against that failure.

Amendments of the Planning Act are required to ensure a person who is dissatisfied with a failure of any decision maker, other than QBCC, to make a decision within the period required under the Building Act will be allowed to appeal against that failure.

The proposed amendments of the Planning Act will align provisions in the Planning Act for the Building Act that deal with a failure to make a decision on time with similar provisions in the Planning Act that already exist for the Plumbing and Drainage Act.

<u>Minor and technical amendments</u>

Amendments of Architects Act 2002 and Professional Engineers Act 2002

Architects and registered professional engineers play a crucial role in the design and

construction of safe buildings. In Queensland, architects and registered professional engineers are regulated by the Board of Architects of Queensland (BOAQ) and the Board of Professional Engineers of Queensland (BPEQ) (the Boards) under the *Architects Act 2002* (Architects Act) and the *Professional Engineers 2002* (PE Act), respectively.

These Acts are similar in operation and seek to promote public safety by ensuring that architectural and professional engineering services are only provided by qualified, registered practitioners and that these services are of a high standard.

Minor, primarily technical amendments to the Architects Act and PE Act are necessary to clarify and improve operation of some existing provisions, for example to reflect the digital age, as well as current operational, business and drafting practices.

Repeal of Building Act provisions not yet commenced

Provisions introduced in 2020 were intended to encourage former certifiers, who could not meet licensing accreditation requirements, back into the certification profession. The provisions were introduced when concerns existed about an ageing and shrinking certification workforce, as well as the affordability and accessibility of professional indemnity (PI) insurance. The number of certifiers in Queensland has stabilised since passage of the provisions and measures have been implemented to help address the uncertainty about PI insurance. Therefore, the Bill repeals provisions, which have not yet commenced, which established the alternative recognition pathway.

Miscellaneous amendments of the QBCC Act

Several minor, operational amendments to the QBCC Act are necessary to improve government and regulator processes and clarify existing provisions. These amendments are required to extend QBCC's ability to share relevant information with Queensland statutory bodies, such as those involved in regulating other elements of the building industry like QLeave. Other amendments are necessary to clarify that both committing offences and contravening requirements under relevant legislation (QBCC Act, BIF Act and Building Act) are grounds for disciplinary action for current and former QBCC licensees, as well as update a range of definitions or terms to ensure the provisions achieve their original policy intent.

Achievement of policy objectives

The Bill achieves its objectives by amending the following legislation:

- *Architects Act 2002*
- *Building Act 1975*
- *Building Industry Fairness (Security of Payment) Act 2017*
- *Planning Act 2016*
- *Plumbing and Drainage Act 2018*
- *Professional Engineers Act 2002*
- *Queensland Building and Construction Commission Act 1991*.

Contemporary consumer expectations about efficiency of buildings

Ban the banners – solar hot water systems and solar panels

The Bill includes proposed amendments clarifying the original intent for sections 246O, 246Q and 246Q of the 'ban the banners' provisions. The amendments of those sections restrict the purposes for which a developer or a body corporate may, through a relevant instrument, inhibit the installation of a solar hot water system or solar panels (solar infrastructure) on the roof of a home or garage, to limited purposes that do not relate to the enhancement or preservation of the external appearance of the building or the residential estate.

These amendments will ensure a homeowner is allowed to install a solar hot water system or solar panels in their preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics.

New sections 356 and 357, which are transitional provisions, together with the amended versions of sections 246O, 246Q and 246S, provide relief for any homeowner who has been inhibited from installing solar infrastructure, on the basis of aesthetics, since 1 January 2010. This is the case even if an agreement, proceeding, order or other action was enforcing the inhibition immediately before the commencement of the amendments. The amendments will ensure the homeowner is allowed to install solar infrastructure in their preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics.

Expanded use of greywater water

The Bill introduces a new head of power that will allow treated greywater to be used for a prescribed use. Use of treated greywater for a prescribed use will only be permitted if the treatment plant meets the prescribed requirements for the plant relating to its capacity and the quality of the water it produces. The head of power will allow a regulation to prescribe a range of uses for treated greywater.

It is intended that the *Plumbing and Drainage Regulation 2019* (Plumbing and Drainage Regulation) will prescribe the use of treated greywater for cooling towers for air conditioning in large building developments. The head of power will provide flexibility to prescribe other uses of treated greywater.

The Plumbing and Drainage Regulation will provide the regulatory framework for prescribed uses of treated greywater to ensure that public health and safety are maintained. This framework will limit the types of uses that are permitted. It will also ensure the greywater must be treated by a treatment plant that has an appropriate capacity for the prescribed use. Further, it will specify the quality of the water the plant must produce for the use. The new head of power mentioned will allow the Regulation to prescribe additional requirements for the use.

The regulatory framework provided for in the Regulation will help ensure appropriate health and safety outcomes are achieved. If there are any breaches of the requirements in the framework, powers in the Plumbing and Drainage Act, the *Public Health Act 2005* (Public Health Act) and the *Work Health and Safety Act 2011* (Work Health and Safety Act), including powers to issue enforcement notices or start prosecutions, may be used to deal with those breaches.

Holding tanks for sewage and greywater

Amendments in the Bill allow the owner of premises to discharge untreated waste and water from a toilet or soil fixture, or greywater, or both types of waste, directly into a holding tank for collection and disposal off-site by a truck, under a permit issued by the local government. The permit allowing the installation will state the period for which the holding tank can be used for the storage of untreated matter before it is collected for disposal off-site.

Efficacy and transparency of the regulatory framework

Head contractor licensing

To address concerns raised during consultation, the Bill will prevent the repeal of the head contractor licensing exemption contained in section 8, schedule 1A of the QBCC Act. However, the amendment provides that the exemption will not apply if a regulation is made requiring the head contractor to be licensed. A regulation may be made for individuals undertaking high risk work such as fire protection and mechanical services.

Complementary amendments to the BIF Act will be made to ensure retention trust account protections apply to the majority of subcontractors in contractual scenarios involving the exemption.

Sharing information on investigation outcomes

Provisions in the Bill clarify that QBCC may disclose the outcome of an investigation to a complainant once the investigation is finalised, to support consumer outcomes and address operational issues caused by section 110 of the QBCC Act.

Decision making

Power for QBCC to commence prosecutions under the combustible cladding checklist

The amendment in the Bill will provide QBCC with express power to take enforcement action (to enforce Part 4A of the *Building Regulation 2006*, as preserved through section 95 of the *Building Regulation 2021*). This amendment gives QBCC the same enforcement powers as local governments regarding offences relating to the combustible cladding checklist.

This amendment does not change local government powers and is consistent with messaging and community expectations that QBCC regulates the industry and oversees the combustible cladding checklist program.

Immediate suspension of a QBCC licence

Currently, QBCC can immediately suspend a licence in response to risks of serious harm or financial loss to QBCC licensees, their employees, consumers and suppliers. To promote public safety and consumer protection, the Bill expands the power of QBCC to immediately suspend a licence in response to risks of serious harm or financial loss to any person. This ensures QBCC is equipped with necessary powers to respond to risks of serious harm or financial loss to a person by ensuring building work is immediately halted.

Security of payment

The policy objectives of the Bill in relation to security of payment are to be achieved by amending the BIF Act to:

- include a regulation-making power to prescribe additional contracts and subcontracts that require a retention trust account when a head contractor relies on the licensing exemption under section 8, Schedule 1A of the QBCC Act
- include a regulation-making power that will allow QBCC to charge a fee for delivering retention trust training in future, if required
- clarify the ambit of the account review report requirements and expectations on the auditing profession, including reporting on non-compliance to QBCC.

Rights of review of decisions on pool safety management plans

Minor amendments of the QBCC Act, complemented by amendments of the Building Act, allow a person who is dissatisfied with a decision made by QBCC about a pool safety management plan, for a swimming pool, to apply for an internal or external review of the decision under the QBCC Act. The amendments address anomalies that exists in the Building Act and the QBCC Act.

Enforcement notices under the Planning Act

Amendments in the Bill clarify and expand provisions in the Planning Act that deal with appeals against decisions to issue enforcement notices. The amendments will ensure the Planning Act adequately provides for appeals against decisions to give enforcement notices under the Plumbing and Drainage Act as well as appeals against decisions to give enforcement notices under the Planning Act.

Failure to decide application or other matter under the Building Act

Amendments in the Bill clarify that a person who is dissatisfied with a failure of any decision maker, other than QBCC, to make a decision within the period required under the Building Act may appeal against that failure, if an information notice about the decision was required to be given under that Act. Currently, it is only possible to appeal against a failure of a local government to decide an application within the period required under the Building Act.

<u>Minor and technical amendments</u>

Amendments of Architects Act 2002 and Professional Engineers Act 2002

To ensure the provisions reflect current operational, business, and drafting practices, amendments in the Bill will:

- require the Boards to make certain information available online, in addition to being available for inspection in their offices
- clarify when the Board's offices are open to the public
- remove outdated references regarding how the Boards manage their common seal.

To clarify the original policy intent, amendments in the Bill will provide that:

- if a Board member resigns by notice given to the Minister, resignation takes effect on the day the notice is given or a later specified date

- Board appointed staff are afforded the same civil liability protections as other staff under the Architects Act and PE Act and the Queensland public service.

Repeal of Building Act provisions not yet commenced

Sections 46, 47 and 48 of the BIFOLA Act amend the Building Act to allow individuals who are not members of an accreditation standards body to apply for a building certifier licence (alternative pathway to licensing). The provisions were originally progressed when concerns existed about the shrinking certification workforce and the availability and accessibility of professional indemnity (PI) insurance. These provisions have not yet commenced and are no longer considered necessary as the number of qualified certifiers in the sector has stabilised and a professional standards scheme limiting liability has been introduced to assist in addressing the PI insurance issues.

Miscellaneous amendments of the QBCC Act

The Bill also provides the following amendments to improve the operation of the QBCC Act:

- expands the bodies with which QBCC may enter into information-sharing arrangements to include Queensland statutory bodies, such as those involved in regulating other elements of the building industry
- clarifies that the definition of 'consumer' does not capture a subcontractor for the purposes of the Queensland Home Warranty Scheme, to ensure only one premium is raised for residential building work
- corrects a typographical error that refers to the 'statutory insurance assistance scheme' instead of 'statutory insurance scheme'
- replaces the reference of 'general manager' to 'commissioner' in section 22(2) of the QBCC Act
- clarifies that any contravention of relevant building-related legislative requirements by a licensee or former licensee, regardless of whether they are described as 'requirements' or 'offence provisions', will constitute proper grounds for disciplinary action.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives other than by legislative amendment. The legislative reform will be supported by communication to industry and consumers, which will occur on implementation.

Estimated cost for government implementation

Amendments of the QBCC Act support QBCC in regulating the industry and are therefore expected to have minimal impact on QBCC resources.

Amendments of the Architects Act, Building Act, PE Act, Planning Act and Plumbing and Drainage Act are not expected to present significant additional administrative or capital costs for government, including QBCC and the Boards. Any implementation costs will be absorbed from existing resources.

Amendments of the BIF Act are not expected to result in a significant cost to government, including QBCC.

Consistency with fundamental legislative principles

The Bill has been drafted having regard to the fundamental legislative principles (FLPs) in the *Legislative Standards Act 1992* (LSA). The principles include requiring that legislation has sufficient regard to—

- rights and liberties of individuals; and
- the institution of Parliament.

Potential FLP breaches are addressed below.

Legislation should have sufficient regard to rights and liberties of individuals – LSA, section 4(2)(a)

Legislation should be consistent with the principles of natural justice – LSA, section 4(3)(b)

Section 4(3)(b) of the LSA provides that whether legislation has sufficient regard to the rights and liberties of individuals may depend on whether legislation is consistent with principles of natural justice. The following areas have been identified as matters relevant to the consideration of whether the provisions in the Bill are consistent with the principles of natural justice.

Absence of a show cause process

Legislation should be consistent with the principles of natural justice, which encompass the entitlement of a person be heard and given a reasonable opportunity to present their case and respond to any adverse material of which the decision-maker has informed itself.

The amendments in Clause 61 of the Bill relating to QBCC's ability to immediately suspend a licence (in the absence of a show cause process) when it reasonably believes there is a risk of serious harm or financial loss to a person, is a potential departure from this principle.

Procedural fairness, however, involves a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. The usual requirements of natural justice may be reduced by circumstances of urgency or a risk to public safety.

The purpose of these provisions is to promote the safety and welfare of all persons, as well as consumer protection, by allowing QBCC to immediately halt building work when there is a risk of serious harm or financial loss a person. The Bill includes a range of safeguards to ensure the powers of QBCC are not misused. For example, QBCC's operational processes require an established evidence base and application of a high existing threshold of "a real likelihood that serious financial loss or other serious harm will happen" to a person when undertaking a decision to suspend a licence. Furthermore, the delegation to exercise this power rests exclusively with the Chief Executive Officer/Commissioner of QBCC, mitigating any risk of potential misuse.

Clause 61 does not prevent affected licensees from seeking avenues to review QBCC's decision to immediately suspend the licence, including the ability to seek redress through the Queensland Civil and Administrative Tribunal to contest the decision to suspend the licence and potentially pursue damages. In addition, existing provisions in section 49A of the QBCC

Act provide that the immediate suspension lapses if QBCC does not proceed within 10 days with a notice to cancel or suspend a licence under section 48 of the QBCC Act, which provides a show cause process.

These provisions adequately balance the rights and protections of maintaining the safety and welfare of the public by protecting all persons, against the rights of the licensee to have procedural fairness in a way that is considered consistent with FLPs.

Immunity from civil liability

Equality under the law is a basic concept of justice, requiring that in the absence of justification to treat persons differently, all persons should be treated in the same way. Clauses 11 and 58 of the Bill clarifies that staff appointed directly by the Boards are 'relevant persons' who are not civilly liable for an act done, or omission made, honestly and without negligence under the Act. This may be a potential departure from this principle.

There may be justification for immunity if it is necessary for the administration of an Act. As the Boards perform unique regulatory and compliance functions, Board appointed staff may be involved in administrative actions to discharge these functions. Exposure to civil liability may make the tasks required by Board appointed staff difficult, or prohibitively costly, to perform. It is important that they are not deterred from exercising their skill and judgment due to fear of personal legal liability. The departure is therefore justified, as the clauses create certainty among Board appointed staff when undertaking their functions and operations.

The effects of the departure are also mitigated, by providing that persons unable to take civil action against Board appointed staff can still seek legal redress from the Boards. Further, immunity is limited to civil liability where the Board appointed staff member act honestly and without negligence. This allows persons to take legal action against a Board appointed staff member personally for the tort of negligence, or other civil wrongs where the Board appointed staff member acted dishonestly, recklessly, unreasonably or excessively.

These provisions adequately balance the effective operation of the Boards against the rights of persons wishing to pursue civil action against a Board appointed staff member in a way that is considered consistent with FLPs.

Privacy and confidentiality

The right to privacy, the disclosure of private or confidential information, and privacy and confidentiality issues is relevant to the consideration of whether legislation has sufficient regard to the rights and liberties of individuals.

Clause 60 of the Bill expands QBCC's ability to enter an information-sharing arrangement under section 28B of the QBCC Act to include Queensland statutory bodies. An information-sharing arrangement authorises QBCC to ask for and receive information held by another agency, as well as disclose information to the other agency. A person's privacy may be interfered with to the extent that information shared between agencies includes personal information. The departure is justified as the amendments promote QBCC's ability to undertake its functions in relation to ensuring the maintenance of proper standards in the industry and integrity of industry participants. The facilitation of information-sharing with

relevant agencies will ensure QBCC can effectively perform its role as a regulator and effectively identify and address offending behaviour.

The effects of the departure are also mitigated, as the QBCC Act provides safeguards to restrict the impact of the limitation. For example, an information-sharing arrangement may relate only to information that assists QBCC or the other agency to perform its functions, or the disclosure of information reasonably necessary for to protect the health or safety of a person or property.

These provisions adequately balance QBCC's ability to efficiently and effectively undertake their compliance and enforcement activities against the right to privacy in a way that is considered consistent with FLPs.

Clause 65 of the Bill provides that QBCC Commissioner may disclose the result of an investigation to a complainant. While it is intended that the Commissioner will delegate this function, the Commissioner must, under the QBCC Act, only delegate functions to appropriately qualified persons (i.e. those with the qualifications, experience or standing appropriate to perform the function). This will help ensure that any result information is provided with appropriate sensitivity and in accordance with the *Information Privacy Act 2009* (IPA).

The IPA allows personal information to be disclosed if it is 'authorised or required under a law'. Consequently, the proposed amendment, may be a departure from the FLP in relation to privacy and confidentiality. The departure is justified, however, as complainants are generally already aware of the particulars of the complaint and, under the proposed amendment, QBCC may only disclose information necessary to convey the 'result' of the investigation.

Further, complainants are presently required to lodge an application under the *Right to Information Act 2009* (RTI) to obtain further detail about their complaint. The RTI process can be costly and is intended to be a method of last resort, with a preference for government to provide information administratively. It will also reduce the regulatory burden imposed on QBCC, by clarifying what information QBCC may share and with whom.

Additionally, while clause 65 applies to both licensed and unlicensed respondents, certain information about QBCC licensees is required to be published on QBCC's website, meaning their right to privacy will not be significantly impacted. For example, subject to the conclusion of relevant appeal periods, any directions to rectify building work or remedy consequential damage, are published on the licensee register to support consumers undertaking due diligence before engaging a contractor.

Lastly, the amendments are intended to primarily apply to complainants directly affected by the subject matter. It is not intended for the QBCC to necessarily disclose the outcome of a complaint to a third-party complainant, such as those who may have observed or merely suspects non-compliance by the accused but who has not been directly or personally affected.

Legislation should not adversely affect rights and liberties, or impose obligations, retrospectively – LSA, section 4(3)(g)

Section 4(3)(g) of the LSA provides that whether legislation has sufficient regard to the rights and liberties of individuals may depend on whether the legislation adversely affects rights and liberties, or imposes obligations, retrospectively.

Developers commonly use covenants in contracts of sale, and by-laws in community title schemes, to control home designs in residential estates and unit complexes. Some covenants and by-laws include provisions that are intended to prohibit or restrict (inhibit) the use of certain energy efficient or sustainable building features for homes, including solar hot water systems and solar panels (solar infrastructure). The purpose of some of these provisions is to preserve or enhance the external appearance of individual homes and the overall character of an estate or neighbourhood.

Sections 246O, 246Q and 246S form part of chapter 8A, part 2 of the Building Act. Part 2 was introduced on 1 January 2010 to implement the then government's 'ban the banners' policy. The policy was intended to limit the extent to which developers and body corporates could inhibit a homeowner's ability to install sustainable building elements and features.

Sections 246O, 246Q and 246S were intended to allow a homeowner to install a solar hot water system or solar panels in the homeowner's preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics. The decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 did not support an interpretation of those sections that would achieve the original policy intent for the provisions. This made it necessary to amend the 'ban the banners' provisions to clarify the original policy intent for the provisions.

The Bill includes proposed amendments clarifying the original intent for sections 246O, 246Q and 246Q of the 'ban the banners' provisions. The amendments of those sections restrict the purposes for which a developer or a body corporate may, through a relevant instrument, inhibit the installation of solar infrastructure on the roof of a home or garage, to limited purposes that do not relate to the enhancement or preservation of the external appearance of the property or the residential estate.

The limited purposes mentioned only apply to a roof or other external surface of a prescribed building if the roof or other surface is common property on an apartment building. The purposes do not apply to the roof of a detached home or an associated garage.

Under the proposed amendments, it will be permissible to prevent or restrict the installation of solar infrastructure on the roof, or other external surface, of an apartment building, under a relevant instrument, only to the extent:

- the roof or other surface is common property; and
- the prohibition or restriction:
  - is necessary to preserve the structural integrity of the building; or
  - prohibits the owner of a unit in the building from installing solar infrastructure on the surface if there is insufficient space for the owner of each other unit in the building to also install solar infrastructure on the surface; or
  - is necessary to prevent noise from piping for a solar hot water system causing unreasonable interference with a person's use or enjoyment of the building.

In addition to clarifying the intent for sections 246O, 246Q and 246Q, the Bill introduces new sections 356 and 357 of the Building Act, which are transitional provisions.

New sections 356 and 357 are intended to remove doubt about the policy intent for sections 246O, 246Q and 246S that has arisen as a result of the decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176.

New sections 356 and 357 are intended to address a situation where a person was inhibited from installing a solar hot water system or solar panels:

- on the roof or other external surface of their home or garage; or
- *at the person's preferred location* (the optimal location for solar generation) on the roof of their home or garage;

because of a relevant instrument, solely on the basis that the system or panels make the building, and any residential estate in which the building is located, look less attractive.

Under new sections 356 and 357, the amended ('new') version of section 246O, 246Q or 246S applies to the relevant instrument as if the relevant instrument had been made after new section 246O, 246Q or 246S commences. Also, any agreement, proceeding, order or other action enforcing the inhibition has effect only to the extent the inhibition has effect under new section 246O, 246Q or 246S.

If a court order was enforcing the inhibition immediately before the commencement of the amendments of the 'ban the banners' provisions, it stops having effect, on the commencement, to the extent (if any) the inhibition has no effect under new section 246O, 246Q or 246S.

As mentioned above, the decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 was not consistent with the original policy intent for the 'ban the banners' provisions. The case arose because a developer withheld consent to a homeowner installing solar panels on the northerly aspect of the roof of their home, under a relevant instrument. As a result of the court's decision, the homeowner was required to remove their solar panels from the northerly aspect of the roof of their home, being the optimal location for solar generation.

New sections 356 and 357, together with new sections 246O, 246Q and 246S, provide relief for any homeowner who has been inhibited from installing solar infrastructure on the roof of their home or garage (or has been prevented from installing the same *in their preferred location* on their roof) on the basis of aesthetics, since 1 January 2010. Under the new sections, the homeowner may install solar infrastructure in their preferred location on the roof of their home or garage, without regard to aesthetics.

Under new section 357, a court order enforcing an inhibition imposed by an entity will cease to have effect, to the extent the inhibition will have no effect under new section 246S.

In addition, under new section 357, an entity that withheld consent under section 246S before the commencement must reconsider giving consent under new section 246S, if the homeowner asks the entity to do so. Under new section 246S, the entity will only be allowed to withhold consent for the limited purposes mentioned in new section 246S. Those limited purposes do not apply to a detached house or associated garage.

Under new section 357, a homeowner may, after obtaining consent from an entity under new section 246S, install a solar hot water system or solar panels on their preferred location, without regard to aesthetics.

The amendments clarifying the original intent for the 'ban the banners' provisions, including new sections 356 and 357, will only operate prospectively. However, despite this prospective operation, new sections 356 and 357 affect existing rights, such as the rights of a developer to inhibit the installation of solar infrastructure on the roof of a home or garage on the basis that the installation makes their residential estate less attractive. Therefore, it could be argued that new sections 356 and 357 apply retrospectively.

The High Court commented, when it considered whether provisions of the *Integrated Planning and Other Legislation Amendment Act 2004* operated retrospectively, that the word 'retrospectivity' is not always used with a constant meaning.[1] The authors of *Statutory Interpretation in Australia* stated as follows:

> All legislation impinges on existing rights and obligations. Conduct that could formerly be engaged in will have to be modified to fit in with the new law. [...] It cannot therefore be said that in this sense legislation is retrospective because this is true of all legislation. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation. The statement of the law advanced by Dixon J in *Maxwell v Murphy* in referring to 'rights or liabilities which the law had defined by reference to the past events' confirms this view.[2]

New sections 356 and 357 do not affect rights with effect prior to the commencement of the section.

However, to the extent (if any) to which new sections 356 and 357 are considered to have any retrospective application, it is considered that this is justified as a requirement for achieving the original policy objective of allowing a homeowner to install solar infrastructure on the roof of their home or garage, without regard to aesthetics. Ultimately, this will encourage homeowners to use solar energy, benefitting the environment and delivering cost savings to homeowners. These outcomes are in the public interest.

Legislation should have sufficient regard to the institution of parliament – LSA, section 4(2)(b)

Legislation should allow the delegation of legislative power only in appropriate cases and to appropriate persons – LSA, section 4(4)(a)

Clause 29 of the Bill includes amendments to section 57 of the BIF Act to clarify the auditing requirements for the auditing profession. It provides that engaging an auditor for review of a trust account must be a 'reasonable assurance engagement'. The amendments refer to the definition of reasonable assurance engagement under the Standard on assurance engagements ASAE 3100—compliance engagements formulated by the AUASB under the *Australian Securities and Investments Commission Act 2001* (Cwlth).

This may raise an FLP issue as it refers to an external document that is beyond the control of Queensland's Legislative Assembly. This is considered reasonable in the circumstances as the delegation is applying to another regulated authority, and one which specifically regulates the auditing profession based on powers assigned to it under Commonwealth legislation. It is

[1] Chang v Laidley Shire Council [2007] HCA 37 at [111]; (2007) 234 CLR 1 at 32
[2] Pearce & Geddes (2011) pp 323-324

believed this is the only possible approach that will ensure clarity and consistency for the profession in defining the type of engagement that must be performed. Additionally, feedback from the auditing professional bodies suggested that this is a necessary amendment that will bring clarity to auditors. It is beneficial to emphasise the reference to a "reasonable assurance engagement under ASAE 3100 Compliance Engagements" to make it very clear to the auditor that another type of assurance such as a limited assurance engagement is not acceptable. Therefore, to provide more clarity for the auditors, it is necessary to refer to the definition of the relevant engagement under the auditing profession standards. The amendments are consistent with the original policy intention and appropriately refer to the relevant AUASB standard under which the review must be completed.

Legislation should authorise the amendment of an Act only by another Act – LSA, section 4(4)(c)

It is important that legislation has sufficient regard to the institution of Parliament, which depends on whether a Bill authorises the amendment of an Act only by another Act.

The Bill contains several regulation making powers, including:

- Clause 25, amendment to section 32 of the BIF Act, for when a retention trust is required, provides that another type of contract or subcontract may be prescribed by a regulation
- Clause 26, amendment to section 41 (retention trust training) of the BIF Act, provides a regulation may prescribe a fee for completing retention trust training
- Clause 67, Schedule 1A, section 8(4) provides that circumstances where the exemption from a requirement to hold a contractor licences may occur, may be prescribed by a regulation
- Clause 46 amends section 79(5) so it provides that a regulation may prescribe a range uses for treated greywater, including the use of the water for cooling towers for air conditioning that will serve large building developments.

Complex legislative schemes, such as ones relating to the regulation of Queensland's building industry, need to be facilitated by robust regulation-making powers. This ensures the legislative framework remains robust as well as flexible to adapt to circumstances such as business model and technological changes.

These regulation-making powers are proposed to address industry concerns regarding the operation of the head contractor licensing exemption. This includes concerns relating to its alleged misuse that circumvents Queensland's licensing system, as other licensing requirements do not apply to the exempt head contractors as they do to other QBCC licensees, such as minimum financial requirements. The exemption essentially allows anyone without a licence to procure building work, provided that the subject work is commercial and is undertaken by licensed contractors. Feedback also suggests the exemption is widely used through various complex business models and transactions in a range of industries where building work is procured, such as civil contracting.

For the regulation-making power proposed in the BIF Act, the presence of an unlicensed head contractor in the contractual chain can mean that subcontractors are not covered by a project or retention trust. This is because it can introduce an additional party to the contractual chain and push subcontractors to a lower contractual tier which is generally not protected by the trust

arrangements. Providing a regulation-making power to ensure these subcontractors are covered by the project and retention trust framework will support the Government's aim to continue supporting strong security of payment protections for subcontractors, benefitting these licensees, their families, the broader industry and community.

In relation to the regulation-making power proposed for the QBCC Act, this clause enables the Act to be expressly or impliedly amended by subordinate legislation, which results in Executive Government being delegated legislative power by the Parliament to modify the intent of the primary legislation. However, it is considered this is justified to address ongoing concerns about potential misuse of the licensing exemption by providing the flexibility for Government to remove application of the exemption in certain high-risk circumstances through regulation. It is intended to undertake consultation on licence categories that are appropriate to be prescribed during development of a regulation.

The provision also seeks to provide government with flexibility to respond to emerging issues and require a licence in certain circumstances, e.g. in higher-risk scenarios where a QBCC licence is considered necessary such as fire protection. It also seeks to strike a balance between head contractors who require the exemption, where the exemption poses no risk to the community, and the head to licence head contractors engaged in high-risk work. The Bill also ensures that subcontractors are afforded protections through the retention trust account framework, regardless of whether the head contractor is licensed or unlicensed.

Consultation

Contemporary consumer expectations about efficiency of buildings

Brisbane City Council, Local Government Association of Queensland, the Institute of Plumbing Inspectors Queensland and Master Plumbers' Association Queensland were consulted on the amendments for using greywater in cooling towers for air-conditioning. No objections to the proposed amendments were made.

The amendments relating to holding tanks for sewage and greywater have been proposed in response to consultation with the Local Government Association of Queensland. The Institute of Plumbing Inspectors Queensland and Master Plumbers' Association Queensland have also been consulted on the proposed amendments.

Efficacy and transparency of the regulatory framework

Industry consultation occurred in relation to the head contractor exemption and the consequential amendment to the BIF Act flowed from the amendment to the QBCC Act in the Bill. Consultation confirmed both the extent of existing business models and transactions that rely on the exemption and valid concerns in relation to the licensing exemption. The approach in the Bill seeks to balance the benefits of the licensing exemption with safeguarding the licensing framework and security of payment protections. Further consultation is proposed in developing regulation amendments.

Consultation occurred with the auditing professional bodies concerning the trust accounting requirements in the BIF Act.

The Australian Institute of Building Surveyors, Royal Institute of Chartered Surveyors and QBCC were consulted about repealing the not yet commenced provisions relating to an alternative recognition pathway for licensing of building certifiers.

Consultation with the QBCC and respective Boards were also undertaken during drafting of amendments relating to respective Acts. As other amendments are generally minor and technical in nature, broader consultation was considered unnecessary.

Consistency with legislation of other jurisdictions

Contemporary consumer expectations about efficiency of buildings

The 'ban the banners' provisions were originally introduced in 2010. Other jurisdictions have not yet introduced similar provisions supporting the use of solar hot water systems and solar panels. The amendments for the 'ban the banners' provisions are only for clarification and do not give effect to new policy.

Legislation in other jurisdictions already allows the use of non-drinking water to be used for cooling towers for air-conditioning.

The amendments allowing the use of holding tanks for sewage and greywater are consistent with provisions in other jurisdictions.

Efficacy and transparency of the regulatory framework

No two states and territories employ the same building and construction regulatory model. While all jurisdictions administer a building licensing framework and are equipped with monitoring and compliance powers to regulate the industry, the type and value of work that is regulated varies. Therefore, while there may be similarities across jurisdictions' security of payment and building quality and safety frameworks, the context in which they operate may differ. This is noted by the national Building Confidence Report published in 2018.

As such, while the amendments in the Bill relating to the QBCC Act could be seen as consistent with other jurisdictions, as each jurisdiction has a building licensing and regulatory framework, the amendments relate to Queensland's specific licensing and regulatory framework.

Queensland is the only Australian jurisdiction to have legislated project and retention trust accounts for the building and construction industry. Other Australian jurisdictions have implemented this type of framework through contractual conditions on government projects. Jurisdictions abroad including Canada, New Zealand, the United States of America and the United Kingdom have security of payment legislation that requires some monies to be held in trust, tailored to individual legislative frameworks. It is important that Queensland continues to protect payments in the building and construction industry through its security of payment framework, and as such the Bill is state-specific.

Amendments to the Bill relating to the Architects Act and PE Act are specific to the legislative framework of the State of Queensland and relate to Queensland statutory bodies. These are also primarily minor and technical legislative amendments.

Each Australian state and territory regulates the profession of architecture, with the aim of ensuring public safety by ensuring that architectural services are only provided by registered practitioners and to a high standard. Queensland, New South Wales and Victoria regulate professional engineering through legislation. As such, the minor amendments in the Bill are complementary and align with other jurisdictions that regulate these professions.

Notes on provisions

Part 1 Preliminary

Clause 1 Short title

Clause 1 provides that the Act may be cited as the Building and Other Legislation Amendment Act 2022.

Part 2 Amendment of Architects Act 2002

Clause 2 Act amended

Clause 2 provides that Part 2 of the Bill amends the *Architects Act 2002*.

Clause 3 Amendment of s 16 (Meaning of *continuing registration requirements*)

Clause 3 amends section 16 (Meaning of continuing registration requirements) to provide that information regarding the Board of Architects of Queensland's continuing registration requirements must be kept available for inspection at the Board's office when the office is open to the public.

Clause 4 Amendment of s 37 (Complaints about conduct)

Clause 4 amends section 37 (Complaints about conduct) to provide that the Board must keep information mentioned in subsection 37(3) published on the Board's website. This information is about the type of conduct the Board considers may give rise to a complaint and how a person may make a complaint.

Clause 5 Amendment of s 87 (Vacation of office)

Clause 5 amends section 87 (Vacation of office) to clarify that if a Board member resigns office by notice given to the Minister, the resignation takes effect on the day the notice is given or, if a later day is stated in the notice, on the later day. Currently, the Act is silent on when resignation takes effect.

Clause 6 Amendment of s 96 (Minutes)

Clause 6 amends section 96 (Minutes) to remove the requirement for minutes to reference authorisations made by the Board in relation to the common seal. This requirement is considered redundant as clause 8 removes requirements in relation to the common seal.

Clause 7 Amendment of s 103 (Inspection of register)

Clause 7 amends section 103 (Inspection of register) to provide that the register maintained by the Board must be kept open for inspection at the Board's office when the office is open to the public. Clause 7 also amends subsection 103(2) to provide that the Board must make the register available for inspection on its website. This reflects current operational practices, promotes consistency in requirements and ensures important documents must be made available online.

Clause 8 Omission of s 105 (Board's common seal)

Clause 8 removes the requirements in relation to the Board's common seal under section 105 (Board's common seal). This provision currently requires that the common seal must be kept in the custody of a person nominated by the Board and may be used only as authorised by the Board. The Board still has a common seal under section 77, however section 105 is considered redundant and unnecessary.

Clause 9 Amendment of s 110 (Inspection of code)

Clause 9 amends section 110 (Inspection of code) to provide that the Board must keep the code of practice open for inspection at the Board's office when the office is open to the public. Clause 9 also amends section 110 to provide that the Board must make the code of practice available for inspection on its website. This reflects current operational practices, promotes consistency and ensures important documents must be made available online.

Clause 10 Amendment of s 125 (Information about review)

Clause 10 amends section 125 (Information about review) to provide that the Board must keep published on their website information about how a person may apply to the tribunal for a review of a decision mentioned in section 121(2).

Clause 11 Amendment of s 141 (Protection from liability)

Clause 11 amends section 141 (Protection from immunity) to extend the immunity from civil liability to all employees of the Board. This ensures Board appointed staff are afforded the same civil liability protections as Board members and other staff engaged under the Architects Act (investigators and persons engaged under section 45 to assist the Board or an investigator) as well as the Queensland public service.

Clause 12 Amendment of s 141A (Notice and record for businesses)

Clause 12 amends section 141A to provide that a notice given to the Board by a business under subsections 141A(2) or (6) must be kept open for inspection at the Board's office when the office is open to the public.

Part 3 Amendment of Building Act 1975

Clause 13 Act amended

Clause 13 provides that part 3 amends the *Building Act 1975.*

Clause 14 Amendment of s 245O (Decision on application)

Clause 14 inserts a note for section 245O. The note refers the reader to internal and external review rights in relation to a decision under this section that are available under the QBCC Act, part 7, division 3 (proceedings for review).

Clause 15 Amendment of s 245Q (Cancellation or amendment)

Clause 15 inserts a note for section 245Q. The note refers the reader to internal and external review rights in relation to a decision under this section that are available under the QBCC Act, part 7, division 3 (proceedings for review).

Clause 16 Omission of ch 8, pt 2, div 6, sdiv 4 (Appeals)

Clause 16 omits ch 8, pt 2, div 6, sdiv 4, as it is no longer required with commencement of amendments of the Building Act (see clauses 14, 15 and 23) and the QBCC Act (see clause 64) that will ensure a person who is dissatisfied with a decision made by QBCC about a pool safety management plan for a swimming pool may apply for an internal or external review of the decision under the QBCC Act.

Clause 17 Amendment of s 246O (Prohibitions or requirements that have limited or no force or effect)

Developers commonly use covenants in contracts of sale, and by-laws in community title schemes, to control home designs in residential estates and unit complexes. Some covenants and by-laws include provisions that are intended to prohibit or restrict the use of certain energy efficient or sustainable building features for homes, including solar hot water systems and solar panels. The purpose of some of these provisions is to preserve or enhance the external appearance of individual homes and the overall character of a neighbourhood.
Sections 246O, 246Q and 246S form part of chapter 8A, part 2 of the Building Act. Part 2 was introduced on 1 January 2010 to implement the then government's 'ban the banners' policy. The policy was intended to limit the extent to which developers and body corporates could inhibit a homeowner's ability to install sustainable building elements and features. Sections 246O, 246Q and 246S were intended to allow a homeowner to install a solar hot water system or solar panels in the homeowner's preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics. The decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 did not support an interpretation of those sections that would achieve the original policy intent for the provisions.

Section 246O was originally intended to invalidate a provision in a relevant instrument prohibiting the installation of a solar hot water system or solar panels on the roof, or other external surface, of a home or garage attached to a home to the extent the prohibition applies only for the purpose of enhancing or preserving the external appearance of the building.

Clause 17 amends section 246O to ensure that the original policy intention for the section is put beyond doubt. The clause achieves this by limiting the purposes for which a developer or a body corporate may, through a relevant instrument, prohibit a homeowner from installing a solar hot water system or solar panels, to purposes that do not relate to the enhancement or preservation of the external appearance of the property.

The limited purposes mentioned only apply to a roof or other external surface of a prescribed building if the roof or other surface is common property on an apartment building. The purposes do not apply to the roof or other surface of a detached home or a garage attached to a home.

Under clause 17, it will be permissible to prevent the installation of a solar hot water system or solar panels (solar infrastructure) on the roof or other external surface of an apartment building, under a relevant instrument, only to the extent:

- the roof or other surface is common property; and
- the prohibition:
  - is necessary to preserve the structural integrity of the building; or

- prohibits the owner of a unit in the building from installing solar infrastructure on the surface if there is insufficient space for the owner of each other unit in the building to also install solar infrastructure on the surface; or
- is necessary to prevent noise from piping for a solar hot water system causing unreasonable interference with a person's use or enjoyment of the building.

To the extent that a prohibition applies to prevent the owner of a unit in the building from installing solar infrastructure on the surface, the owners of all units may install a shared hot water system, or shared solar panels, on the surface for the benefit of all owners, provided the infrastructure will not adversely affect the structural integrity of the building or cause issues relating to noise of the type mentioned in clause 17.

As a result of clause 17, a homeowner will be allowed to install a solar hot water system or solar panels on the roof, or other external surface, of their home or garage, without regard to aesthetics.

New sections 356 and 357 (see clause 22), together with the amended version of section 246O, provide relief for any homeowner who has been inhibited from installing solar infrastructure on the roof of their home or garage, solely on the basis of aesthetics, since 1 January 2010. Under the new sections, the homeowner may install solar infrastructure in their preferred location on the roof of their home or garage, without regard to aesthetics.

Clause 18 Amendment of s 246Q (Restrictions that have limited or no force or effect—other restrictions)

Developers commonly use covenants in contracts of sale, and by-laws in community title schemes, to control home designs in residential estates and unit complexes. Some covenants and by-laws include provisions that are intended to prohibit or restrict the use of certain energy efficient or sustainable building features for homes, including solar hot water systems and solar panels. The purpose of some of these provisions is to preserve or enhance the external appearance of individual homes and the overall character of a neighbourhood.

Sections 246O, 246Q and 246S form part of chapter 8A, part 2 of the Building Act. Part 2 was introduced on 1 January 2010 to implement the then government's 'ban the banners' policy. The policy was intended to limit the extent to which developers and body corporates could inhibit a homeowner's ability to install sustainable building elements and features. Sections 246O, 246Q and 246S were intended to allow a homeowner to install a solar hot water system or solar panels in their preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics. The decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 did not support an interpretation of those sections that would achieve the original policy intent for the provisions.

Clause 18 clarifies the original policy intention for section 246Q. Section 246Q was originally intended to invalidate provisions in a relevant instrument restricting the location on the roof, or other external surface, of a home or garage where a solar hot water system or solar panels may be installed, if the only purpose of the restriction was to preserve or enhance the external appearance of the home or garage. It was intended that a homeowner would not be inhibited from installing solar infrastructure in their preferred location on the roof or other surface, on the basis of aesthetics. It was expected that the homeowner's preferred location would usually be the optimal location for solar energy generation.

Clause 18 amends subsection 246Q to ensure it gives effect to the original policy intention for the section. The clause achieves this by limiting the purposes for which a developer or a body corporate may, through a relevant instrument, restrict where a homeowner may position a solar hot water system or solar panels on the roof, or other external surface, of their home or garage, to purposes that do not relate to the enhancement or preservation of the external appearance of the property.

The limited purposes mentioned only apply to a roof or other external surface of a prescribed building if the roof or other surface is common property on an apartment building. The purposes do not apply to a roof or other external surface of a detached home or an associated garage.

Under clause 18, it will be permissible to restrict the location on the roof or other external surface of an apartment building, where a person may install a solar hot water system or solar panels (solar infrastructure), under a relevant instrument, only to the extent:

- the roof or other surface is common property; and
- the restriction:
  - is necessary to preserve the structural integrity of the building; or
  - prohibits the owner of a unit in the building from installing solar infrastructure on the surface if there is insufficient space for the owner of each other unit in the building to also install solar infrastructure on the surface; or
  - is necessary to prevent noise from piping for a solar hot water system causing unreasonable interference with a person's use or enjoyment of the building.

To the extent that a restriction applies to restrict the owner of a unit in the building from installing solar infrastructure on the surface, the owners of all units may install a shared hot water system, or shared solar panels, on the surface for the benefit of all owners, provided the infrastructure will not adversely affect the structural integrity of the building or cause issues relating to noise of the type mentioned in clause 18.

As a result of clause 18, a homeowner will be allowed to install a solar hot water system or solar panels in their preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics.

New sections 356 and 357 (see clause 22), together with the amended version of section 246Q, provide relief for any homeowner who has been inhibited from installing solar infrastructure in their preferred location on the roof of their home or garage, solely on the basis of aesthetics, since 1 January 2010. Under the new sections, the homeowner may install solar infrastructure in their preferred location, without regard to aesthetics.

Clause 19 Amendment of s 246R (When requirement to obtain consent for particular activities can not be withheld—roof colours and windows)

Clause 19 aligns the heading for section 246R with the content of section 246R.

Clause 20 Amendment of s 246S (When requirement to obtain consent for particular activities cannot be withheld—other matters)

Developers commonly use covenants in contracts of sale, and by-laws in community title schemes, to control home designs in residential estates and unit complexes. Some covenants and by-laws include provisions that are intended to prohibit or restrict the use of certain energy efficient or sustainable building features for homes, including solar hot water systems and solar panels. The purpose of some of these provisions is to preserve or enhance the external appearance of individual homes and the overall character of a neighbourhood.

Sections 246O, 246Q and 246S form part of chapter 8A, part 2 of the Building Act. Part 2 was introduced on 1 January 2010 to implement the then government's 'ban the banners' policy. The policy was intended to limit the extent to which developers and body corporates could inhibit a homeowner's ability to install sustainable building elements and features. Sections 246O, 246Q and 246S were intended to allow a homeowner to install a solar hot water system or solar panels in the homeowner's referred location on the roof, or other external surface, of their home or garage, without regard to aesthetics. The decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 did not support an interpretation of those sections that would achieve the original policy intent for the provisions.

Clause 20 clarifies the original policy intention for section 246S and aligns the heading for the section with the rest of the provision.

Section 246S was originally intended prevent or restrict an entity from withholding consent, required under a relevant instrument, to a homeowner installing a solar hot water system or solar panels in their preferred location on the roof, or other external surface, of their home or garage, if the only purpose of the inhibition was to preserve or enhance the external appearance of the home or garage. It was expected that the homeowner's preferred location would usually be the optimal location for solar energy generation.

Clause 20 amends subsection 246S to ensure it gives effect to the original policy intention for the section. The clause achieves this by limiting the purposes for which a developer or body corporates may withhold consent, required under a relevant instrument, for the installation of a solar hot water system or solar panels, to purposes that do not relate to the enhancement or preservation of the external appearance of the property.

The limited purposes mentioned only apply to a roof or other external surface of a prescribed building if the roof or other surface is common property on an apartment building. The purposes do not apply to the roof of a detached home or an associated garage.

Under clause 20, it will be permissible to withhold consent to the installation of a solar hot water system or solar panels (solar infrastructure) on the roof or other external surface of an apartment building, under a relevant instrument, only to the extent:

- the roof or other surface is common property; and
- the withholding of consent:
  - is necessary to preserve the structural integrity of the building; or
  - prohibits the owner of a unit in the building from installing solar infrastructure on the surface if there is insufficient space for the owner of each other unit in the building to also install solar infrastructure on the surface; or

- is necessary to prevent noise from piping for a solar hot water system causing unreasonable interference with a person's use or enjoyment of the building.

To the extent consent is withheld for the owner of a unit in the building to install solar infrastructure on the surface, the owners of all units may install a shared hot water system, or shared solar panels, on the surface for the benefit of all owners, provided the infrastructure will not adversely affect the structural integrity of the building or cause issues relating to noise of the type mentioned in clause 20.

As a result of clause 20, a homeowner will be allowed to install a solar hot water system or solar panels in their preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics.

New sections 356 and 357 (see clause 22), together with the amended version of section 246S, provide relief for any homeowner who has been inhibited from installing solar infrastructure in their preferred location on the roof of their home or garage, solely on the basis of aesthetics, since 1 January 2010. Under the new sections, the homeowner may install solar infrastructure in their preferred location on the roof of their home or garage, without regard to aesthetics.

Clause 21 Amendment of s 256 (Prosecution of offences)

Clause 21 amends section 256(2) to include an additional provision for QBCC Commissioner to make a complaint for an offence against the *Building Regulation 2006*, Part 4A which continues in force under the *Building Regulation 2021*, section 95. Under the Building Act where local governments can also commence court proceedings, QBCC requires express permission from the relevant local government to commence a proceeding. However, as the administrator of the cladding checklist and industry regulator, QBCC is considered better placed to take enforcement action for breaches relating to the combustible cladding checklist. As a result, QBCC will be able to commence prosecution for those who have committed an offence in relation to the combustible cladding checklist process. This amendment does not change local government powers and is consistent with messaging and community expectations that QBCC is the industry regulator and oversees the combustible cladding checklist program.

Clause 22 Insertion of new ch 11, pt 22

Clause 22 inserts new chapter 11, part 22 which provides for transitional provisions for the *Building and Other Legislation Amendment Act 2002*. New section 354 (Definitions for part) introduces definitions for new sections 356 (Effect of particular relevant instruments made in affected period – former ss 246O and 246Q) and 357 (Effect of particular relevant instruments made in affected period – former ss 246S) of the Building Act, which are transitional provisions for amendments of the 'ban the banners' provisions.

Transitional provision for appeals against decisions on pool safety management plans

Minor amendments of the QBCC Act (see clause 64), complemented by amendments of the Building Act (see clauses 14, 15 and 23), allow a person who is dissatisfied with a decision made by QBCC about a pool safety management plan, for a swimming pool, to apply for an internal or external review of the decision under the QBCC Act.

New section 355 (Existing appeals under former s 245S) deals with a case where, immediately before the commencement of amendments relating to decisions about pool safety management

plans (see clauses 14, 15, 23 and 64), a person could have appealed to a development tribunal against such a decision under the Planning Act, but the person had not done so. If, immediately before the commencement, the period for appealing against such a decision had not ended, the person may appeal to a development tribunal under the unamended version of section 245S as if the section had not been amended.

New section 355 also deals with a situation where, immediately before the commencement of amendments relating to decisions about pool safety management plans, a person had started an appeal to a development tribunal against a decision about a pool safety management plan, but the appeal had not been decided. Under section 355, the development tribunal may continue to hear, and decide, the appeal under the unamended version of section 245S as if the section had not been amended.

Transitional provision for 'ban the banners' provisions

Developers commonly use covenants in contracts of sale, and by-laws in community title schemes, to control home designs in residential estates and unit complexes. Some covenants and by-laws include provisions that are intended to prohibit or restrict (inhibit) the use of certain energy efficient or sustainable building features for homes, including solar hot water systems and solar panels (solar infrastructure). The purpose of some of these provisions is to preserve or enhance the external appearance of individual homes and the overall character of an estate or neighbourhood.

Sections 246O, 246Q and 246S form part of chapter 8A, part 2 of the Building Act. Part 2 was introduced on 1 January 2010 to implement the then government's 'ban the banners' policy. The policy was intended to limit the extent to which developers and body corporates could inhibit a homeowner's ability to install sustainable building elements and features.

Sections 246O, 246Q and 246S were intended to allow a homeowner to install solar infrastructure in the homeowner's preferred location on the roof, or other external surface, of their home or garage, without regard to aesthetics. The decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 did not support an interpretation of those sections that would achieve the original policy intent for the provisions. This made it necessary to amend the 'ban the banners' provisions to clarify the original policy intent for the provisions.

Clauses 17 to 20 clarify the original intent for sections 246O, 246Q and 246Q of the 'ban the banners' provisions. The amendments of those sections restrict the purposes for which a developer or a body corporate may, through a relevant instrument, inhibit the installation of solar infrastructure on the roof of a home or garage, to limited purposes that do not relate to the enhancement or preservation of the external appearance of the property or the residential estate.

The limited purposes mentioned only apply to a roof or other external surface of a prescribed building if the roof or other surface is common property in an apartment building. The purposes do not apply to the roof of a detached home or an associated garage.

Under the proposed amendments, it will be permissible to prevent or restrict the installation of solar infrastructure on the roof, or other external surface, of an apartment building, under a relevant instrument, only to the extent:

- the roof or other surface is common property; and
- the prohibition or restriction:
  - is necessary to preserve the structural integrity of the building; or
  - prohibit the owner of a unit in the building from installing solar infrastructure on the surface if there is insufficient space for the owner of each other unit in the building to also install solar infrastructure on the surface; or
  - is necessary to prevent noise from piping for a solar hot water system causing unreasonable interference with a person's use or enjoyment of the building.

Clause 22 introduces new sections 356 and 357 of the Building Act, which are transitional provisions.

New sections 356 and 357 are intended to remove doubt about the policy intent for sections 246O, 246Q and 246S that has arisen as a result of the decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176.

New sections 356 and 357 are intended to address a situation where a person was inhibited from installing a solar hot water system or solar panels:

- on the roof or other external surface of their home or garage; or
- *at the person's preferred location* (the optimal location for solar generation) on the roof of their home or garage;

because of a relevant instrument, solely on the basis that the system or panels make the building, and any residential estate in which the building is located, look less attractive.

Under new sections 356 and 357, the amended ('new') version of section 246O, 246Q or 246S applies to the relevant instrument as if the relevant instrument had been made after new section 246O, 246Q or 246S commences. Also, any agreement, proceeding, order or other action enforcing the inhibition has effect only to the extent the inhibition has effect under new section 246O, 246Q or 246S.

If a court order was enforcing the inhibition immediately before the commencement of the amendments of the 'ban the banners' provisions, it stops having effect, on the commencement, to the extent (if any) the inhibition has no effect under new section 246O, 246Q or 246S.

As mentioned above, the decision of the Court of Appeal in *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 was not consistent with the original policy intent for the 'ban the banners' provisions. The case arose because a developer withheld consent to a homeowner installing solar panels on the northerly aspect of the roof of their home, under a relevant instrument. As a result of the court's decision, the homeowner was required to remove their solar panels from the northerly aspect of the roof of their home, being the optimal location for solar generation.

New sections 356 and 357, together with new sections 246O, 246Q and 246S, provide relief for any homeowner who has been inhibited from installing solar infrastructure on the roof of their home or garage (or has been prevented from installing the same *in their preferred location*

on their roof) on the basis of aesthetics, since 1 January 2010. Under the new sections, the homeowner may install solar infrastructure in their preferred location on the roof of their home or garage, without regard to aesthetics.

Under new section 357, a court order enforcing an inhibition imposed by an entity will cease to have effect, because the inhibition will have no effect under new section 246S.

In addition, under new section 357, an entity that withheld consent under section 246S before commencement must reconsider giving consent under new section 246S, if the homeowner asks the entity to do so. Under new section 246S, the entity will only be allowed to withhold consent for the limited purposes mentioned in new section 246S. Those limited purposes do not apply to a detached house or associated garage.

Under new section 357, a homeowner may, after obtaining consent from an entity under new section 246S, install a solar hot water system or solar panels on their preferred location, without regard to aesthetics.

The amendments clarifying the original intent for the 'ban the banners' provisions, including new sections 356 and 357, will only operate prospectively, and not retrospectively.

Clause 23 Amendment of sch 2 (Dictionary)

Clause 23 inserts a reference to sections 245O and 245Q into paragraph (b) of the definition *information notice*. The effect of this is that a requirement under section 245O or 245Q to give an information notice is a requirement to give an information notice that complies with the requirements in the definition *information notice*, paragraph (b)(i) to (iv).

Part 4 Amendment of Building Industry Fairness (Security of Payment) Act 2017

Clause 24 Act amended

Clause 24 provides that Part 4 of the Bill amends the *Building Industry Fairness (Security of Payment) Act 2017*.

Clause 25 Amendment of s 32 (When retention trust required)

Clause 25 amends section 32 to insert a head of power to allow a regulation to specify additional contracts and subcontracts as being withholding contracts. The usual trust account scenario, contemplated by the BIF Act, is a three-tier scenario with the principal (1st tier) engaging a builder/head contractor (2nd tier) who further engages subcontractors (3rd tier).

The presence of unlicensed head contractors in the contractual chain can mean subcontractors normally protected are not covered by a project or retention trust under the BIF Act. This is because the use of the head contractor licensing exemption under the QBCC Act can introduce an additional party in the contractual chain and push the subcontractors down to a lower contractual tier which is generally not protected by the trust arrangements. To accommodate additional contractual scenarios and arrangements, section 14E of the BIF Act provides that a subcontract is eligible for a project trust if it is of a type prescribed by regulation. A similar head of power does not currently exist for withholding contracts for retention trusts.

To address these concerns, clause 25 amends section 32 to insert a head of power to allow a regulation to specify additional contracts and subcontracts as being withholding contracts. This will ensure subcontractors normally within scope are protected by project and retention trusts in the event that a head contractor licensing exemption is used.

Clause 26 Amendment of s 41 (Training before withholding retention amount)

Clause 26 amends section 41 to provide that a regulation may prescribe a fee for completing retention trust training. This will provide flexibility for QBCC to charge a fee in future, if required, following an evaluation of the training after full implementation of the trust account framework.

The current title of section 41 does not reflect the policy intention and is a carryover from earlier drafting. It states, 'training before withholding retention amount', however, the legislation currently requires the trustee to complete the training within certain timeframes after withholding the first retention amount (e.g. 20 business days after first retention amount is withheld). To address this issue, clause 26 also amends the section 41 title to state 'retention trust training'.

Clause 27 Amendment of s 50 (Definitions for part)

Clause 27 amends section 50 and inserts a new definition for 'Chapter 2 requirement'. It states that chapter 2 requirement means a requirement applying to a trustee under chapter 2 in relation to the administration of a trust account. This new definition is used in other auditing and reporting provisions including section 57A.

Clause 28 Amendment of s 54A (Grounds for excluding persons from undertaking trust account reviews and preparing account review reports)

Clause 28 amends section 54A(a) to clarify the circumstances under which a person may be excluded from undertaking reviews of trust accounts and preparing account review reports. Currently, section 54A(a) includes giving information about compliance of a trust account with this Act. Clause 28 replaces 'with this Act' with 'a chapter 2 requirement' to align this requirement with other auditing provisions in the Act.

Clause 29 Amendment of s 57 (Engaging auditor for review of trust account)

Clause 29 inserts new subsection 57 (1A) and provides that engaging an auditor for review of a trust account must be a 'reasonable assurance engagement'. This responds to feedback from the auditing profession that the terminology could be clarified.

To provide greater clarity for the auditing profession, clause 29 also provides a definition for the 'reasonable assurance engagement' which is the meaning given by the Standard on assurance engagements ASAE 3100—compliance engagements' formulated by the Auditing and Assurance Standards Board under the *Australian Securities and Investments Commission Act 2001* (Cwlth), section 227B(1)(b).

Ensuring that auditors are clear about the type of engagement that is required, should also make clear that for auditor purposes an 'audit' is intended, despite the language of the BIF Act adopting the generic term 'review'.

Clause 30 Amendment of s 57A (Account review report)

Clause 30 amends section 57A and provides that an account review report for a trust account is a report stating the auditor's conclusion, based on a review of the administration of the account, about whether the trustee of the account has complied with all chapter 2 requirements in relation to the account during the period to which the report relates.

The amendment clarifies the account review report requirements of the BIF Act to refer to the relevant trustee requirements in relation to the administration of the trust account under Chapter 2 of the BIF Act, rather than the broader terminology which captures all requirements for the trust account under this Act.

Clause 30 also amends section 57A(3)(d) to streamline the requirements and ensure the terminology aligns with the approach adopted in other auditing and reporting sections of the BIF Act. Subsection (iii) has been omitted as it is now redundant and the existing subsection (iv) has been recast slightly to reference 'chapter 2 requirements' rather than the broader trust requirements under the Act.

Clause 31 Replacement of s 57C (Reporting serious breaches)

Clause 31 amends section 57C to clarify what the reporting threshold is for auditors and what breaches may constitute a 'serious breach' that must be promptly reported to QBCC within 5 business days after the auditor finds the breach. The amendments intend to differentiate between promptly reporting serious breaches directly to QBCC versus highlighting minor breaches and contraventions in the account review report required under the Act.

Clause 31 clarifies that if the auditor finds that the trustee of the trust has wilfully contravened a chapter 2 requirement in relation to the trust account; and the contravention has caused, or is likely to cause, financial loss to a beneficiary of the trust, the auditor must notify the commissioner within 5 business days after making the finding. The same requirement applies if the trustee of the trust has repeatedly failed to comply with 1 or more chapter 2 requirements in relation to the trust account.

Clause 32 Insertion of new ch 8B

Clause 32 inserts new Chapter 8B - Transitional provisions for *Building and Other Legislation Amendment Act 2022* that includes new sections 212 to 214.

Section 212 provides definitions for the new chapter 8B. It states that 'amendment Act' means the *Building and Other Legislation Amendment Act 2022*; and 'former' in relation to a provision of the Act, means the provision as in force immediately before the commencement.

New section 213 provides transitional provisions for a situation where the trustee for a project trust or retention trust engaged an auditor to carry out a review of the trust account for the trust under former section 57. It states that if before commencement of the amended sections 57 and 57A, the review had not been completed; or the account review report for the trust account required under former section 57A had not been given to the trustee, for the purposes of the review and report, former sections 57 and 57A continue to apply as if the amendment Act had not been enacted.

New section 214 provides transitional provisions for the existing obligations to report serious breaches to QBCC. It states that if before the commencement, an auditor was required to notify

QBCC of a belief about a circumstance under former 57C; and before the commencement, the auditor had not yet notified the commissioner, former section 57C continues to apply as if the amendment Act had not been enacted.

However, if the review of the trust account in relation to which the notification requirement arose had not been completed before the commencement, the amended section 57C as in force on the commencement applies to the auditor in relation to the review.

Clause 33 Amendment of sch 2 (Dictionary)

Clause 33 amends the schedule 2 (Dictionary) and provides a definition for 'chapter 2 requirement' that is the definition provided in section 50.

Part 5 Amendment of Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020

Clause 34 Act amended

Clause 34 provides that Part 5 amends the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (the Act)

Clause 35 Omission of ss 46–48

Clause 35 omits sections 46, 47 and 48 of the Act, which will repeal provisions not yet commenced that would otherwise have established an alternative recognition pathway for building certifiers.

Clause 36 Omission of s 125A (Amendment of sch 1A (Exemptions from requirement to hold contractor's licence))

Clause 36 omits uncommenced section 125A of the Act, which sought to repeal a licensing exemption for head contractors. This has the effect of allowing the exemption to continue.

Part 6 Amendment of Planning Act 2016

Clause 37 Act amended

Clause 37 provides that part 6 amends the *Planning Act 2016.*

Clause 38 Amendment of s 229 (Appeals to tribunal or P&E Court)

Clause 38 sets an open-ended timeframe for an appeal against the failure of a decision maker (other than QBCC) to make a decision about an application or other matter under the Plumbing and Drainage Act within the period allowed for making the decision (the 'required period'). The right to appeal arises if an information notice about the decision was required to be given but was not provided.

The right to appeal such a failure is referenced in the Planning Act, schedule 1, table 3, item 5. Under new section 229(3)(f)(iii), a person who was entitled to receive an information notice about the decision (an 'affected person') may appeal against the failure any time after the end of the required period.

Clause 39 Amendment of s 253 (Conduct of appeals)

Clause 39 clarifies the policy intention for section 253 of the Planning Act. Section 253 deals with the conduct of appeals. Section 253(3) refers to an appeal by the recipient of an enforcement notice. The term 'enforcement notice' is defined in the Act with reference to section 168 of the Act, which provides for an enforcement notice that may be given under the Planning Act. However, it is intended that section 253 will apply to an enforcement notice given under the Plumbing and Drainage Act just as it applies to an enforcement notice given under the Planning Act. The new provision clarifies that a reference in section 253 to 'enforcement notice' is a reference to either an enforcement notice under the Planning Act, or an enforcement notice under the Plumbing and Drainage Act, as the case requires.

Clause 40 Amendment of s 254 (Deciding appeals to tribunal)

Clause 40 expands section 254 of the Planning Act.

Section 254 deals with how appeals to a development tribunal must be decided. New section 254(2)(f) sets out the decisions that a development tribunal can make in relation to an appeal for a failure to make a decision under the Plumbing and Drainage Act.

Clause 41 Amendment of sch 1 (Appeals)

Clause 41(1) inserts new item 7 in schedule 1, section 1, table 1 of the Planning Act.

New item 7 ensures an appeal may be made against a decision to give an enforcement notice under the Plumbing and Drainage Act.

Clause 41(2) expands schedule 1, section 1, table 3, item 4 of the Planning Act so the right to appeal that the item provides for, extends to a failure of *any* decision-maker, other than QBCC, to make a decision in the timeframe stated in the Building Act. The appeal arises where an information notice was required to be given in relation to the decision (but was not given). For example, clause 41(2) will ensure that the failure of the chief executive to make a decision under section 43 of the Building Act within the timeframe provided for in that section will be appealable.

Clause 41(3) introduces a consequential amendment that is required as a result of clause 42(2).

Clause 41(4) amends the wording for schedule 1, section 1, table 3, item 5 so it is consistent with the wording for schedule 1, section 1, table 3, item 4.

Part 7 Amendment of Plumbing and Drainage Act 2018

Clause 42 Act amended

Clause 42 provides that Part 7 amends the *Plumbing and Drainage Act 2018*.

Clause 43 Amendment of s 65 (Installing things as part of plumbing or drainage work)

Clause 43 expands section 65 so it allows a person to install, as part of plumbing or drainage work, a greywater treatment plant that treats greywater for a prescribed use under section 79(5)(b), if the plant meets the prescribed requirements for the plant mentioned in section 79(5)(b)(i) to (iv). The prescribed requirements deal with matters such as the capacity of the plant and the water quality it produces. Amendments of section 79 will allow a regulation to prescribe a range of uses for treated greywater.

Clause 44 Amendment of s 74 (Discharging toilet waste and water)

Clause 44 expands section 74 of the Plumbing and Drainage Act. Under the unamended version of section 74(1)(a), the owner of premises in an area served by a sewerage system (in a sewered area) must ensure waste and wastewater from a toilet or soil fixture (sewage) from the premises is discharged into the sewerage system for the area. Although section 74(1)(a)(ii) allows sewage to be discharged into an on-site sewage treatment plant on the premises, it only allows this in the exceptional circumstances where the plant is being tested for compliance under a treatment plant testing approval.

If the premises are not connected to the sewage system for the area (even temporarily), the only viable option available to the owner is to discharge sewage into an on-site sewage treatment plant (for treatment) before it is held in a separate holding tank for collection by a truck or is discharged on to a land application area. This requirement poses issues if the premises are only to be used for a temporary purpose, where it is impractical for the premises to be connected to the sewerage system. However, clause 44 will ensure the owner will also have the option of discharging untreated sewage into a holding tank installed on the premises under a permit, during the period stated in the permit, for collection and disposal off-site by a truck. Examples of circumstances where this option would be required are as follows:

Example 1

Toilets in a temporary structure located on a construction site for the use of contractors constructing a building on the site before the building is connected to the sewerage system for the area.

Example 2

Toilets in a temporary structure located on the tarmac in an airport for the use of passengers who have disembarked from a flight and are prohibited from using toilet facilities in the airport because of the risk that they may transmit COVID-19 to members of the public in the airport.

Under the unamended version of section 74(1)(b), the owner of premises located in an area not served by a sewerage system (an unsewered area) must ensure sewage from the premises is discharged into an on-site sewage facility or an environmentally relevant on-site sewage facility. This requirement is problematic where there is insufficient space to accommodate a facility for treating the matter.

Clause 47(4) expands the definition *on-site sewage facility* for the Plumbing and Drainage Act so it captures a holding tank installed on premises. As a result, an owner of premises located in an unsewered area will have the option to discharge untreated sewage directly into a holding tank installed on the premises under a permit, during the period stated in the permit, for collection and disposal off-site by a truck. This may be preferable to having to discharge the

sewage into a facility that includes an on-site sewage treatment plant (for treatment), before it is held in a separate holding tank for collection by a truck or is discharged onto a land application area.

Local governments will be allowed to issue permits for the installation of holding tanks to be used on a permanent basis for premises in unsewered areas.

The option to discharge untreated matter directly into a holding tank installed on premises under a permit issued by the local government, will provide a safe, practical and cost-effective solution to the problems mentioned above. It is proposed that such a permit would state the period for which the holding tank could be used for the discharge and disposal of untreated matter.

Clause 45 Amendment of s 78 (Discharging kitchen greywater)

Clause 45 expands section 78 of the Plumbing and Drainage Act. Under the unamended version of section 78(1)(a), the owner of premises in an area served by a sewerage system must ensure kitchen greywater from the premises is discharged into the sewerage system for the area.

If the premises are not connected to the sewerage system for the area (even temporarily), the kitchen greywater cannot be discharged legally. However, clause 45 will ensure that if the premises are not connected to the sewerage system the owner will be allowed to discharge kitchen greywater into a holding tank installed on the premises under a permit, during the period stated in the permit, for collection and disposal off-site by a truck.

Under the unamended version of section 78(1)(b), an owner of premises located in an area not served by a sewerage system (an unsewered area) must ensure kitchen greywater is discharged into:

- a greywater use facility that includes a greywater treatment plant; or
- an on-site sewage facility; or
- an environmentally relevant on-site sewage facility.

This requirement is problematic where there is insufficient space to accommodate a facility for treating the greywater.

Clause 47(4) expands the definition *on-site sewage facility* for the Plumbing and Drainage Act so it captures a holding tank installed on premises. As a result, an owner of premises located in an unsewered area will have the option to discharge untreated kitchen greywater directly into a holding tank installed on the premises under a permit, during the period stated in the permit, for collection and disposal off-site by a truck.

Local governments will be allowed to issue permits for the installation of holding tanks to be used on a permanent basis for premises in unsewered areas.

The option to discharge untreated matter directly into a holding tank installed on premises under a permit issued by the local government, will provide a safe, practical and cost-effective solution to the problems mentioned above. It is proposed that such a permit would state the period for which the holding tank could be used for the discharge and disposal of untreated matter.

Clause 46 Amendment of s 79 (Discharging and using greywater, other than kitchen greywater)

Clause 46(1) expands section 79(3) of the Plumbing and Drainage Act.

Under the unamended version of section 79(3)(a), the owner of premises in an area served by a sewerage system (a sewered area) must ensure greywater, other than kitchen greywater, from the premises is discharged into:

- a greywater use facility; or
- onto a garden or lawn on the premises using a hose or bucket; or
- into the sewerage system for the area.

Clause 46(1) will provide the owner with the additional option to discharge the greywater into a holding tank installed on the premises under a permit, during the period stated in the permit, for collection and disposal off-site by a truck.

In a sewered area, the local government will only issue a permit for the installation of a holding tank for temporary purposes in circumstances where it is not practical to connect to the sewerage system. For example, a local government may issue a permit for the installation of a holding tank for toilets and showers in a temporary structure used for an event such as an outdoor concert or show.

Under section 79(4), an owner of the premises located in an area that is not served by a sewerage system (an unsewered area) must ensure the greywater is discharged:

- into a greywater use facility; or
- onto a garden or lawn on the premises using a hose or bucket; or
- into an on-site sewage facility; or
- into an environmentally relevant on-site sewage facility.

Clause 47(4) expands the definition *on-site sewage facility* for the Plumbing and Drainage Act, so it captures a holding tank installed on premises. As a result, an owner of premises located in an unsewered area will have the option to discharge untreated kitchen greywater directly into a holding tank installed on the premises under a permit, during the period stated in the permit, for collection and disposal off-site by a truck.

Local governments will be allowed to issue permits for the installation of holding tanks to be used on a permanent basis for premises in unsewered areas.

The proposed amendments will alleviate the need for space on premises that might otherwise be required to accommodate a greywater use facility together with either a holding tank or a land application area, a garden or an environmentally relevant on-site sewage facility.

Clause 46(2) expands section 79(5), which states the ways in which treated greywater generated on premises located in an area served by a sewerage service may be used.

Clause 46(2) clarifies that section 79(5)(a) is intended to refer to a greywater treatment plant for which a treatment plant approval has been granted rather than a greywater treatment plant

that treats water to the standard stated for the plant in the Queensland Plumbing and Wastewater Code.

Clause 46(2) also introduces a new head of power that will allow a regulation to prescribe a range of additional uses for treated greywater. However, the greywater may only be used for a prescribed use if the requirements mentioned in section 79(5)(b)(i) to (iv) are satisfied.

It is intended that the Plumbing and Drainage Regulation will prescribe the use of the water for cooling towers for air conditioning that will serve large building developments. It is proposed that the Regulation will have the flexibility to prescribe other uses for treated greywater for large building developments including the use of the treated greywater for flushing toilets.

The Plumbing and Drainage Regulation will provide the regulatory framework for prescribed uses of treated greywater required to ensure public health and safety are maintained. This framework will limit uses that are permitted. It will also ensure the greywater must be treated by a treatment plant that has an appropriate capacity for the proposed use. Further, it will specify the quality of the water the plant must produce for the use. The new head of power in section 79(5)(b) will allow the Regulation to prescribe additional requirements for the use.

The regulatory framework provided for in the Regulation will help ensure appropriate health and safety outcomes are achieved. If there are any breaches of the requirements in the framework, powers in the Plumbing and Drainage Act, the Public Health Act and the Work Health and Safety Act, including powers to issue enforcement notices or start prosecutions, may be used to deal with those breaches.

Clause 47 Amendment of sch 1 (Dictionary)

Clause 47(1) omits the current definition *on-site sewage treatment plant* from the dictionary.

Clause 47(2) inserts a definition *holding tank* in the dictionary. It also inserts a new definition *on-site sewage treatment plant* in the dictionary.

Clause 47(3) corrects some minor drafting errors in the definition *on-site sewage facility*. The effect of the subclause is to replace references to ‘on-site treatment plant’ with ‘on-site sewage treatment plant’.

Clause 47(4) expands the definition *on-site sewage facility* to include a reference to a holding tank installed on premises.

Part 8 Amendment of Professional Engineers Act 2002

Clause 48 Act amended

Clause 48 provides that Part 8 amends the *Professional Engineers Act 2002*.

Clause 49 Amendment of s 16 (Meaning of continuing registration requirements)

Clause 49 amends section 16 (Meaning of continuing registration requirements) to provide that information regarding the Board of Professional Engineers of Queensland’s continuing

registration requirements must be kept available for inspection at the Board's office when the office is open to the public.

Clause 50 Amendment of s 37 (Complaints about conduct)

Clause 50 amends section 37 (Complaints about conduct) to provide that the Board must keep information mentioned in subsection 37(3) published on the Board's website. This information is about the type of conduct the Board considers may give rise to a complaint and how a person may make a complaint.

Clause 51 Amendment of s 87 (Vacation of office)

Clause 51 amends section 87 (Vacation of office) to clarify that if a Board member resigns office by notice given to the Minister, the resignation takes effect on the day the notice is given or, if a later day is stated in the notice, on the later day. Currently, the Act is silent on when resignation takes effect.

Clause 52 Amendment of s 96 (Minutes)

Clause 52 amendments section 96 (Minutes) to remove the requirement for minutes to reference authorisations made by the Board in relation to the common seal. This requirement is considered redundant as clause 54 removes requirements in relation to the common seal.

Clause 53 Amendment of s 103 (Inspection of register)

Clause 53 amends section 103 (Inspection of register) to provide that the register maintained by Board must be kept open for inspection at the Board's office when the office is open to the public. Clause 53 also amends subsection 103(2) to provide that the Board must make the register available for inspection on its website. This reflects current operational practices, promotes consistency and ensures important documents must be made available online.

Clause 54 Omission of s 105 (Board's common seal)

Clause 54 removes the requirements in relation to the Board's common seal under section 105 (Board's common seal). This provision currently requires that the common seal must be kept in the custody of a person nominated by the Board and may be used only as authorised by the Board. The Board still has a common seal under section 77, however section 105 is considered redundant and unnecessary.

Clause 55 Amendment of s 110 (Inspection of code)

Clause 55 amends section 110 (Inspection of code) to provide that the Board must keep the code of practice open for inspection at the Board's office when the office is open to the public. Clause 55 also amends section 110 to provide that the Board must make the code of practice available for inspection on its website. This reflects current operational practices, promotes consistency in requirements and ensures important documents must be made available online.

Clause 56 Amendment of s 112V (Record of assessment entities)

Clause 56 amends section 112V to provide that a record given to the Board by an entity under subsections 112V(1) must be kept open for inspection at the Board's office when the office is open to the public.

Clause 57 Amendment of s 126 (Information about review)

Clause 57 amends section 126 (Information about review) to provide that the Board must keep information published on the Board's website information about how a person may apply to the tribunal for a review of a decision mentioned in section 122(2).

Clause 58 Amendment of s 142 (Protection from liability)

Clause 58 amends section 142 (Protection from immunity) to extend the immunity from civil liability to all employees of the Board. This ensures Board appointed staff are afforded the same civil liability protections as Board members and other staff engaged under the PE Act (investigators and persons engaged under section 45 to assist the Board or an investigator) as well as the Queensland public service.

Part 9 Amendment of Queensland Building and Construction Commission Act 1991

Clause 59 Act amended

Clause 59 provides that Part 9 amends the *Queensland Building and Construction Commission Act 1991*.

Clause 60 Amendment of s 28B (Exchange of information between commission and relevant agencies)

Clause 60 amends section 28B (Exchange of information between commission and relevant agencies) to include 'an entity established under an Act' within the definition of 'relevant agency'.

Clause 61 Amendment of s 49A (Immediate suspension of licence)

Clause 61 amends section 49A (Immediate suspension of licence) to provide that the QBCC has the power to immediately suspend a licence in response to risks of serious financial loss or other serious harm to a person. The clause will omit references to 'other licensees', 'the employees of other licensees', 'consumers' and 'suppliers of building materials or services' listed in section 49A(1)(a)-(d), as these classes of persons will be captured within the broad remit of 'a person'.

Clause 62 Amendment of s 67WA (Definition for pt 5)

Clause 62 amends section 67WA (Definition for pt 5) to clarify that a licensed contractor engaging a subcontractor to carry out work is not captured within the definition of a 'consumer' for the purposes of the Queensland Home Warranty Scheme.

Clause 63 Amendment of s 74B (Proper grounds for taking disciplinary action against a licensee and former licensees)

Clause 63 amends section 74B (Proper grounds for taking disciplinary action against licensee and former licensees) to clarify that a licensee or former licensee contravening a requirement or offence provision under the *Queensland Building and Construction Commission Act 1991*, the *Building Act 1975* or the *Building Industry Fairness (Security of Payment) Act 2017* is proper grounds for the QBCC taking disciplinary action.

Clause 63 also amends section 74B(3) to clarify that an offence provision means a provision creating an offence or civil penalty.

Clause 64 Amendment of s 86 (Reviewable decisions)

Clause 64 makes a decision made under section 245O or section 245Q of the Building Act a reviewable decision under the QBCC Act, part 7, division 3. Together with various amendments of the Building Act, the clause will ensure a person who is dissatisfied with a decision made by QBCC about a pool safety management plan for a swimming pool may apply for an internal or external review of the decision under the QBCC Act.

Clause 65 Insertion of new s 106V (Information to complainant on completion of investigation or internal review)

Clause 65 inserts new section 106V (Information to complainant on completion of investigation or internal review) to provide that if an investigator investigates compliance with an Act mentioned in section 104A(a) because of a complaint, the commissioner may inform the complainant of the result of the investigation. This is intended to primarily address circumstances where complainants are directly affected by the subject matter, and not necessarily other third-party complainants, such as those who may have merely observed or suspected non-compliance but who have not been directly or personally affected.

Clause 66 Amendment of s 110 (Confidentiality of information)

Clause 66 amends section 110 (Confidentiality of information) to:

- refine the drafting of certain subsections, without changing the policy intent of the original provision; and
- clarify that the requirements of confidentiality of information contained in section 110(2) does not apply to new section 106V (Information to complainant on completion of investigation).

Clause 67 Amendment of sch 1A (Exemptions from requirement to hold contractor's licence)

Clause 67 amends schedule 1A (Exemptions from requirement to hold contractor's licence) to clarify that the head contractor licensing exemption prescribed in schedule 1A, section 8(1) and (2) does not apply in circumstances prescribed in regulation.

Part 10 Other amendments

Clause 68 Acts amended

Clause 68 provides a schedule that amends the Acts it mentions.

Schedule 1 Other amendments

Building Industry Fairness (Security of Payment) Regulation 2018

Clause 68 Amendment of s 10K (Review of trust account – Act, s 57)

Clause 68 makes consequential amendments to section 10K of the BIF Regulation as a consequence of renumbering of various sections of the BIF Act.

Clause 68 Amendment of s 10L (Account review report—Act, s 57A)

Clause 68 makes a consequential amendment to section 10L of the BIF Regulation to replace ‘requirements for the trust account under the Act’ with ‘chapter 2 requirements in relation to the trust account’ as provided in the amended section 57A of the BIF Act.

Queensland Building and Construction Commission Act 1991

Clause 68 Section 22(2), general manager’s’ –

Clause 68 replaces ‘general manager’ with ‘commissioner’ to reflect current title.

Clause 68 Section 67WB(1) and (3), ‘assistance scheme’ –

Clause 68 replaces ‘assistance scheme’ with ‘scheme’ to amend a typographical error.