



Building Industry Fairness (Security of Payment) Act 2017

Current as at 27 August 2020

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

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Queensland

Building Industry Fairness (Security of Payment) Act 2017

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Building Industry Fairness (Security of Payment) Act 2017

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

Chapter 1 Preliminary

Part 1 Introduction

1 Short title

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

2 Commencement

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

Note—

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

3 The main purpose of Act

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

Part 2 Application and operation of Act

4 Act binds all persons

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

Part 3 Interpretation

5 Definitions

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

6 Subcontracts, subcontractors and subcontracted work

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

Example for paragraph (b)—

the purchase of tools from a retail store

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

Note—

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

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

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

Example—

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

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

Chapter 2 Project bank accounts

Part 1 Preliminary

7 Purpose of chapter

The main purpose of this chapter is to ensure that money to be paid to particular subcontractors is held in a way that protects the interests of the subcontractors.

8 Definitions for chapter

In this chapter—

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

building contract—

- (a) means a contract or other arrangement for carrying out building work in Queensland (whether or not the contract or arrangement is also for other matters); but
- (b) does not include a subcontract.

building work—

- (a) means—
 - (i) the erection or construction of a building; or
 - (ii) the renovation, alteration, extension, improvement or repair of a building; or

- (iii) the provision of lighting, heating, ventilation, air-conditioning, water supply, sewerage or drainage in connection with a building; or
 - (iv) any site work (including the construction of retaining structures) related to work of a kind referred to above; or
 - (v) the preparation of plans or specifications for the performance of building work; or
 - (vi) contract administration carried out by a person in relation to the construction of a building designed by the person; or
 - (vii) fire protection work; or
 - (viii) carrying out a completed building inspection; or
 - (ix) the inspection or investigation of a building, and the provision of advice or a report, for termite management systems for the building or for termite infestation in the building; and
- (b) includes work prescribed by regulation; and
 - (c) does not include work prescribed by regulation.

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

contract price see section 10.

disputed funds trust account see section 23(1)(c).

fire protection work see the *Queensland Building and Construction Commission Act 1991*, schedule 2.

first tier subcontract see section 6(5).

general trust account see section 23(1)(a).

head contractor means the party to a building contract who is required to carry out building work under the contract.

maintenance work—

- (a) means work required on an ongoing basis to—

- (i) prevent deterioration or failure of a thing; or
 - (ii) restore a thing to its correct operating specifications; or
 - (iii) replace a component at the end of its working life; but
- (b) does not include—
- (i) improving a building to increase its capabilities or functions; or
 - (ii) improving a building to meet new statutory requirements applying to the building; or
 - (iii) a refurbishment or replacement of a building that extends the life of the building.

payment dispute see section 35.

principal means the party to a building contract for whose benefit building work is to be carried out under the contract.

project bank account see section 9(1).

related entity see section 19.

retention trust account see section 23(1)(b).

State authority—

- (a) means—
- (i) an agency, authority, commission, corporation, instrumentality, office, or other entity, established under an Act or by authority of the State for a public or State purpose; or
 - (ii) a corporation, owned or controlled by the State, a local government or an entity mentioned in subparagraph (i), if declared by regulation to be a State authority; or
 - (iii) a subsidiary of a corporation mentioned in subparagraph (ii); or

- (iv) a part of an entity mentioned in subparagraphs (i) to (iii); but
- (b) does not include an entity prescribed by regulation.

subcontractor beneficiary, for a project bank account, means a subcontractor that—

- (a) as a party to a subcontract for the building contract is required to carry out subcontracted work; and
- (b) is a beneficiary of the project bank account.

supplier see section 11.

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

9 What is a **project bank account**

- (1) A **project bank account** is a trust over the following amounts—
 - (a) an amount paid by the principal to the head contractor under a building contract;
 - (b) an amount a subcontractor is entitled to be paid by the head contractor in connection with a first tier subcontract;
 - (c) a retention amount withheld from a subcontractor under a first tier subcontract;
 - (d) an amount that is the subject of a payment dispute.
- (2) The head contractor is the trustee of the project bank account.
- (3) The head contractor and each subcontractor are the beneficiaries of the project bank account and have a beneficial interest in the amounts held on trust under the project bank account to the extent of—
 - (a) for a subcontractor—an amount the subcontractor is entitled to be paid in connection with its subcontract,

including a retention amount and an amount the subject of a payment dispute; or

- (b) for the head contractor—the remainder for the project bank account.
- (4) A subcontractor—
- (a) becomes a beneficiary when its subcontract is entered into; and
 - (b) ceases to be a beneficiary when paid all amounts it is entitled to be paid in connection with its subcontract, including a retention amount and an amount the subject of a payment dispute.
- (5) In this section—

remainder, for a project bank account, means the amount held in trust under the project bank account after subtracting all of the following amounts—

- (a) an amount a subcontractor is entitled to be paid by the head contractor in connection with a first tier subcontract;
- (b) a retention amount withheld from a subcontractor under a first tier subcontract;
- (c) an amount that is the subject of a payment dispute.

subcontractor, for a building contract, means a subcontractor, other than a supplier, for a first tier subcontract for the building contract.

10 Contract price

- (1) The *contract price*, for a building contract, means the amount the head contractor is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the head contractor is entitled to be paid under the contract.
- (2) An amount mentioned in subsection (1) is inclusive of GST.

10A When amount is liable to be paid to subcontractor

The head contractor for a project bank account is liable to pay an amount to a subcontractor beneficiary if any of the following apply in connection with a subcontract between the head contractor and the subcontractor beneficiary—

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

11 Who is a *supplier*

- (1) A subcontractor is a *supplier* if, under their subcontract, the subcontractor is only required to supply goods or services without also carrying out building work.
- (2) However, a subcontractor is not a *supplier* if the subcontractor is required under any of the following Acts to hold a licence or other authority to lawfully supply the goods or services—
 - (a) the *Building Act 1975*;
 - (b) the *Electrical Safety Act 2002*;

- (c) the *Plumbing and Drainage Act 2018*;
- (d) the *Queensland Building and Construction Commission Act 1991*;
- (e) another Act prescribed by regulation.

12 References to particular terms in this chapter

In this chapter—

- (a) a reference to a building contract in association with a reference to a project bank account is a reference to the building contract for which the project bank account is required; and
- (b) a reference to a principal in association with a reference to a project bank account is a reference to the principal for the building contract for which the project bank account is required; and
- (c) a reference to a head contractor in association with a reference to a project bank account is a reference to the head contractor for the building contract for which the project bank account is required; and
- (d) a reference to a subcontract in association with a reference to a project bank account is a reference to a subcontract for the building contract for which the project bank account is required; and
- (e) a reference to a subcontractor beneficiary in association with a reference to a project bank account is a reference to a subcontractor beneficiary for the project bank account; and
- (f) a reference to a trust account in association with a reference to a project bank account is a reference to a trust account opened for the project bank account.

Part 2 **When project bank accounts required**

Division 1 **Building contracts requiring project bank account**

13 **Building contracts requiring a project bank account**

- (1) A project bank account is required for a building contract if—
 - (a) the contract is a PBA contract under section 14 or 15;
and
 - (b) the head contractor enters into a subcontract for all or
part of the contracted building work.
- (2) However, a project bank account is not required for a building
contract if it is a building contract for which a project bank
account is not required under division 2.
- (3) If a project bank account is required for a building contract
under subsection (1), the requirement continues until the
contract ends, regardless of any of the following—
 - (a) a variation, or any other amendment, of the contract;
 - (b) a change in the contract price;
 - (c) a change in the work to be carried out under the
contract.

14 **Particular government building contracts**

- (1) A building contract is a PBA contract if—
 - (a) the principal for the contract is—
 - (i) the State; or
 - (ii) a State authority that has decided a project bank
account is to be established for the contract; and

- (b) more than 50% of the contract price is for building work; and
 - (c) the contract price for the building contract is \$1 million or more but not more than \$10 million; and
 - (d) the building contract is not a subcontract for another building contract.
- (2) A building contract may, by regulation, be declared a PBA contract if the principal for the contract is the State or a State authority.

15 Amendment of building contract

- (1) A building contract becomes a PBA contract if—
- (a) before an amendment of the contract, the contract is not a building contract described in section 14; but
 - (b) after an amendment of the contract, the contract is a building contract described in section 14.
- (2) However, if the amendment of the building contract includes an increase in the contract price, the contract becomes a PBA contract only if the amendment of the contract, together with any earlier amendments of the contract, increases the contract price by 30% or more.
- (3) In this section—
- amendment*, of a building contract, includes any variation of the contract or change in the contract price.

Division 2 Building contracts not requiring project bank account

16 Building contracts for residential construction work

- (1) A project bank account is not required for a building contract if the only building work that the contract is for is residential construction work.

-
- (2) However, subsection (1) does not apply to a building contract if—
- (a) the principal for the contract is the department; and
 - (b) the residential construction work relates to 3 or more living units.
- (3) For subsection (2)(b)—
- (a) a single detached dwelling is taken to be 1 living unit; and
 - (b) a residential unit is taken to be 1 living unit; and
 - (c) a duplex is taken to be 2 living units.

- (4) In this section—

building envelope, for a residence or related roofed building, means the outermost sides of the aggregation of the components of a building that have the primary function of separating the internal part of the residence or related roofed building from the external environment.

Example of a building envelope—

the slab and footings system, an external wall and a roof

related roofed building—

- (a) means a building that—
 - (i) has a roof designed to be part of the building and is impervious to water or wind; and
 - (ii) is, or is proposed to be, on the site of a residence or proposed residence; and
 - (iii) is used, or proposed to be used, for a purpose related to the use of a residence or proposed residence; but
- (b) does not include—
 - (i) a residence; or
 - (ii) a building if the roof is a sail, umbrella or similar thing.

regulated amount means \$3,300 or the higher amount, if any, prescribed by a regulation.

residence means a type of building or structure prescribed by regulation.

residential construction work—

- (a) means any of the following work if carried out by a licensed contractor and the insurable value of the work is more than the regulated amount—
 - (i) the erection or construction of a residence or related roofed building;
 - (ii) building work within the building envelope of a residence or related roofed building;
 - (iii) building work for anything attached or connected to a residence or related roofed building that requires building or plumbing approval;
 - (iv) the erection, construction or installation of a swimming pool within the meaning of the *Building Act 1975*, schedule 2;
 - (v) other building work prescribed by regulation; and
- (b) includes additional work, whether or not it is building work, that may be contracted to be carried out under a building contract if—
 - (i) for work relating to a residence—the work is carried out on the site of the residence or proposed residence and is for residential purposes; or
 - (ii) for work relating to a related roofed building—the work is carried out on the site of the building or proposed building and is for residential purposes.

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

17 Building contracts for maintenance work

A project bank account is not required for a building contract if the only building work that the contract is for is maintenance work.

18 Government contracts tendered before commencement

- (1) A project bank account is not required for a building contract if—
 - (a) the principal is the State or a State authority; and
 - (b) the first time the tender for the contract was issued or advertised was before the commencement of this section.
- (2) To remove any doubt, it is declared that the project bank account continues to not be required for the building contract regardless of any of the following—
 - (a) a variation, or any other amendment, of the contract;
 - (b) a change in the contract price;
 - (c) a change in the work to be carried out under the contract.

Division 3 Related entities

19 Who is a *related entity*

- (1) A person is a *related entity* for another person if—
 - (a) for individuals—they are members of the same family; or
 - (b) for an individual and a corporation—the individual or a member of the individual's family—
 - (i) is a majority shareholder, director or secretary of the corporation or a related body corporate of the corporation; or

- (ii) has an interest of 50% or more in the corporation;
or
 - (c) for an individual and a trustee of a trust—the individual or a related entity under another provision of this section is a beneficiary of the trust; or
 - (d) for corporations—they are related bodies corporate; or
 - (e) for a corporation and a trustee of a trust—the corporation or a related entity under another provision of this section is a beneficiary of the trust; or
 - (f) for trustees of 2 or more trusts—
 - (i) a person is a beneficiary of both trusts; or
 - (ii) a person is a beneficiary of 1 trust and a related entity under another provision of this section is a beneficiary of the other trust.
- (2) Also, a person is a **related entity** for another person if the persons acquire interests in a land holding trust and the acquisitions form, evidence, give effect to or arise from what is substantially 1 arrangement.
- (3) In this section—

family, for a person, means—

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

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

related body corporate see the Corporations Act, section 50.

20 Application of chapter if parties to a subcontract are related entities

- (1) This section applies if—
 - (a) a project bank account is required for a building contract; and
 - (b) a subcontractor, for a first tier subcontract, is a related entity for the head contractor.
- (2) A project bank account is also required for the first tier subcontract if the subcontractor further subcontracts all or part of the building work it is required to carry out under the subcontract.
- (3) For the purpose of subsection (2), this chapter, other than this division, applies as if—
 - (a) a reference to a principal is taken to be a reference to the head contractor; and
 - (b) a reference to a head contractor is taken to be a reference to the subcontractor for a first tier subcontract; and
 - (c) a reference to a subcontractor (the *higher subcontractor*) for a first tier subcontract is taken to be a reference to a subcontractor for a second tier subcontract to which the higher subcontractor is a party.
- (4) To remove any doubt, it is declared that the subcontractor continues to be a subcontractor beneficiary under the project bank account for the building contract.
- (5) In this section—

subcontractor does not include a supplier.

21 Notices about related entities

- (1) This section applies if a project bank account is established for a building contract.
- (2) If the principal knows that a subcontractor beneficiary is a related entity for the head contractor, the principal must

advise the commissioner of the matter in the approved form within 5 business days after the person first knows the subcontractor beneficiary is a related entity for the head contractor.

Maximum penalty—50 penalty units.

- (3) For subsection (2), the principal is taken to know a subcontractor beneficiary is a related entity for the head contractor if the principal ought reasonably to know.
- (4) If the head contractor enters into a subcontract with a related entity, the head contractor must advise the commissioner and the principal, in the approved form, within 5 business days after entering into the subcontract.

Maximum penalty—200 penalty units.

Part 3 Project bank accounts

Division 1 Application

22 Application of part

This part applies if a project bank account is required for a building contract under section 13.

Division 2 Establishing project bank accounts

23 Head contractor must establish project bank account

- (1) The head contractor must establish a project bank account by opening all of the following trust accounts at the office or a branch of a financial institution within the State—
 - (a) an account (*general trust account*) for amounts paid under the head contract, paid under a subcontract with a

subcontractor beneficiary or authorised to be deposited under section 28(e);

- (b) an account (*retention trust account*) for amounts held as a retention amount for a subcontract with a subcontractor beneficiary;
- (c) an account (*disputed funds trust account*) for amounts the subject of a payment dispute.

Maximum penalty—500 penalty units.

- (2) The building contract may provide for the date by which the project bank account must be established but only to the extent that the date is not—
 - (a) less than 20 business days after the building contract is entered into; or
 - (b) later than 20 business days after the head contractor enters into the first subcontract for the building contract.
- (3) The project bank account must be established by the date provided for its establishment under the building contract.
- (4) However, if the contract does not provide for a date for establishment of a project bank account, or provides for a date incompatible with subsection (2), the project bank account must be established within 20 business days after the head contractor enters into the first subcontract for the building contract.
- (5) Also, if a regulation prescribes a maximum period within which a project bank account must be established, the project bank account must be established within the prescribed period.
- (6) Despite subsections (1) to (5), subsection (7) applies if the head contractor has already entered into a subcontract for the building contract before the day (the *start date*) a project bank account is required for the contract.

Note—

Under section 15 a project bank account may be required for a building contract after an amendment of the contract.

- (7) The head contractor must establish the project bank account within 20 business days after the start date.

Maximum penalty—500 penalty units.

- (8) This section does not apply to a head contractor if the contractor can prove that there is less than 90 days between—

- (a) the day a project bank account would, apart from this subsection, have been required for the contract; and
- (b) the day practical completion for the building work carried out under the contract would occur.

- (9) In this section—

practical completion, for building work carried out under a building contract, means—

- (a) the day for practical completion as worked out under the contract; or
- (b) if the contract does not provide for the day practical completion of the work is achieved—the day that work carried out under the contract would reasonably be estimated to be completed—
 - (i) in compliance with the contract, including all plans and specifications for the work and all statutory requirements applying to the work; and
 - (ii) without any defects or omissions, other than minor defects or minor omissions that will not unreasonably affect the intended use of the work.

24 Particular requirements for trust accounts

- (1) The head contractor must ensure the following for trust accounts for the project bank account—

- (a) deposits of amounts to, and withdrawals of amounts from, the trust accounts can only be made using electronic transfers; and

- (b) withdrawals from the trust accounts can only be made using a payment instruction given to the financial institution; and
- (c) transfers between the trust accounts can only be made using a payment instruction given to the financial institution.

Maximum penalty—500 penalty units.

- (2) The head contractor must ensure that the principal can view—
 - (a) deposits of amounts to, and withdrawals of amounts from, a trust account from the project bank account; and
 - (b) information relevant to payment instructions given to a financial institution about the project bank account; and
 - (c) account payment reports.

Maximum penalty—200 penalty units.

- (3) In this section—

principal includes an agent or employee of the principal if the principal informs the head contractor that the agent or employee is authorised to view the information mentioned in subsection (2).

25 Name of trust account

If opening an account at a financial institution in relation to a project bank account, the head contractor must ensure the account's name includes the word 'trust'.

Maximum penalty—200 penalty units.

26 Notice of trust account's opening, closing or name change

- (1) This section applies if the head contractor takes any of the following actions in relation to the project bank account—
 - (a) opens a trust account;

- (b) changes the name of a trust account;
 - (c) closes a trust account.
- (2) The head contractor must give the principal notice, in the approved form, of taking the action within 5 business days after taking it.

Maximum penalty—200 penalty units.

- (3) The approved form must require the following information—
- (a) the name of the trust account;
 - (b) the name of the financial institution where the trust account is or was kept;
 - (c) the identifying number of the financial institution;

Note—

The identifying number is commonly referred to as the bank state branch number (BSB).

- (d) the trust account number.

Division 3 Payments to project bank account

27 All payments from principal to be deposited in project bank account

- (1) Subsection (2) applies if the principal pays an amount to the head contractor—
- (a) under the building contract; or
 - (b) because the principal is liable under section 77 to pay the amount to the head contractor in relation to the building contract; or
 - (c) because of an adjudication under chapter 3, part 4 of a disputed progress payment relating to the building contract; or
 - (d) because of a final and binding dispute resolution process relating to the building contract; or

- (e) because of a court order relating to the building contract;
or
 - (f) for any other reason that reduces the unpaid amount of
the contract price for the building contract.
- (2) The principal must deposit the amount into the general trust
account for the project bank account unless—
- (a) the amount was due to be paid before the project bank
account was established; or
 - (b) the amount is paid into court; or
 - (c) the amount is paid directly to a person under chapter 4;
or
 - (d) the principal has a reasonable excuse.

Maximum penalty—200 penalty units.

- (3) An amount deposited under subsection (2) is taken to be a
payment made by the principal to the head contractor and
discharges the principal's liability to pay that amount to the
head contractor under the building contract.
- (4) If an amount is paid to the head contractor or its agent in
contravention of subsection (2), the head contractor must
deposit the amount into the general trust account as soon as
practicable after receiving the amount.

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

28 Limited purposes for which money may be deposited into project bank account

The head contractor must not cause an amount to be deposited
into a trust account, for the project bank account, for any
purpose other than—

- (a) paying the head contractor an amount the principal must
deposit into the general trust account under
section 27(2); or

[s 29]

- (b) paying a subcontractor beneficiary an amount the head contractor is liable to pay the subcontractor beneficiary in connection with its subcontract with the head contractor; or
- (c) paying an amount held as a retention amount; or
- (d) paying an amount the subject of a payment dispute; or
- (e) making another payment prescribed by regulation.

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

Division 4 Payments from project bank account

29 All payments to subcontractor beneficiaries to be paid from project bank account

- (1) This section applies if the head contractor is liable to pay an amount to a subcontractor beneficiary in connection with its subcontract with the head contractor.
- (2) The head contractor may only pay the amount to the subcontractor beneficiary from a trust account.

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

- (3) To remove any doubt, it is declared that the obligation under subsection (2) applies whether or not the amount to be paid is held in a trust account when the amount is due.

Note—

See section 30 about head contractors covering shortfalls.

30 Head contractor to cover shortfalls

- (1) This section applies if—

- (a) an amount is due to be paid from a trust account to a subcontractor beneficiary; and
 - (b) there is an insufficient amount available in the trust account to pay the amount to the subcontractor beneficiary.
- (2) The head contractor must immediately deposit into the trust account an amount equal to the shortfall.

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

- (3) In this section—

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

31 Limited purposes for which money may be withdrawn from project bank account

- (1) The head contractor must not withdraw an amount from a trust account for any purpose other than—
- (a) paying a subcontractor beneficiary an amount the head contractor is liable to pay the subcontractor beneficiary in connection with its subcontract with the head contractor; or
 - (b) paying to the head contractor an amount that the principal is liable to pay the head contractor for contracted building work but only to the extent the head contractor is not also liable to pay a subcontractor beneficiary for the same work; or
 - (c) returning an amount paid in error by the principal; or
 - (d) transferring the money to another trust account as required under this chapter; or
 - (e) making another payment prescribed by regulation.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (2) The head contractor must repay to the trust account all amounts that the head contractor withdraws in contravention of subsection (1) as soon as practicable after withdrawing the amount.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (3) The head contractor is taken to have made a withdrawal if the head contractor authorises any person to make the withdrawal or knowingly contributes to the withdrawal being made.

32 Order of priority

- (1) A head contractor must not withdraw an amount from a trust account for a project bank account to pay itself, or make another payment prescribed by regulation, unless—

- (a) there would still be a sufficient amount available in the trust account after the withdrawal to pay all amounts the head contractor is liable to pay the subcontractor beneficiaries at the time of the withdrawal; and
- (b) the withdrawal will not reduce a retention amount, for a subcontract, held in the retention trust account before the retention amount may be released under the subcontract.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (2) However, the head contractor may withdraw an amount contrary to subsection (1) if the withdrawal is to make a payment ordered by a court or for an adjudication under chapter 3, part 4.

33 Insufficient amounts available for payments

- (1) This section applies if—

- (a) the head contractor is liable to pay 2 or more subcontractor beneficiaries (each a *claimant*) an amount from a trust account at the same time; and
 - (b) the total amount held in the trust account is insufficient to satisfy in full all of the amounts liable to be paid to the claimants; and
 - (c) at the time an amount liable to be paid to a claimant is due to be paid, the head contractor has not complied with its obligation under section 30 to cover the insufficient amount.
- (2) The amount to be paid by the head contractor to each subcontractor beneficiary is to be reduced in proportion to the amounts liable to be paid to each.

Example—

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

- (3) While there continues to be insufficient amounts held in the trust account, the head contractor must not pay a claimant unless the amount paid complies with subsection (2).

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

- (4) Nothing in this section relieves the head contractor of its liability to pay in full the amounts the head contractor is liable to pay each claimant.

Division 5 Retention amounts

34 Dealing with retention amounts

- (1) The head contractor must ensure that a retention amount for a subcontract with a subcontractor beneficiary is held in the retention trust account for the project bank account.

[s 34A]

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) If a project bank account is not established until after a retention amount is withheld from a subcontractor beneficiary, subsection (1) applies to that part of the retention amount still withheld past 5 business days after the project bank account is established.

Note—

Under section 15 a project bank account may be required for a building contract only after an amendment of the contract.

- (3) If subsection (2) causes the head contractor to deposit a retention amount into the retention trust account, the head contractor must give written notice of the deposit to the subcontractor beneficiary from whom the amount was withheld.

Maximum penalty—100 penalty units.

- (4) The notice of the deposit must—
- (a) be given to the subcontractor beneficiary as soon as practicable after making the deposit; and
 - (b) state the amount of the deposit and when the deposit was made.
- (5) The head contractor must ensure a retention amount held in the retention trust account is identifiable as being held for the subcontractor beneficiary from whom it was withheld.

Maximum penalty—100 penalty units.

34A Withdrawing retention amounts held in retention trust account

- (1) The head contractor must not withdraw any part of a retention amount held in the retention trust account unless the withdrawal is to make—
- (a) a payment to the subcontractor beneficiary from whom the amount was withheld; or

- (b) a payment to the head contractor that is—
 - (i) to correct defects in subcontracted work, or otherwise to secure, wholly or partly, the performance of the related subcontract; and
 - (ii) made under the related subcontract; and
 - (iii) made after the end of the defects liability period for the related subcontract; or
- (c) a payment ordered by a court; or
- (d) a payment to a subcontractor beneficiary, engaged on behalf of the head contractor, that—
 - (i) is to correct defects or omissions in subcontracted work; and
 - (ii) would be made in accordance with the related subcontract if it were made to the head contractor.

Maximum penalty—300 penalty units or 2 years imprisonment.

- (2) In this section—

related subcontract, for a retention amount, means the subcontract under which the retention amount was withheld from payment.

Division 6 Payment disputes

34B Definitions for division

In this division—

appeal, of an outcome of a dispute resolution process, includes a review of the outcome of the dispute resolution process.

dispute resolution process means a process prescribed by regulation.

35 When payment dispute occurs

- (1) A *payment dispute* occurs if—
 - (a) a subcontractor beneficiary gives the head contractor a payment claim for a progress payment under section 75; and
 - (b) the head contractor gives a payment schedule to the subcontractor beneficiary for the progress payment; and
 - (c) the head contractor does not prepare a payment instruction to pay the full amount proposed to be paid under the payment schedule.
- (2) A *payment dispute* also occurs if—
 - (a) a subcontractor beneficiary gives the head contractor a payment claim for a progress payment under section 75; and
 - (b) the head contractor fails to give a payment schedule to the subcontractor beneficiary for the progress payment as required to do so under section 76; and
 - (c) under section 77, the head contractor becomes liable to pay the subcontractor beneficiary the amount claimed in the payment claim; and
 - (d) the head contractor does not prepare a payment instruction to pay the full amount claimed in the payment claim.

36 Obligation to transfer amounts if payment dispute occurs

- (1) If a payment dispute occurs, the head contractor must transfer an amount to the disputed funds trust account that is equal to the difference between—
 - (a) whichever of the following amounts apply for the dispute—
 - (i) for a payment dispute mentioned in section 35(1)—the amount the head contractor

proposed to pay the subcontractor beneficiary under a payment schedule;

- (ii) for a payment dispute mentioned in section 35(2)—the amount the head contractor is liable to pay the subcontractor beneficiary under section 77; and
- (b) whichever of the following amounts apply for the dispute—
- (i) if the head contractor prepared a payment instruction for payment to the subcontractor beneficiary of an amount in relation to the payment dispute—the amount stated in the payment instruction;
 - (ii) if the head contractor did not prepare a payment instruction—\$0.

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

- (2) The amount must be transferred—
- (a) for a payment dispute mentioned in section 35(1)—when the head contractor prepares a payment instruction for payment to the subcontractor beneficiary for the progress payment; or
 - (b) for a payment dispute mentioned in section 35(2)—when the head contractor becomes liable to pay the subcontractor beneficiary under section 77.
- (3) However, the head contractor need not comply with subsection (1) for an amount the subject of a payment dispute mentioned in subsection 35(2) to the extent the amount to be transferred is more than the contract price for the subcontract with the subcontractor beneficiary.
- (4) The ***contract price***, for a subcontract, means the amount the subcontractor is entitled to be paid under the subcontract or, if the amount can not be accurately calculated, the reasonable

estimate of the amount the subcontractor is entitled to be paid under the subcontract.

- (5) An amount mentioned in subsection (4) is inclusive of GST.
- (6) Immediately after transferring an amount under subsection (1), the head contractor must inform the subcontractor beneficiary in writing of when the amount was transferred into the disputed funds trust account.

Maximum penalty—50 penalty units.

- (7) In this section—

transfer means—

- (a) transfer from the general trust account or retention trust account; or
- (b) to the extent there is insufficient funds available in the accounts mentioned in paragraph (a)—transfer or deposit from another source.

36A Identifying amounts held in the disputed funds trust account

The head contractor must ensure an amount held in the disputed funds trust account is identifiable as being held for the subcontractor beneficiary who is a party to the payment dispute for which the amount is held.

Maximum penalty—100 penalty units.

36B Withdrawing amounts held in disputed funds trust account

- (1) The head contractor must not withdraw any part of an amount held in the disputed funds trust account unless the withdrawal is to—
 - (a) make a payment to—
 - (i) the subcontractor beneficiary who is a party to the payment dispute for which the amount is held; or

- (ii) the head contractor in accordance with the outcome of a dispute resolution process; or
 - (iii) another person in the circumstances prescribed by regulation; or
- (b) comply with the head contractor's obligation under section 36C(2).

Maximum penalty—300 penalty units or 2 years imprisonment.

- (2) However, if the outcome of the dispute resolution process mentioned in subsection (1)(a)(ii) may be appealed, the withdrawal for the payment to the head contractor under that provision must not be made until—
- (a) the conclusion of the period within which the appeal may be commenced; and
 - (b) if the appeal is commenced—the conclusion of the appeal.

36C Returning amounts held in disputed funds trust account after particular time

- (1) This section applies if—
- (a) the head contractor transfers an amount into the disputed funds trust account under section 36; and
 - (b) at the end of the relevant day any part of the amount remains in the disputed funds trust account.
- (2) As soon as practicable after the relevant day, the head contractor must—
- (a) if the amount was transferred from the general trust account or retention trust account—return the remaining amount to the trust account from which it was transferred; or
 - (b) otherwise—withdraw the remaining amount for payment to the head contractor.

Maximum penalty—50 penalty units.

(3) In this section—

relevant day, for an amount transferred into the disputed funds trust account, means—

- (a) if the amount is the subject of a dispute resolution process and the outcome of the process can not be appealed—the day the dispute resolution process ends; or
- (b) if the amount is the subject of a dispute resolution process and the outcome of the dispute resolution process may be appealed—
 - (i) the last day by which the appeal may be commenced; or
 - (ii) if an appeal from the outcome of the process is commenced—the day the appeal is decided; or
- (c) otherwise—the day that is 60 days after the notice of the transfer was given to the subcontractor beneficiary under section 36(7).

Division 7 Ending project bank account

37 Ending project bank account

- (1) The head contractor may dissolve a project bank account only if—
 - (a) there are no longer any subcontractor beneficiaries for the project bank account; or

Note—

A subcontractor beneficiary ceases to be a beneficiary when paid all amounts the head contractor is liable to pay the subcontractor beneficiary in connection with a first tier subcontract, including a retention amount and an amount the subject of a payment dispute. See section 9.

- (b) the only remaining building work to be carried out under the building contract is maintenance work.
- (2) The head contractor dissolves a project bank account by—
 - (a) closing the trust accounts; and
 - (b) giving written notice to the principal that the project bank account has been dissolved.
- (3) When dissolving a project bank account, the head contractor may pay itself the following amounts—
 - (a) any amount that is interest the contractor is entitled to under section 44;
 - (b) any remaining amount that is not otherwise owing to another person.
- (4) In this section—

maintenance work does not include work for which a retention amount has been withheld under a subcontract with a subcontractor beneficiary.

38 Unauthorised ending of project bank account

- (1) While a project bank account is required for a building contract, the head contractor must not dissolve the project bank account.

Maximum penalty—500 penalty units or 1 year’s imprisonment.
- (2) Without limiting subsection (1), the head contractor is taken to dissolve a project bank account if it closes any of the trust accounts while a project bank account is still required for the building contract.

Division 8 Other

39 **Amounts in project bank account unavailable for head contractor's debts**

- (1) An amount paid, or required to be paid, into a trust account for a project bank account can not be—
 - (a) used for payment of the debt of a creditor of the head contractor; or
 - (b) attached or taken in execution under a court order or process for the benefit of a creditor of the head contractor.
- (2) Subsection (1) ceases to apply to the amount if lawfully withdrawn from the trust account.
- (3) In this section—

creditor does not include a subcontractor beneficiary to the extent the head contractor is liable to pay an amount to the subcontractor beneficiary in connection with its subcontract with the head contractor.

40 **No power of head contractor to invest**

- (1) The head contractor must not invest funds held in a trust account for the project bank account in any form of investment.

Maximum penalty—200 penalty units or 1 year's imprisonment.
- (2) Subsection (1) does not apply to interest earned on an amount held in the trust account paid by the financial institution at which the account is held.

41 Power to employ agents

- (1) The head contractor may employ, or otherwise engage, an agent to do any act relating to the project bank account on behalf of the contractor.
- (2) The head contractor is liable for the acts and defaults of its agent as if they were the contractor's own acts and defaults.
- (3) The costs of employing or engaging an agent under subsection (1) are not recoverable from the project bank account or any of the beneficiaries.

42 Power to delegate

- (1) The head contractor may, using the approved form, delegate to a person resident in the State any powers of the contractor in relation to a project bank account, other than the power to delegate.
- (2) The delegation takes effect—
 - (a) if the person accepts the delegation; and
 - (b) during the periods stated in the approved form.
- (3) The head contractor is liable for the acts and defaults of its delegate as if they were the contractor's own acts and defaults.
- (4) Subsection (5) applies if—
 - (a) a person is delegated a power of a head contractor under subsection (1); and
 - (b) the person purports to—
 - (i) exercise a different power of the head contractor; or
 - (ii) exercise the power while the delegation is not in force; or
 - (iii) exercise the power after the delegation has been revoked by the head contractor or by operation of law; and

- (c) another person relies on the power purportedly exercised by the delegate.
- (5) Unless the other person had actual notice that the delegate was not authorised to exercise the power, the purported exercise of the power is taken to be as valid as if it were exercised under a delegation that was in force and authorised the purported exercise of the power.
- (6) The costs relating to the delegation are not recoverable from the project bank account or any of the beneficiaries.

43 Head contractor not entitled to payment for administration of project bank account or fees

The head contractor is not entitled to payment from the project bank account, or from a subcontractor beneficiary, for any amount relating to—

- (a) the administration of the project bank account by the contractor; or
- (b) fees payable for the project bank account.

44 Interest earned on amounts held in project bank account

- (1) The head contractor is entitled to receive all interest earned on amounts held in a trust account for a project bank account.
- (2) Subject to any amount to be paid under this chapter, the head contractor may withdraw an amount equal to the interest once every 12 months or on the dissolution of the project bank account.

45 Account to be kept by head contractor

- (1) A head contractor must keep written records of all transactions involving amounts held in a trust account for a project bank account that will—
 - (a) sufficiently explain the transactions; and

- (b) provide a true position in relation to the outcome of the transactions; and
- (c) enable accurate accounts to be prepared from time to time; and
- (d) enable convenient and proper audit of the transactions.

Maximum penalty—300 penalty units or 1 year's imprisonment.

- (2) Any words used in the records to explain a transaction must be in the English language.
- (3) The head contractor must retain a copy of the records for a period of not less than 7 years.

Maximum penalty—300 penalty units or 1 year's imprisonment.

46 Right of head contractor to apply to Supreme Court for directions

- (1) The head contractor may apply to the Supreme Court for directions about—
 - (a) an amount held in trust under a project bank account; or
 - (b) the administration of the project bank account; or
 - (c) the exercise of a power by the head contractor.
- (2) An application made under subsection (1) must be served on all subcontractor beneficiaries for the project bank account unless otherwise directed by the Supreme Court.

47 No assignment of entitlement by head contractor

An assignment by the head contractor of an entitlement of the head contractor to an amount held in trust under the project bank account is of no effect.

48 Equity and court’s jurisdiction preserved

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

Part 4 Information sharing

49 Notice of project bank account before entering subcontracts

- (1) This section applies if a project bank account is required for a building contract under section 13.
- (2) Before entering into a subcontract for the building contract, the head contractor must give the subcontractor the following information using the approved form—
 - (a) that a project bank account will be used for making payments to the subcontractor;
 - (b) details of the financial institution at which the trust accounts for the project bank account are to be held.

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

- (3) However, if the head contractor entered into a subcontract for the building contract before the day (the *start date*) a project bank account is required for the contract, the head contractor must give the subcontractor the information within 10 business days after the start date.

Note—

Under section 15 a project bank account may be required for a building contract only after an amendment of the contract.

50 Principal to be given information about subcontracts

- (1) This section applies if a project bank account is required to be established for a building contract under section 13.
- (2) The head contractor must give the principal the information prescribed by regulation—
 - (a) if the head contractor entered into a subcontract for the building contract before the day a project bank account is required to be established under section 13—within 5 business days after the project bank account is required to be established; or

Note—

Under section 15 a project bank account may be required for a building contract only after an amendment of the contract.

- (b) otherwise—within 5 business days after entering into a subcontract for the building contract.

Maximum penalty—200 penalty units.

- (3) The head contractor must, within 5 business days after becoming aware of a change in information given to the principal under subsection (2), advise the principal of the change using the approved form.

Note—

A change would include the addition of a subcontractor beneficiary.

Maximum penalty—200 penalty units.

- (4) A notice given under this section must be given in the approved form.

51 Principal and subcontractor to be given copy of payment instruction information

- (1) This section applies if a head contractor gives a financial institution a payment instruction for the payment of an amount from a trust account for a project bank account.
- (2) The head contractor must, as soon as practicable after giving the financial institution the payment instruction, ensure a copy

of the information contained in the payment instruction is given to—

- (a) the principal; and
- (b) if the payment is to a subcontractor beneficiary—the subcontractor beneficiary.

Maximum penalty—100 penalty units.

- (3) However, the copy of the information need only include the information prescribed by regulation.
- (4) In giving a copy of the information under subsection (2), the head contractor must not give the principal or subcontractor beneficiary information the contractor knows is false or misleading in a material particular.

Maximum penalty—200 penalty units.

52 Principal to inform commissioner of discrepancies

- (1) This section applies if a head contractor gives a principal a copy of information contained in a payment instruction under section 51.
- (2) The principal must inform the commissioner of any discrepancies in the payment instruction as soon as practicable after becoming aware of the discrepancies or after it ought to reasonably have known of the discrepancies.

Maximum penalty—100 penalty units.

- (3) In this section—

discrepancies, for a payment instruction, means—

- (a) an error in the account number for a subcontractor beneficiary; or
- (b) payment to an entity, other than the head contractor, that is not a subcontractor beneficiary; or
- (c) payment to a subcontractor beneficiary if the name of the beneficiary and the account name do not match.

Part 5 Effect of insolvency or termination of building contract

Division 1 Interpretation

53 Definitions for part

In this part—

administrator see the Corporations Act, section 9.

controller see the Corporations Act, section 9.

insolvency official means—

- (a) an administrator, controller, provisional liquidator or liquidator; or
- (b) trustee in bankruptcy; or
- (c) any person having a similar function to an office mentioned in paragraph (a) or (b).

liquidator see the Corporations Act, section 9.

provisional liquidator see the Corporations Act, section 9.

trustee in bankruptcy, for an individual, means—

- (a) in relation to a bankruptcy—the trustee of the estate of the bankrupt; or
- (b) in relation to a composition or scheme of arrangement under division 6 of part IV of the *Bankruptcy Act 1966* (Cwlth)—the trustee of the composition or scheme of arrangement; or
- (c) in relation to a personal insolvency agreement under part X of the *Bankruptcy Act 1966* (Cwlth)—the trustee of the agreement; or
- (d) in relation to the estate of a deceased person in respect of which an order has been made under part XI of the *Bankruptcy Act 1966* (Cwlth)—the trustee of the estate.

Division 2 Principal may step in as trustee

54 Right of principal to step in as trustee

- (1) This section applies if a project bank account is established for a building contract and—
 - (a) the contract is terminated by the principal for a default by the head contractor; or
 - (b) if the head contractor is an individual—he or she is an insolvent under administration within the meaning of the Corporations Act, section 9; or
 - (c) if the head contractor is a company—
 - (i) the company has a provisional liquidator, liquidator, administrator or controller appointed; or
 - (ii) the company is wound up, or is ordered to be wound up by the Court within the meaning of the Corporations Act, section 9; or
 - (d) another circumstance, prescribed by regulation, happens.
- (2) The principal may give a notice, in the approved form, to the head contractor advising that the principal will replace the head contractor as trustee of the project bank account.
- (3) From the day the notice is given to the head contractor—
 - (a) the head contractor is discharged as trustee for the project bank account; and
 - (b) the principal is appointed as trustee for the project bank account.
- (4) The notice—
 - (a) divests the amounts held in trust under the project bank account from the head contractor as trustee; and
 - (b) vests the amounts held in trust under the project bank account in the principal as trustee.

- (5) However, the head contractor continues to be entitled to an amount of interest that the head contractor would have been entitled to under section 44, up to the divestment.
- (6) Nothing in this section relieves the head contractor of their liability for an act or failure committed as trustee.
- (7) In this section—
head contractor includes an insolvency official for the head contractor.

Division 3 Principal as trustee

54A Application of division

This division applies if a principal is appointed as trustee for a project bank account under section 54.

55 Information to be given to principal as trustee

- (1) The head contractor must, as soon as practicable after the principal is appointed trustee, give the principal the information the principal will require to act as trustee of the project bank account, including, for example, the following information—
 - (a) details of the relevant financial institution;
 - (b) sufficient information to enable the principal to contact each subcontractor beneficiary;
 - (c) the details of a bank account into which each subcontractor beneficiary is to be paid amounts from the project bank account;
 - (d) a copy of the records of transactions that the head contractor was required to keep under section 45(1).

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

- (2) The head contractor must, as soon as practicable after the principal is appointed trustee, inform the relevant financial institution that the principal will act as the trustee of the project bank account.

Maximum penalty—50 penalty units.

- (3) A person with information the principal will require to act as trustee of the project bank account must give the information to the principal if requested in writing by the principal.

Maximum penalty—50 penalty units.

- (4) In this section—

relevant financial institution, for a project bank account, means the financial institution at which the trust accounts for the project bank account are held.

head contractor includes an insolvency official for the head contractor.

55A Right of principal to apply to Supreme Court for directions

- (1) As trustee for the project bank account, the principal may apply to the Supreme Court for directions about—
- (a) an amount held in trust under the project bank account; or
 - (b) the administration of the project bank account; or
 - (c) the exercise of a power by the principal.
- (2) An application made under subsection (1) must be served on all subcontractor beneficiaries for the project bank account unless otherwise directed by the Supreme Court.

56 Principal as trustee

- (1) As trustee of the project bank account, the principal may only make the payments to the subcontractor beneficiaries or head

contractor (as a beneficiary) that may be made under this chapter.

- (2) To remove any doubt, it is declared that—
- (a) the principal as trustee is not entitled to any payment from the project bank account, other than payment of an amount for interest earned under section 44; and
 - (b) the head contractor is not relieved of their obligation to top-up any shortfall in the project bank account under section 30; and
 - (c) the head contractor continues to be a beneficiary of the project bank account; and
 - (d) the principal as trustee is responsible for preparing any payment instructions required for payments from the project bank account; and
 - (e) an amount paid, or required to be paid, into a project bank account can not be—
 - (i) used for payment of the debt of a creditor of the principal; or
 - (ii) attached or taken in execution under a court order or process by a creditor of the principal; or
 - (iii) used to pay bank fees.

57 Protection from civil liability

As trustee for the project bank account, the principal does not incur civil liability for performing a function or exercising a power of a trustee if the conduct is engaged in good faith and without negligence.

Part 6 Other

58 **Limited liability of principal**

Nothing in this chapter creates or supports a right of action against the principal by a subcontractor beneficiary, or the head contractor, as a beneficiary of a project bank account.

59 **Application of Personal Property Securities Act 2009 (Cwlth)**

- (1) A project bank account—
- (a) is declared to be a statutory interest to which section 73(2) of the *Personal Property Securities Act 2009* (Cwlth) applies; and
 - (b) has priority over all security interests in relation to all money held in trust under the project bank account.
- (2) In this section—
- security interest* has the meaning given by the *Personal Property Securities Act 2009* (Cwlth), section 12.

60 **Application of Trust Accounts Act 1973 and Trusts Act 1973**

The *Trust Accounts Act 1973* and the *Trusts Act 1973* do not apply to a project bank account or a trustee or beneficiary of a project bank account.

Chapter 3 Progress payments

Part 1 Preliminary

Division 1 Application and operation of chapter

61 Application of chapter

- (1) Subject to subsections (2) to (4), this chapter applies to construction contracts—
 - (a) whether written or oral, or partly written and partly oral; and
 - (b) whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland; and
 - (c) whether entered into before or after the commencement of this section, other than to the extent the repealed *Building and Construction Industry Payments Act 2004* continues to apply to unfinished matters under section 205.
- (2) This chapter does not apply to—
 - (a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—
 - (i) to lend an amount or to repay an amount lent; or
 - (ii) to guarantee payment of an amount owing or repayment of an amount lent; or
 - (iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract; or

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

(5) In this section—

resident owner, in relation to a construction contract for carrying out domestic building work, means a resident owner under the *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 1, but does not include a person—

- (a) who holds, or should hold, an owner-builder permit under the *Queensland Building and Construction Commission Act 1991* relating to the work; or
- (b) who is a building contractor within the meaning of the *Queensland Building and Construction Commission Act 1991*.

62 Effect of giving notice of claim for subcontractors' charges

- (1) This section applies if a person gives a notice of claim under chapter 4 in relation to construction work or related goods and services the subject of a construction contract.
- (2) Proceedings or other action may not be started or continued by the person under part 3 for all or part of the construction work or related goods and services.
- (3) Without limiting subsection (2), if the person gave a respondent a payment claim for all or part of the construction work or related goods and services before or at the same time as giving the notice of claim—
 - (a) the respondent is not required to pay an amount to the person under section 77(2) in relation to the claim; and
 - (b) amounts may not be recovered by the person as a debt owing to the person in any court of competent jurisdiction in relation to the claim; and
 - (c) if the person made an adjudication application in relation to the claim and the application has not been decided by an adjudicator before the notice of claim is

- given, the person is taken to have withdrawn the application; and
- (d) if the person made an adjudication application in relation to the claim and the application has been decided by an adjudicator before the notice of claim was given—
- (i) the respondent to the application is not required to pay the adjudicated amount under section 90; and
 - (ii) the registrar must not give the person an adjudication certificate under section 91 relating to the adjudication; and
 - (iii) any adjudication certificate provided in relation to the adjudication can not be enforced by the person under section 93 as a judgment of a court; and
- (e) the person may not suspend, or continue to suspend, carrying out all or part of the construction work or the supply of the related goods and services under section 98.
- (4) This section does not affect the operation of section 95 and an adjudication application taken to have been withdrawn by the person under subsection (3)(c) is taken to have been withdrawn for the purpose of section 95.
- (5) This section does not stop the person serving, under this chapter, a payment claim in relation to all or part of the construction work or related goods and services and taking other action under this chapter in relation to that claim, if the notice of claim in so far as it relates to the construction work or related goods and services, or part, is withdrawn.
- (6) In this section—
notice of claim see section 122(1).

63 Act does not limit claimant's other rights

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

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

Division 2 Interpretation

64 Definitions for chapter

In this chapter—

adjudicated amount see section 88(1).

adjudication application see section 79(1).

adjudication certificate see section 91(1).

adjudication response see section 82(1).

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

carry out construction work means—

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

claimant see section 75(1).

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

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

construction work see section 65.

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

payment claim see section 68(1).

payment schedule see section 69.

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

- (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
- (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or
- (c) a payment that is based on an event or date, known in the building and construction industry as a ‘milestone payment’.

reference date see section 67.

related goods and services see section 66.

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

respondent see section 75(1).

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

65 Meaning of **construction work**

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

- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;
- (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
- (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—
 - (i) site clearance, earthmoving, excavation, tunnelling and boring; and
 - (ii) the laying of foundations; and
 - (iii) the erection, maintenance or dismantling of scaffolding; and
 - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
 - (v) site restoration, landscaping and the provision of roadways and other access works;

- (f) the painting or decorating of the internal or external surfaces of any building, structure or works;
 - (g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;
 - (h) any other work of a kind prescribed by regulation.
- (2) To remove doubt, it is declared that **construction work** includes building work within the meaning of the *Queensland Building and Construction Commission Act 1991*.
- (3) However, **construction work** does not include any of the following work—
- (a) the drilling for, or extraction of, oil or natural gas;
 - (b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose.

66 Meaning of **related goods and services**

- (1) **Related goods and services**, in relation to construction work, means any of the following—
- (a) goods of the following kind—
 - (i) materials and components to form part of any building, structure or work arising from construction work;
 - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
 - (b) services of the following kind—
 - (i) the provision of labour to carry out construction work;
 - (ii) architectural, design, surveying or quantity surveying services relating to construction work;

- (iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;
 - (iv) soil testing services relating to construction work;
 - (c) goods and services, relating to construction work, of a kind prescribed by regulation.
- (2) In this chapter, a reference to related goods and services includes a reference to related goods or services.

67 Meaning of *reference date*

- (1) A *reference date*, for a construction contract, means—
- (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract; or
 - (b) if the contract does not provide for the matter—
 - (i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each later month.
- (2) However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated.

68 Meaning of *payment claim*

- (1) A *payment claim*, for a progress payment, is a written document that—
- (a) identifies the construction work or related goods and services to which the progress payment relates; and

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

69 Meaning of *payment schedule*

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

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

Part 2 Right to progress payments

70 Right to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has

carried out construction work, or supplied related goods and services, under the contract.

71 Amount of progress payment

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

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

72 Valuation of construction work and related goods and services

- (1) Construction work carried out under a construction contract is to be valued—
 - (a) if the contract provides for the matter—in accordance with the contract; or
 - (b) if the contract does not provide for the matter—having regard to—
 - (i) the contract price for the work; and
 - (ii) any other rates or prices stated in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
- (2) Related goods and services supplied under a construction contract are to be valued—

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

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

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

73 Due date for payment

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

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

Notes—

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

- (b) if the contract does not provide for the matter—on the day that is 10 business days after the day a payment claim for the progress payment is made under part 3.
- (2) Interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—
- (a) the rate stated in the contract;
 - (b) the rate prescribed under the *Civil Proceedings Act 2011*, section 59(3) for a money order debt.
- (3) However, for a construction contract to which the *Queensland Building and Construction Commission Act 1991*, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section.
- (4) Each of the following construction contracts are taken to be a contract to which subsection (1)(b) applies—
- (a) a construction contract that includes a ‘pay when paid’ provision;
 - (b) a construction management trade contract or subcontract mentioned in the *Queensland Building and Construction Commission Act 1991*, section 67U;

- (c) a commercial building contract mentioned in the *Queensland Building and Construction Commission Act 1991*, section 67W.
- (5) In this section—
- ‘pay when paid’ provision***, of a construction contract, see section 74.

74 Effect of ‘pay when paid’ provisions

- (1) A ‘pay when paid’ provision of a construction contract has no effect in relation to any payment for construction work carried out, or related goods and services supplied, under the construction contract.
- (2) In this section—
- amount owing***, in relation to a construction contract, means an amount owing for construction work carried out, or related goods and services supplied, under the construction contract.
- ‘pay when paid’ provision***, of a construction contract, means a provision of the contract—
- (a) that makes the liability of 1 party (the ***first party***) to pay an amount owing to another party (the ***second party***) contingent on payment to the first party by someone else (the ***third party***) of the whole or any part of that amount; or
 - (b) that makes the due date for payment of an amount owing by the first party to the second party dependent on the date on which payment of the whole or any part of that amount is made to the first party by the third party; or
 - (c) that otherwise makes the liability to pay an amount owing, or the due date for payment of an amount owing, contingent or dependent on the operation of another contract.

Part 3 Claiming progress payments

75 Making payment claim

- (1) A person (the *claimant*) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the *respondent*) who, under the relevant construction contract, is or may be liable to make the payment.
- (2) Unless the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
 - (a) the period, if any, worked out under the construction contract;
 - (b) the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
- (3) If the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
 - (a) the period, if any, worked out under the relevant construction contract;
 - (b) 28 days after the end of the last defects liability period for the construction contract;
 - (c) 6 months after the completion of all construction work to be carried out under the construction contract;
 - (d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.
- (4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.
- (5) A payment claim may include an amount that was included in a previous payment claim.
- (6) In this section—

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

76 Responding to payment claim

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

Maximum penalty—100 penalty units.

Note—

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

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

77 Consequences of failing to give payment schedule

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

78 Consequences of failing to pay claimant

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

amount owed, to a claimant for a payment claim, means—

 - (a) if the respondent did not respond to the payment claim with a payment schedule as required under section 76—the amount claimed under the payment claim; or
 - (b) if the respondent did respond to the payment claim with a payment schedule as required to do so under section 76—the amount proposed to be paid under the payment schedule.

after the claimant receives the payment schedule;
and

- (c) must identify the payment claim and the payment schedule, if any, to which it relates; and
 - (d) must be accompanied by the fee prescribed by regulation for the application; and
 - (e) may include the submissions relevant to the application the claimant chooses to include.
- (3) A copy of an adjudication application must be given to the respondent.
- (4) The registrar must, within 4 business days after the application is received, refer the application to a person eligible to be an adjudicator under section 80.

80 When adjudicator ineligible to adjudicate

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

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

81 Appointment of adjudicator

- (1) If the registrar refers an adjudication application to an adjudicator for a decision, the adjudicator must, unless the adjudicator has a reasonable excuse, accept or reject the referral within 4 business days after the referral is made.
- (2) The adjudicator may accept the referral by serving written notice of the acceptance on the claimant, the respondent and the registrar.
- (3) The adjudicator may reject the referral by notifying the registrar of the refusal.

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

82 Adjudication response

- (1) After being given notice of an adjudicator's acceptance of an adjudication application under section 81, the respondent may give the adjudicator a response to the adjudication application (the *adjudication response*).
- (2) However, the respondent must not give an adjudication response if the respondent failed to give the claimant a payment schedule as required under section 76.
- (3) The adjudication response—
 - (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) may include the submissions relevant to the response the respondent chooses to include.
- (4) However, the adjudication response must not include any reasons (*new reasons*) for withholding payment that were not included in the payment schedule when given to the claimant.

- (5) The adjudicator may require the respondent to resubmit the adjudication response without the new reasons.

83 Time for making adjudication response

- (1) If responding to a standard payment claim, the respondent must give the adjudicator the adjudication response within the later of the following periods to end—
- (a) 10 business days after receiving a copy of the adjudication application;
 - (b) 7 business days after receiving notice of the adjudicator’s acceptance of the adjudication application.
- (2) If responding to a complex payment claim, the respondent must give the adjudicator the adjudication response within the later of the following to end—
- (a) 15 business days after receiving a copy of the adjudication application;
 - (b) 12 business days after receiving notice of the adjudicator’s acceptance of the adjudication application.
- (3) However, if responding to a complex payment claim, the respondent may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the adjudication response to the adjudicator.
- (4) The application must—
- (a) be in writing; and
 - (b) be made within the later of the following periods to end—
 - (i) 5 business days after receiving a copy of the adjudication application;
 - (ii) 2 business days after receiving notice of the adjudicator’s acceptance of the adjudication application; and
 - (c) include the reasons for requiring the extension of time.

- (5) If the application is granted, the respondent may give the adjudicator the adjudication response no later than the end of the extension of time granted by the adjudicator.
- (6) If the respondent gives the adjudicator an adjudication response under this section, the respondent must give a copy of the response to the claimant not more than 2 business days after giving the response to the adjudicator.

84 Adjudication procedures

- (1) Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
 - (a) an adjudication application;
 - (b) applications for extensions of time under section 83.
- (2) For a proceeding conducted to decide an adjudication application, an adjudicator—
 - (a) must decide—
 - (i) whether he or she has jurisdiction to adjudicate the application; and
 - (ii) whether the application is frivolous or vexatious; and
 - (b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and
 - (c) may set deadlines for further submissions and comments by the parties; and
 - (d) may call a conference of the parties; and
 - (e) may carry out an inspection of any matter to which the claim relates.
- (3) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation unless allowed by the adjudicator.

- (4) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

85 Time for deciding adjudication application

- (1) Subject to section 86, an adjudicator must decide an adjudication application no later than—
- (a) for a standard payment claim—10 business days after the response date; or
 - (b) for a complex payment claim—15 business days after the response date.
- (2) The *response date* is—
- (a) if the adjudicator is given an adjudication response under section 83—the day on which the adjudicator receives the response; or
 - (b) otherwise—the last day on which the respondent could give the adjudicator an adjudication response under section 83.
- (3) An adjudicator must not decide an adjudication application before the end of the period that the respondent may give an adjudication response to the adjudicator under section 83, unless—
- (a) the adjudicator decides he or she does not have jurisdiction to adjudicate the application; or
 - (b) the adjudicator decides the application is frivolous or vexatious.

86 Extending time for deciding adjudication application

- (1) The claimant and respondent for an adjudication application may, before or after the end of the maximum period for deciding the application under section 85(1), agree in writing

that the adjudicator has additional time to decide the application.

- (2) Despite section 85(1), an adjudicator may decide an adjudication application within a longer period if—
 - (a) the claimant and respondent have informed the adjudicator that they have agreed under subsection (1) that the adjudicator has additional time to decide the application; or
 - (b) the application relates to a complex payment claim and, in the opinion of the adjudicator, the claimant and respondent have failed to reach an agreement mentioned in subsection (1).
- (3) The *longer period* is—
 - (a) if subsection (2)(a) applies—the additional time agreed to by the claimant and respondent under subsection (1); or
 - (b) if subsection (2)(b) applies—5 business days after the time the adjudicator would otherwise have to decide the application under section 85(1).

87 Valuation of work etc. in later adjudication application

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

Note—

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

- (2) Any adjudicator must, in any later adjudication application that involves the working out of the value of the construction work or of the related goods and services, give the work, or

the goods and services, the same value as that previously decided by the adjudicator unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision.

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

88 Adjudicator's decision

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

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

Maximum penalty for subsection (6)—40 penalty units.

89 Adjudicator may correct clerical mistakes etc.

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

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

90 Respondent required to pay adjudicated amount

If an adjudicator decides that a respondent is required to pay an adjudicated amount, the respondent must pay the amount to the claimant on or before—

- (a) the day that is 5 business days after the day on which a copy of the adjudicator's decision is given to the respondent by the adjudicator; or
- (b) if the adjudicator decides a later date for payment under section 88(1)(b)—the later date.

Maximum penalty—200 penalty units.

Note—

A failure to pay an adjudicated amount on or before the due date is also a ground for taking disciplinary action under the *Queensland Building and Construction Commission Act 1991*.

91 Adjudication certificate

- (1) As soon as practicable after being given a copy of a decision by an adjudicator, but no later than 5 business days after being given the decision, the registrar must give the claimant a certificate (an *adjudication certificate*) of the decision stating the following matters—
 - (a) the name of the claimant;

- (b) the name of the respondent who is liable to pay the adjudicated amount;
 - (c) the adjudicated amount;
 - (d) the date on which payment of the adjudicated amount was required to be paid to the claimant;
 - (e) the rate of interest payable on the adjudicated amount;
 - (f) the fees, identified in the decision, that the respondent is to pay;
 - (g) that the certificate is made under this Act.
- (2) However, the registrar does not have to give the claimant an adjudication certificate if—
- (a) the respondent is not required to pay an amount under the decision; or
 - (b) the adjudicator decided he or she does not have jurisdiction to decide the application; or
 - (c) the adjudicator decided the adjudication application is frivolous or vexatious.

92 Consequences of not paying adjudicated amount

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant as required under section 90, the claimant may give the respondent written notice of the claimant's intention to suspend carrying out construction work, or supplying related goods and services, under the construction contract under section 98.
- (2) The notice about suspending work must state that it is made under this Act.

93 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.

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

94 Claimant may make new application in certain circumstances

- (1) Subsection (2) applies if an adjudicator, who accepts a referral to decide an adjudication application (the *original application*), does not decide the application within the period required under section 85.
- (2) The claimant may do either of the following within 5 business days after the period mentioned in subsection (1)—
 - (a) request the registrar refer the original application to another adjudicator; or
 - (b) make a new adjudication application (the *new application*) under section 79.
- (3) If the claimant requests the registrar refer the original application to another adjudicator—

- (a) the registrar must refer the application to another adjudicator within 4 business days after the request is made; and
 - (b) no fee is payable for referring the original application to another adjudicator.
- (4) Also, if another adjudicator accepts the referral, this division applies for the original application with the following changes—
- (a) the claimant must give the adjudicator a copy of his or her submissions included in the original application within 5 business days after the adjudicator accepts the referral;
 - (b) the respondent must give the adjudicator a copy of his or her submissions included in an adjudication response, if any, for the original application within 5 business days after the adjudicator accepts the referral;
 - (c) the response date for the application under section 85(2) is the day—
 - (i) the adjudicator receives the copy of the submission from the respondent; or
 - (ii) if the respondent does not give the adjudicator the copy of the submission within the period mentioned in paragraph (b)—immediately after the end of the period;
 - (d) in deciding the adjudication application, the adjudicator must not consider any submissions other than—
 - (i) the submissions mentioned in paragraph (a) or (b); or
 - (ii) further written submissions asked for by the adjudicator under section 84(2)(b).
- (5) This division applies to the new application in the same way it applies to any other adjudication application made under section 79.

- (6) However, the claimant may, despite section 79(2)(b), make the new application within 5 business days after the claimant becomes entitled to act under subsection (2).

95 Adjudicator's fees

- (1) An adjudicator is entitled to be paid for adjudicating an adjudication application—
- (a) the amount, by way of fees and expenses, agreed between the adjudicator and the parties to the adjudication; or
 - (b) if no amount is agreed, the amount, for fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.
- (2) A regulation may prescribe the maximum amount for fees and expenses (the *prescribed maximum*) an adjudicator may be paid for adjudicating an adjudication application.
- (3) Despite subsection (1), an adjudicator is not entitled to be paid any amount that is more than the prescribed maximum.
- (4) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.
- (5) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions unless the adjudicator decides otherwise.
- (6) An adjudicator is not entitled to be paid any fees or expenses for adjudicating an adjudication application if the adjudicator fails to make a decision on the application.
- (7) An adjudicator does not fail to make a decision only because—
- (a) the adjudication application is withdrawn; or
 - (b) the adjudicator decided he or she did not have jurisdiction to adjudicate the application; or
 - (c) the adjudicator decided the application was frivolous or vexatious; or

- (d) the adjudicator refuses to communicate the adjudicator's decision on an adjudication application until the adjudicator's fees and expenses are paid.
- (8) Also, if a court finds that the adjudicator's decision is void and unenforceable, the adjudicator is still entitled to be paid any fees or expenses for adjudicating the application if the adjudicator acted in good faith in adjudicating the application.
- (9) In this section—
adjudicating, an adjudication application, includes accepting, considering and deciding the application.

96 Deciding fees payable by claimant and respondent

- (1) When making a decision about an adjudication application, an adjudicator may also decide the following—
 - (a) the proportion of the adjudicator's fees and expenses to be paid by the claimant and respondent;
 - (b) the proportion of the fee, payable for the adjudication application under section 79(2)(d), for which the respondent is to reimburse the claimant.
- (2) In making the decision, the adjudicator—
 - (a) must consider the conduct of the claimant and respondent; and
 - (b) may consider any of the following matters—
 - (i) the relative success of the claimant or respondent in the adjudication;
 - (ii) whether the claimant or respondent commenced or participated in the adjudication for an improper purpose;
 - (iii) whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success;

- (iv) the reasons given by the respondent for not making the progress payment the subject of the adjudication application;
 - (v) whether an adjudication application is withdrawn;
 - (vi) the services provided by the adjudicator in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed;
 - (vii) another matter the adjudicator considers relevant in making the decision.
- (3) In this section—

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

conduct, of the claimant and respondent, includes—

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

new reasons see section 82(4).

97 Withdrawing from adjudication

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

Note—

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

- (2) If subsection (1)(b) applies, the claimant must as soon as practicable inform the adjudicator that the adjudication application has been withdrawn because of payment.

Part 5 Suspending work

98 Claimant’s right to suspend work

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

Part 6 **Court proceedings for debt recovery**

99 **Notice required before starting particular proceedings**

- (1) This section applies if—
 - (a) after being given a payment claim, the respondent fails to pay the amount stated in the claim on or before the due date for the progress payment to which the claim relates; and
 - (b) because of the failure to pay, the claimant intends to start proceedings in a court to recover the unpaid portion of the amount owed to the claimant.

Note—

See section 78 for the claimants right to recover from a respondent an amount owed to the claimant.

- (2) Before taking the intended action, the claimant must give the respondent written notice (a **warning notice**), in the approved form, of the claimant's intention to start the proceedings.
- (3) The claimant must not give the respondent the warning notice later than 20 business days after the due date for the progress payment.
- (4) The claimant must not take the intended action before the end of 5 business days after giving the respondent the warning notice.
- (5) The giving of a warning notice does not—
 - (a) require the claimant to complete the action stated in the notice; or
 - (b) prevent the claimant from taking different action to that stated in the notice.

100 Proceedings to recover unpaid amount as debt

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

Part 7 Miscellaneous

101 Effect of pt 3 on civil proceedings

- (1) Subject to section 200, nothing in this chapter affects any right that a party to a construction contract—
 - (a) may have under the contract; or
 - (b) may have under part 2 in relation to the contract; or
 - (c) may have apart from this chapter in relation to anything done or omitted to be done under the contract.
- (2) Nothing done under or for this chapter affects any civil proceedings arising under a construction contract, whether under this chapter or otherwise, except as provided by subsection (3).

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

102 Service of notices

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

Example—

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

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

Chapter 4 Subcontractors' charges

Part 1 Preliminary

Division 1 Application and operation of chapter

103 Application to particular domestic building work

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

Division 2 Interpretation

104 Definitions

In this chapter—

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

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

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

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

notice of claim see section 122(1).

person includes an unincorporated association.

security, for a contract, means something—

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

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

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

Example of a structure included under this definition—

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

subcontractor's charge see section 109(4).

valuable instrument means any of the following—

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

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

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

work see section 105.

105 Meaning of *work*

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

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

(2) In this section—

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

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

Example of mixing things together—

mixing things together to make concrete or asphalt

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

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

In this chapter, unless a contrary intention appears—

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

107 When work specified in contract completed

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

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

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

108 Contracts to which this part applies

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

109 Charges in favour of subcontractors

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

110 Limits on amount recoverable under subcontractor's charge

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

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

Example—

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

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

Example—

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

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

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

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

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

112 Damages etc. not covered by subcontractor's charge

A subcontractor's charge can not include the following—

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

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

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

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

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

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

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

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

115 Insufficient money available for claims

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

Example—

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

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

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

116 Assignment and transmission of subcontractor's charge

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

117 No subcontractor's charge over money held in trust under a project bank account

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

118 Limit of 1 claim for work

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

Part 3

Information to be given to subcontractor

119 Request for information about building contract or security

- (1) If requested in writing by a subcontractor, the contractor must give the subcontractor the following information within 10 business days after the request is made, unless the contractor has a reasonable excuse—
 - (a) the name of the person who engaged the contractor under the contract;
 - (b) the address of—
 - (i) the person's place of business; or
 - (ii) if the person does not have a place of business—the person's place of residence;
 - (c) the information about the contract that would enable the subcontractor to give a notice of claim to a person under section 122;
 - (d) advice as to whether there are any securities in existence for the contract;
 - (e) if known to the contractor, the name and address of the holder of each security mentioned in paragraph (d).

Maximum penalty—20 penalty units.

- (2) Subsection (3) applies if, in response to a request under subsection (1), the contractor tells the subcontractor of the existence of a security but does not give the name and address of the holder of the security.
- (3) If requested in writing by the subcontractor, the person who engaged the contractor under the contract must give the subcontractor the name and address of the holder of the security within 10 business days after the request is made, unless the person has a reasonable excuse.

Maximum penalty—20 penalty units.

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

120 Damages payable for failure to give information

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

Part 4 Claiming subcontractor's charge

Division 1 Preliminary

121 Application of part

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

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

Division 2 Action by subcontractor

122 Notice of claim

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

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

123 Copy of notice of claim to contractor

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

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

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

125 Withdrawing a notice of claim

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

Division 3 Action by person given notice of claim

126 Person given notice of claim must retain money

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

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

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

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

Division 4 Action by contractor given copy of notice of claim

128 Contractor given copy of notice of claim must respond

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

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

Division 5 Payment of claim

129 Payment of amount claimed

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

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

(6) In this section—

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

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

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

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

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

(1) This section applies if—

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

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

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

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

(7) In this section—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

132 Authority of court for security

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

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

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

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

133 Particular subcontractor securities of no effect

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

Part 5 Enforcing subcontractor's charge

134 Recovering amount claimed

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

135 Enforcing subcontractor's charge on behalf of other subcontractors

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

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

136 Proceedings for subcontractor's charge

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

137 Claims of charge relating to retention amount not limited

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

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

Part 6

Protection against subcontractor's charge

138 When person prejudicially affected by a claim

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

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

139 Application to court by person prejudicially affected

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

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

140 Vexatious claims

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

Part 7 Miscellaneous

141 Effect of payment made under order of the court

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

142 Court jurisdiction

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

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

143 Consolidation of actions

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

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

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

145 Costs

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

146 Appeal

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

147 Qualified persons

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

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

148 Right to recover debt generally preserved

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

Chapter 5 Administration

Part 1 Registry and staff

Division 1 Registry

149 Registry

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

Division 2 Registrar

150 Adjudication registrar

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

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

Examples of other matters for paragraph (b)—

the application of laws relating to building or dispute resolution processes

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

151 Disqualification from appointment

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

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

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

152 Term of appointment

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

153 Conditions of appointment

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

154 Registrar's functions and powers

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

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

155 Registrar's policy

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

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

156 Delegation by registrar

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

Division 3 Other matters

157 Annual report on operation of chapter and registry

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

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

Part 2 Adjudicators

Division 1 Preliminary

158 Definitions for chapter

In this chapter—

accepted representations see section 172(2).

adjudicated amount see section 88(1).

adjudication application see section 79(1).

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

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

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

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

original decision see section 177(1).

payment claim means a claim mentioned in section 75.

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

review decision see section 178(2).

review notice see section 178(3).

show cause notice see section 171(2).

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

spent conviction means a conviction—

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

Division 2 Registration of adjudicators

159 Application for registration as adjudicator

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

160 Consideration of application

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

161 Suitability of person to be registered

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

- (c) the experience and qualifications of the person;
 - (d) the matters stated in the application for registration under section 159;
 - (e) anything else relevant to the person's ability to perform the person's functions as an adjudicator.
- (3) In this section—

adjudication qualification means a qualification issued by a body prescribed by regulation to an individual stating that the individual has achieved an adjudication competency standard prescribed by regulation.

relevant offence means—

- (a) an indictable offence, other than an indictable offence that is taken to be a simple offence under the Criminal Code, section 659; or
- (b) an offence against this Act; or
- (c) an offence against a corresponding law; or
- (d) an offence against the *Queensland Building and Construction Commission Act 1991* or a law of another State or the Commonwealth that provides for the same matter as that Act or a provision of that Act; or
- (e) an offence against the repealed *Domestic Building Contracts Act 2000* or a law of another State or the Commonwealth that provides for the same matter as that Act or a provision of that Act; or
- (f) an offence, relating to the provision of services as an adjudicator, against a law applying, or that applied, in the State, the Commonwealth, another State or a foreign country.

162 Request for further information

- (1) The registrar may, by written notice given to the applicant, require the applicant to give the registrar further information

or a document the registrar reasonably requires to decide the application.

- (2) The requirement—
 - (a) must state the period, of at least 28 days, within which the applicant must give the registrar the information or document; or
 - (b) may require the information or document be verified by statutory declaration.
- (3) The registrar may, before the end of the stated period, extend the time for complying with the requirement.
- (4) Unless the registrar extends the time to comply with the requirement, the applicant is taken to have withdrawn the application if he or she does not comply with the requirement with the stated period.

163 Decision on application for registration

- (1) If the registrar decides to grant the application, the registrar must issue a certificate of registration to the applicant.
- (2) If the registrar decides to impose conditions on the registration, the registrar must immediately give the applicant an information notice for the decision.
- (3) If the registrar decides to refuse to grant the application, the registrar must immediately give the applicant an information notice for the decision.

164 Term of registration

Registration as an adjudicator becomes effective on the day the certificate of registration is issued or on the day of the registration's renewal and ends either—

- (a) 3 years after that day; or
- (b) on the earlier day decided by the registrar and stated in the certificate of registration.

165 Conditions of registration

- (1) Registration as an adjudicator is subject to the following conditions—
 - (a) the adjudicator must comply with this chapter and chapter 3;
 - (b) the adjudicator must complete continuing professional development as prescribed by regulation;
 - (c) the adjudicator must complete the mandatory training as prescribed by regulation;
 - (d) other reasonable conditions the registrar considers appropriate to give effect to this chapter and that are stated in the certificate of registration or in an information notice given under subsection (3).
- (2) Conditions may be imposed on an adjudicator's registration—
 - (a) when registration first happens or is renewed or amended; or
 - (b) at another time if the registrar considers the conditions are necessary to ensure that an adjudicator effectively performs the adjudicator's functions under this chapter.
- (3) If the registrar decides to impose conditions on the registration under subsection (1)(d)—
 - (a) the registrar must immediately give the adjudicator an information notice for the decision; and
 - (b) the conditions take effect when the information notice is received by the adjudicator or the later day stated in the notice.
- (4) The mandatory training that may be prescribed under subsection (1)(c) may include training about—
 - (a) the difference between processes under this Act and the equivalent processes under the repealed *Building and Construction Industry Payments Act 2004*; or
 - (b) amendments of this Act.

166 Form of certificate of registration

A certificate of registration must state the following particulars—

- (a) the adjudicator's name;
- (b) the day the registration becomes effective;
- (c) the day the registration expires;
- (d) the registration number;
- (e) the registration conditions.

Division 3 Renewals of registrations of adjudicators

167 Applications for renewal of registration

- (1) An adjudicator may apply to the registrar for the renewal of the adjudicator's registration.
- (2) The application must be made at least 1 month before the registration ends and must—
 - (a) be in the approved form; and
 - (b) be signed by or for the applicant; and
 - (c) be accompanied by the fee prescribed by regulation for the application.
- (3) The registrar must consider the application and renew, or refuse to renew, the registration.
- (4) In deciding whether to grant the application, the registrar may have regard to the matters mentioned in section 161(2).
- (5) The registrar must not renew the registration if—
 - (a) the applicant would not be eligible to be registered as an adjudicator under section 161(1); or

- (b) the applicant has not completed the required continuing professional development prescribed under section 165(1).
- (6) If the registrar decides to refuse to renew the registration, the registrar must give the applicant an information notice for the decision.
- (7) If the registrar decides to impose conditions on the registration, the registrar must give the applicant an information notice for the decision.
- (8) A registration may be renewed by—
 - (a) endorsing the existing certificate of registration; or
 - (b) cancelling the existing certificate and issuing another certificate.

168 Request for further information

- (1) The registrar may, by written notice given to the applicant, require the applicant to give the registrar further information or a document the registrar reasonably requires to decide the application.
- (2) The requirement—
 - (a) must state the period, of at least 28 days, within which the applicant must give the registrar the information or document; or
 - (b) may require the information or document be verified by statutory declaration.
- (3) The registrar may, before the end of the stated period, extend the time for complying with the requirement.
- (4) Unless the registrar extends the time for complying with the requirement, the applicant is taken to have withdrawn the application if he or she does not comply with the requirement within the stated period.

169 Registration taken to be in force while application for renewal is considered

- (1) If an application is made under section 167, the adjudicator's registration is taken to continue in force from the day that it would, apart from this section, have ended until the application is decided under section 167 or is withdrawn.
- (2) However, if the application is refused, the registration continues in force until the information notice for the decision is given to the applicant.
- (3) Subsection (1) does not apply if the registration is earlier suspended or cancelled.

Division 4 Suspension or cancellation of registrations of adjudicators

170 Grounds for suspension or cancellation

- (1) Each of the following is a ground for suspending or cancelling an adjudicator's registration—
 - (a) the adjudicator is not, or is no longer, a suitable person to hold the registration;
 - (b) the adjudicator has contravened a requirement of the code of conduct made by the registrar under section 181;
 - (c) the adjudicator has contravened a condition of the registration;
 - (d) the registration was issued because of a materially false or misleading representation or declaration.
- (2) For forming a belief that the adjudicator is not, or is no longer, a suitable person to hold registration, the registrar—
 - (a) must have regard to section 161(1); and
 - (b) may have regard to the matters mentioned in section 161(2).

171 Show cause notice

- (1) This section applies if the registrar believes a ground exists to suspend or cancel an adjudicator's registration.
- (2) The registrar must give the adjudicator a notice under this section (a *show cause notice*).
- (3) The show cause notice must state—
 - (a) the action (the *proposed action*) the registrar proposes taking under this division; and
 - (b) the grounds for the proposed action; and
 - (c) an outline of the facts and circumstances forming the basis for the grounds; and
 - (d) if the proposed action is suspension of the registration—the proposed suspension period; and
 - (e) an invitation to the adjudicator to show within a stated period (the *show cause period*) why the proposed action should not be taken.
- (4) The show cause period must be a period ending at least 21 days after the show cause notice is given to the adjudicator.

172 Representations about show cause notices

- (1) The adjudicator may make written representations about the show cause notice to the registrar in the show cause period.
- (2) The registrar must consider all representations (the *accepted representations*) made under subsection (1).

173 Ending show cause process without further action

- (1) This section applies if, after considering the accepted representations for the show cause notice, the registrar no longer believes a ground exists to suspend or cancel the registration.

- (2) The registrar must not take any further action in relation to the show cause notice.
- (3) The registrar must give the adjudicator written notice that no further action is to be taken in relation to the show cause notice.

174 Suspension or cancellation

- (1) This section applies if—
 - (a) there are accepted representations for the show cause notice and, after considering the representations, the registrar still believes a ground exists to suspend or cancel the registration; or
 - (b) there are no accepted representations.
- (2) If the registrar believes suspension or cancellation of the registration is warranted, the registrar may—
 - (a) if the proposed action stated in the show cause notice was to suspend the registration for a stated period—suspend the registration for not longer than the stated period; or
 - (b) if the proposed action stated in the show cause notice was to cancel the registration—either cancel the registration or suspend it for a period.
- (3) The registrar must immediately give an information notice for the decision to the adjudicator.
- (4) The decision takes effect on the later of the following days—
 - (a) the day the information notice is given to the adjudicator;
 - (b) the day stated in the information notice for that purpose.

175 Immediate suspension of registration

- (1) The registrar may suspend an adjudicator's registration immediately if the registrar believes—

- (a) a ground exists to suspend or cancel the registration; and
 - (b) it is necessary to suspend the registration immediately because there is an immediate and serious harm to the effectiveness of the adjudication of payment claims under chapter 3.
- (2) The suspension—
- (a) must be effected by an information notice for the decision given by the registrar to the adjudicator to suspend the adjudicator's registration together with a show cause notice; and
 - (b) begins when the notices are given to the adjudicator; and
 - (c) continues until the earliest of the following happens—
 - (i) the registrar cancels the remaining period of the suspension;
 - (ii) the show cause notice is finally dealt with;
 - (iii) 28 days have passed since the notices were given to the adjudicator.

176 Effect of suspension or cancellation of registration of adjudicator

- (1) This section applies if—
- (a) the registration of an adjudicator is suspended or cancelled or otherwise ends; and
 - (b) an adjudication application has been referred to the adjudicator for adjudication of a payment claim; and
 - (c) the adjudicator has not yet made a decision under section 88 for the adjudication application.
- (2) Within 4 business days after the registration is suspended, cancelled or ends, the registrar must refer the adjudication application to a person eligible to be an adjudicator under section 80.
- (3) No fee is payable for the referral.

- (4) The adjudicator is not entitled to any fees or expenses in relation to the adjudication application.

Division 5 Internal review of registration decisions

177 Applying to registrar for internal review

- (1) A person who is given, or is entitled to be given, an information notice for a decision under divisions 1 to 4 (the *original decision*) may apply to the registrar for an internal review of the original decision.
- (2) The application must be made within 28 days after—
 - (a) if the person is given an information notice for the decision—the day the person is given the information notice; or
 - (b) if paragraph (a) does not apply—the day the person otherwise becomes aware of the decision.
- (3) The registrar may, at any time, extend the time for applying for the internal review.
- (4) The application must be in writing and state fully the grounds for making the application.

178 Internal review of original decision

- (1) This section applies if a person applies for an internal review of an original decision under section 177.
- (2) After reviewing the original decision, the registrar must make a further decision (the *review decision*) to—
 - (a) confirm the original decision; or
 - (b) amend the original decision; or
 - (c) substitute another decision for the original decision.

- (3) The registrar must immediately give the applicant notice of the review decision (the *review notice*).
- (4) The review notice must comply with the QCAT Act, section 157(2).
- (5) If the registrar does not give the notice within 28 days after the application is made, the registrar is taken to have made a review decision confirming the original decision on the 28th day after the application is made.
- (6) If the review decision confirms the original decision, for the purpose of an application to QCAT for an external review, the original decision is taken to be the review decision.
- (7) If the review decision amends or substitutes the original decision, for the purpose of an application to QCAT for an external review, the original decision as amended or substituted is taken to be the review decision.

179 Stay of operation of original decision

- (1) If an application is made for an internal review of an original decision, the applicant may immediately apply, as provided under the QCAT Act, to QCAT for a stay of the decision.
- (2) QCAT may stay the decision to secure the effectiveness of the review and any later review by QCAT.
- (3) The stay—
 - (a) may be given on conditions QCAT considers appropriate; and
 - (b) operates for the period fixed by QCAT; and
 - (c) may be revoked or amended by QCAT.
- (4) The period of the stay must not extend past the time when the registrar makes a review decision about the original decision and any later period QCAT allows the applicant to enable the applicant to apply to QCAT for a review of the review decision.

- (5) The application affects the decision, or carrying out of the decision, only if the decision is stayed.

Division 6 External review of registration decisions

180 Applying to QCAT for external review

A person who has applied for an internal review of an original decision under division 5 and is dissatisfied with the review decision may apply, as provided under the QCAT Act, to QCAT for an external review of the review decision.

Note—

The QCAT Act requires the application to be made within 28 days after the day the applicant is notified of the reviewable decision. If the registrar did not notify the applicant of the reviewable decision within 28 days (the *first 28 days*) after the applicant applied for a review of an original decision, the applicant would have 28 days to apply to QCAT for an external review starting at the end of the first 28 days.

Division 7 Code of conduct

181 Code of conduct for adjudicators

- (1) The registrar may make a code of conduct for adjudicators.
- (2) The code of conduct, or an amendment or replacement of the code, does not take effect until approved by regulation.
- (3) The Minister must, within 14 sitting days after the code of conduct, or an amendment or replacement of the code, takes effect, table a copy of the code in the Legislative Assembly.
- (4) A failure to comply with subsection (3) does not invalidate or otherwise affect the code of conduct.
- (5) The commissioner must—

- (a) publish the code of conduct on the commission's website; and
- (b) keep copies of the code of conduct available for inspection, without charge, at the commission's office at any time that office is open to the public; and
- (c) if asked, advise where copies of the code of conduct may be obtained.

Division 8 Other provisions about adjudicators

182 Adjudicator must comply with registration conditions

- (1) An adjudicator must not contravene a condition of the registration.

Maximum penalty—200 penalty units.

- (2) The penalty under subsection (1) may be imposed whether or not the registration is suspended or cancelled because of the contravention.

183 Surrender of registration

- (1) An adjudicator may surrender the adjudicator's registration by giving the registrar written notice of the surrender.
- (2) The surrender takes effect on the later of the following—
 - (a) the day the notice is given;
 - (b) the day specified in the notice.

184 Replacement of certificate of registration

- (1) An adjudicator may apply to the registrar for replacement of the adjudicator's certificate of registration if the certificate has been damaged, destroyed, lost or stolen.
- (2) The application must—

-
- (a) include information about the circumstances in which the certificate was damaged, destroyed, lost or stolen; and
 - (b) be accompanied by the fee prescribed by regulation for the application.
 - (3) The registrar must consider the application and either grant, or refuse to grant, the application.
 - (4) The registrar must grant the application if the registrar is satisfied the certificate of registration has been damaged, destroyed, lost or stolen in a way that requires its replacement.
 - (5) If the registrar decides to grant the application, the registrar must, as soon as practicable, issue another certificate of registration to the applicant.
 - (6) If the registrar decides to refuse to grant the application, the registrar must immediately give the applicant an information notice for the decision.

185 Adjudicator must give information to registrar

- (1) An adjudicator must inform the registrar, in the approved form, of any of the following matters within 10 business days after it happens—
 - (a) the adjudicator changes any of the following addresses—
 - (i) the address of the adjudicator;
 - (ii) the address in Queensland at which documents may be served on the adjudicator;
 - (b) the adjudicator is convicted of a relevant offence;
 - (c) the adjudicator's registration with a professional association is cancelled because of disciplinary action.

Maximum penalty—40 penalty units.

- (2) In this section—

relevant offence see section 161(3).

186 Protection from liability for adjudicators

An adjudicator is not personally liable for anything done or omitted to be done in good faith—

- (a) in performing the adjudicator's functions under this chapter; or
- (b) in the reasonable belief that the thing was done or omitted to be done in the performance of the adjudicator's functions under this chapter.

187 False or misleading statements

A person must not, for an application made under this part, state anything to the registrar the person knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

188 False or misleading documents

- (1) A person must not, for an application made under this part, give a document to the registrar that includes information the person knows is false or misleading in a material particular.

Maximum penalty—100 penalty units.

- (2) Subsection (1) does not apply to a person if the person, when giving the document—
 - (a) tells the registrar, to the best of the person's ability, how it is false or misleading; and
 - (b) if the person has, or can reasonably obtain, the correct information—gives the correct information to the registrar.

Chapter 6 Legal proceedings

Part 1 Offences

190 Proceedings for offences

- (1) A proceeding for an offence against this Act may be started only within 1 year after the offence comes to the complainant's knowledge, but no later than 2 years after the commission of the offence.
- (2) A statement in a complaint for an offence against this Act that the matter of the complaint came to the complainant's knowledge on a stated day is evidence the matter came to the complainant's knowledge on that day.
- (3) A proceeding for an offence against this Act may be started only by a person authorised in writing by the commissioner, either generally or in a particular case, to start the proceeding.
- (4) The written authorisation is evidence that the person is authorised to start the proceeding.

191 Enforcement action to comply with prescribed guidelines

- (1) An entity considering taking enforcement action must consider a guideline, about taking enforcement action, prescribed by regulation.
- (2) A failure to comply with subsection (1) does not invalidate or otherwise affect the enforcement action.
- (3) Nothing in subsection (1)—
 - (a) affects the functions of Director of Public Prosecutions under the *Director of Public Prosecutions Act 1984*, section 10; or
 - (b) affects the power of the Director of Public Prosecutions to act under the *Director of Public Prosecutions Act 1984*, section 11; or

- (c) prevents a person from complying with a guideline made by the Director of Public Prosecutions under the *Director of Public Prosecutions Act 1984*, section 11(1).
- (4) To the extent of any inconsistency between a guideline prescribed under subsection (1) and a guideline mentioned in subsection (3)(c), the latter guideline prevails.

- (5) In this section—

enforcement action means a proceeding for an offence against this Act or issuing an infringement notice for an offence against this Act.

infringement notice see the *State Penalties Enforcement Act 1999*, schedule 2.

192 Payment of penalties and fines

- (1) A penalty recovered because of a proceeding for an offence against this Act prosecuted by a person authorised by the commissioner must be paid to the commission.
- (2) A fine recovered because of an infringement notice for an offence against this Act and for which the commission is the administering authority must be paid to the commission.
- (3) In this section—

administering authority, for an infringement notice, see the *State Penalties Enforcement Act 1999*, schedule 2.

infringement notice see the *State Penalties Enforcement Act 1999*, schedule 2.

Part 2 Evidence

193 Application of part

This part applies to a proceeding under this Act.

194 Appointments and authority

The registrar's appointment must be presumed unless a party to the proceeding, by reasonable notice, requires proof of it.

195 Evidentiary aids

- (1) A certificate signed by the registrar certifying anything about the contents of the register is evidence of the thing stated.
- (2) A certificate signed by the registrar stating any of the following is evidence of the matters stated—
 - (a) that an individual was or was not at a time or during a period, or is or is not, an adjudicator;
 - (b) that a stated document is a record or document, a copy of a record or document, or an extract from a record or document, kept under this chapter.

196 Proof of signature unnecessary

A signature purporting to be the signature of the registrar is evidence of the signature it purports to be.

Part 3 Civil liability for officials

197 Protection from liability

- (1) The commissioner, registrar and staff of the registry do not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.
- (2) If subsection (1) prevents a civil liability attaching to a person, the liability attaches instead to the State.

Chapter 7 Miscellaneous

198 Approved forms

- (1) The chief executive or commissioner may approve forms for use under this Act.
- (2) Information in an approved form must, if the approved form requires, be verified by a statutory declaration.
- (3) An approved form has no effect if information in the form must be verified by a statutory declaration and it is not.

199 Delegations

- (1) The commissioner may delegate the commissioner's functions or powers under this Act to an appropriately qualified officer of the commission.
- (2) In this section—
appropriately qualified includes having the qualifications, experience or standing appropriate to perform the function or exercise the power.

200 Contracting out prohibited

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.
- (2) A provision of a contract, agreement or arrangement is of no effect to the extent to which it—
 - (a) is contrary to this Act; or
 - (b) purports to exclude, limit or change the operation of this Act; or
 - (c) has the effect of excluding, limiting or changing the operation of this Act; or
 - (d) may reasonably be construed as an attempt to deter a person from taking action under this Act.

200A Review of Act

- (1) The Minister must ensure a review of the operation and effectiveness of the 2017 suite of building and construction reforms.
- (2) The review must be conducted by a panel of not more than 4 appropriately qualified persons appointed by the Minister.
- (3) The Minister must prepare, and give to the panel, terms of reference to guide the conduct of the review.
- (4) The review must be started no later than 1 September 2018.
- (5) The Minister must table in the Legislative Assembly a report on the outcome of the review as soon as practicable after the review is completed.
- (6) In this section—
2017 suite of building and construction reforms means—
 - (a) this Act; and
 - (b) the amendments to other Acts made under this Act as passed; and
 - (c) the other Acts prescribed by regulation.

200B Act does not prevent early payment

Nothing in this Act prevents a person paying an amount due under a contract before the latest date allowed under the contract for payment of that amount.

201 Regulation-making power

- (1) The Governor in Council may make regulations under this Act.
- (2) A regulation may—
 - (a) provide for payment instructions for project bank accounts; and

- (b) for an adjudication qualification, prescribe the following—
 - (i) the name of the qualification;
 - (ii) the bodies that may issue the qualification;
 - (iii) the name of the adjudication competency to be achieved to gain the qualification;
 - (iv) the elements that must be successfully completed to achieve the competency; and
- (c) prescribe the grading of adjudicators; and
- (d) prescribe the continuing professional development that must be undertaken by adjudicators; and
- (e) prescribe the limits on fees payable to adjudicators; and
- (f) prescribe procedures for—
 - (i) the lodgement of adjudication applications with the registrar, including the last time during a day that applications may be lodged; and
 - (ii) the processing of adjudication applications by the registrar; and
- (g) prescribe limitations on submissions and accompanying documents for adjudication applications and adjudication responses; and
- (h) provide for fees payable under this Act.

Chapter 8 Transitional and repeal

Part 1A Provisions for transitional arrangements before repeal

201A References in ch 2 relating to progress payments

- (1) This section applies until the repeal of the *Building and Construction Industry Payments Act 2004*.
- (2) A reference in chapter 2 to a payment claim is taken to be a reference to a payment claim made under the *Building and Construction Industry Payments Act 2004*.
- (3) A reference in chapter 2 to a payment schedule is taken to be a reference to a payment schedule made under the *Building and Construction Industry Payments Act 2004*.
- (4) A reference in chapter 2 to a progress payment is taken to be a reference to a progress payment under the *Building and Construction Industry Payments Act 2004*.
- (5) A reference in chapter 2 to an adjudication under chapter 3, part 4 is taken to be a reference to an adjudication under the *Building and Construction Industry Payments Act 2004*, part 3, division 2.

201B No subcontractors' charges over money held in trust

- (1) This section applies until the repeal of the *Subcontractors' Charges Act 1974*.
- (2) No entitlement to a subcontractor's charge exists to the extent it relates to money held in trust under a project bank account.
- (3) In this section—
subcontractor's charge means a charge within the meaning of section 3 of the *Subcontractors' Charges Act 1974*.

201C Repeal of transitional regulation

The Building Industry Fairness (Security of Payment) (Transitional) Regulation 2018, SL No. 17 is repealed.

Part 1 Repeal

202 Acts repealed

- (1) The Building and Construction Industry Payments Act 2004, No. 6 is repealed.
- (2) The Subcontractors' Charges Act 1974, No. 37 is repealed.

Part 2 Transitional provisions for the repealed Building and Construction Industry Payments Act 2004

203 Definitions for part

In this part—

existing, in relation to a matter, means the matter as in force immediately before the commencement.

repealed Act means the repealed *Building and Construction Industry Payments Act 2004*, as in force immediately before its repeal.

204 Continuation of existing appointments and employment

- (1) An existing registration of an adjudicator under part 4 of the repealed Act continues as registration as an adjudicator under this Act—

- (a) for the remainder of the term the registration was subject to under the repealed Act; and
 - (b) with the conditions imposed under the repealed Act, to the extent the conditions are consistent with this Act.
- (2) However, the continued registration is subject to this Act, including, for example—
- (a) eligibility under section 161; and
 - (b) the conditions mentioned in section 165(1) and any other conditions imposed under that section; and
 - (c) any suspension or cancellation of the registration under chapter 5, part 2, division 4.
- (3) An existing appointment of an adjudicator to decide an adjudication application under section 23 of the repealed Act continues for the adjudication of the application.
- (4) An existing appointment of the registrar under section 37 of the repealed Act continues on the same terms and conditions as the appointment made under the repealed Act.
- (5) An appointment continued under subsection (4) ends when a person is appointed as registrar under section 150.

205 Unfinished matters for existing payment claims to be dealt with under the repealed Act

- (1) This section applies if a payment claim was given to a respondent before the commencement and, at the commencement, there are unfinished matters for the payment claim.
- (2) Despite the repeal of the *Building and Construction Industry Payments Act 2004*, the repealed Act continues to apply for the payment claim and any unfinished matters for the claim.
- (3) In this section—
- unfinished matter*, for a payment claim, includes a matter under the repealed Act that has yet to be started or completed, including, for example, the following—

- (a) replying to the payment claim by serving a payment schedule on the claimant;
- (b) the consequences of not paying any or all of the claimed amount for the progress payment to which the payment claim relates;
- (c) making an adjudication application for adjudication of the payment claim;
- (d) the adjudication of the payment claim under the repealed Act, including—
 - (i) the giving of an adjudication response; or
 - (ii) the adjudication procedures; or
 - (iii) the adjudicator's decision; or
 - (iv) correcting a clerical mistake in an adjudicator's decision; or
 - (v) the consequences of not paying the claimant the adjudicated amount; or
 - (vi) the filing of an adjudication certificate as a judgment debt; or
 - (vii) an adjudicator's entitlement to be paid for adjudicating the payment claim, including accepting, considering and deciding the application;
- (e) the claimant suspending work under the construction contract relevant to the payment claim.

205A References in ch 2 relating to progress payments

- (1) This section applies from the commencement.
- (2) A reference in chapter 2 to a payment claim includes a reference to a payment claim made under the repealed Act, including as preserved under section 205.

- (3) A reference in chapter 2 to a payment schedule includes a reference to a payment schedule made under the repealed Act, including as preserved under section 205.
- (4) A reference in chapter 2 to a progress payment includes a reference to a progress payment the right to which arose under the repealed Act, including as preserved under section 205.
- (5) A reference in chapter 2 to an adjudication under chapter 3, part 4 includes a reference to an adjudication under the repealed Act, part 3, division 2, including as preserved under section 205.

206 References to repealed Act

A reference in an Act or document to the repealed Act may, if the context permits, be taken to be a reference to this Act.

Part 3 Transitional provisions for the repealed Subcontractors' Charges Act 1974

207 Definitions for part

In this part—

repealed Act means the repealed *Subcontractors' Charges Act 1974*, as in force immediately before its repeal.

repealed, in relation to a provision, means that provision of the repealed Act.

subcontractor's charge means a charge within the meaning of section 3 of the repealed Act.

208 Preservation of existing entitlement to subcontractors' charges

- (1) This section applies if, before the commencement, a subcontractor became entitled to a subcontractor's charge under the repealed Act and the entitlement had not been extinguished or otherwise ended before the commencement.
- (2) The entitlement to the subcontractor's charge continues under this Act until it is extinguished or otherwise ends under this Act.

209 Unfinished matters for existing subcontractors' charges to be dealt with under the repealed Act

- (1) This section applies if, before the commencement, a subcontractor gave a person a notice of claim of charge for a subcontractor's charge and, at the commencement, there are unfinished matters for the charge.
- (2) Despite the repeal of the *Subcontractors' Charges Act 1974*, the repealed Act continues to apply for the notice of claim and subcontractor's charge, and any unfinished matters for the charge.
- (2A) However, a reference to a subcontractor's charge in section 117 includes a reference to a subcontractor's charge mentioned in subsection (2).
- (3) To remove any doubt, it is declared that if a subcontractor became entitled to a subcontractor's charge before the commencement, but had not given a person a notice of claim of charge in relation to the charge, the person must secure the charge in accordance with this Act.
- (4) In this section—

notice of claim of charge means a notice complying with repealed section 10(1)(a).

unfinished matter, for a subcontractor's charge, includes a matter under the repealed Act that has yet to be started or completed, including, for example, the following—

- (a) giving a person who holds a security a notice under repealed section 10(1)(aa);
- (b) giving a person a notice of having made a claim under repealed section 10(1)(b);
- (c) a person given a notice of claim of charge retaining money under repealed section 11;
- (d) the giving of a contractor's notice under repealed section 11(3).
- (e) the use of securities for the subcontractor's charge under repealed section 11A to 11D;
- (f) the giving of information under repealed section 9A or 11E;
- (g) the paying of money for the subcontractor's charge;
- (h) the enforcement of the subcontractor's charge.

210 References to repealed Act

A reference in an Act or document to the repealed Act may, if the context permits, be taken to be a reference to this Act.

Part 4 Other transitional provision

Chapter 9 Amendment of this and other Acts

Part 1 Amendment of this Act

Division 1 Extended application of project trusts and retention trusts

213 *Amendment of s 14 (Particular contracts for project trust work)*

(1) *Section 14(1)(a)—*

omit, insert—

(a) the contracting party is the State or a hospital and health service; and

(2) *Section 14(1)(c), ‘but not more than \$10 million’—*

omit.

Division 2 Extended application of project trusts and retention trusts to local government and private sector

214 *Amendment of s 12 (When project trust required for a contract)*

Section 12(6) and (7)—

omit.

215 Amendment of s 14 (Particular contracts for project trust work)

(1) Section 14(1)—

omit, insert—

(1) *A contract is eligible for a project trust if—*

(a) *the contracting party is the State, a state authority, a local government, an individual, a private entity or a hospital and health service; and*

(b) *more than 50% of the contract price is for project trust work; and*

(c) *the contract price is—*

(i) *if the contracting party is the State or a hospital and health service—\$1 million or more; or*

(ii) *otherwise—\$10 million or more.*

(2) Section 14(3)—

insert—

private entity—

(a) *means a company or other entity that is owned by any entity other than the State; but*

(b) *does not include a State authority.*

Division 3 **Extended application of project trusts and retention trusts to particular contracts for \$3 million or more**

216 **Amendment of s 14 (Particular contracts for project trust work)**

Section 14(1)(c)(ii), ‘\$10 million’—

omit, insert—

\$3 million

Division 4 **Extended application of project trusts and retention trusts to most contracts**

217 **Amendment of s 14 (Particular contracts for project trust work)**

Section 14(1) to (3)—

omit, insert—

A contract is eligible for a project trust if—

(a) more than 50% of the contract price is for project trust work; and

(b) the contract price is \$1 million or more.

218 **Amendment of s 32 (When retention trust required)**

(1) Section 32(1)—

omit, insert—

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

- (a) *the contracting party withholds the retention amount in the form of cash; and*
 - (b) *a project trust is required for—*
 - (i) *if the withholding contract is a subcontract—the head contract for the subcontract; or*
 - (ii) *otherwise—the withholding contract.*
- (2) *Section 32(5)—*
omit, insert—
- (5) *In this section—*
head contract *means a contract that is not also a subcontract for another contract.*

Schedule 2 Dictionary

section 5

accepted representations, for chapter 5, see section 172(2).

adjudicated amount, for chapter 3, see section 88(1).

adjudication application see section 79(1).

adjudication certificate see section 91(1).

adjudication response see section 82(1).

adjudicator means an individual registered under chapter 5, part 2, division 2 as an adjudicator.

administrator, for chapter 2, part 5, see the Corporations Act, section 9.

appeal, for chapter 2, part 3, division 6, see section 34B.

approved form means a form approved by the chief executive or the commissioner under section 198.

building, for chapter 2, see section 8.

building contract, for chapter 2, see section 8.

building work, for chapter 2, see section 8.

business day does not include—

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done; or
- (c) any day occurring within any of the following periods—
 - (i) 22 to 24 December;
 - (ii) 27 to 31 December;
 - (iii) 2 to 10 January.

carry out construction work, for chapter 3, see section 64.

claimant, for chapter 3, see section 75(1).

code of conduct means a code of conduct for adjudicators made by the registrar under section 181.

commission means the Queensland Building and Construction Commission established under the *Queensland Building and Construction Commission Act 1991*, section 5.

commissioner means the commissioner appointed under the *Queensland Building and Construction Commission Act 1991*, section 20D.

complex payment claim, for chapter 3, see section 64.

construction contract, for chapter 3, see section 64.

construction work, for chapter 3, see section 65.

contract price—

(a) for chapter 2—see section 10; or

(b) for chapter 4—see section 104.

contracted building work, for chapter 2, see section 8.

contractor, for chapter 4, see section 104.

controller, for chapter 2, part 5, see the Corporations Act, section 9.

conviction, for chapter 5, part 2, see section 158.

corresponding law, for chapter 5, part 2, see section 158.

court, for chapter 4, see section 104.

defects liability period, for a contract, means—

(a) the period worked out under the contract as being the period that—

(i) starts on the day of practical completion for the work carried out under the contract; and

(ii) ends on the last day any omission or defect in the work, carried out under the contract, may be required or directed to be rectified under the contract; or

- (b) if the contract does not provide for a period mentioned in paragraph (a)—the statutory defects liability period under the *Queensland Building and Construction Commission Act 1991*, section 67NA(2).

disputed funds trust account, for chapter 2, see section 23(1)(c).

dispute resolution process, for chapter 2, part 3, division 6, see section 34B.

domestic building work see *Queensland Building and Construction Commission Act 1991*, schedule 1B, section 1.

due date, for a progress payment, for chapter 3, see section 64.

fire protection work, for chapter 2, see the *Queensland Building and Construction Commission Act 1991*, schedule 2.

first tier subcontract see section 6(5).

general trust account, for chapter 2, see section 23(1)(a).

head contractor, for chapter 2, see section 8.

higher subcontract see section 6(7).

information notice, for chapter 5, see section 158.

insolvency official, for chapter 2, part 5, see section 53.

land, for chapter 4, see section 104.

liquidator, for chapter 2, part 5, see the Corporations Act, section 9.

maintenance work, for chapter 2, see section 8.

notice of claim see section 122.

original decision, for chapter 5, see section 177(1).

payment claim see section 68(1).

payment dispute, for chapter 2, see section 35.

payment instruction means an instruction to a financial institution for the payment of an amount from an account.

payment schedule see section 69.

person, for chapter 4, see section 104.

practical completion, for work carried out under a contract, means—

- (a) the day practical completion of the work is achieved, as worked out under the contract; or
- (b) if the contract does not provide for the day practical completion of the work is achieved—the day the work is completed—
 - (i) in compliance with the contract, including all plans and specifications for the work and all statutory requirements applying to the work; and
 - (ii) without any defects or omissions, other than minor defects or minor omissions that will not unreasonably affect the intended use of the work.

principal, for chapter 2, see section 8.

progress payment see section 64.

project bank account, for chapter 2, see section 9(1).

proposed action, for chapter 5, see section 171(3)(a).

recognised financial institution means a bank, or other financial institution prescribed by regulation.

provisional liquidator, for chapter 2, part 5, see the Corporations Act, section 9.

reference date, for chapter 3, see section 67.

registrar see section 150(1).

registry, for chapter 5, see section 149(1).

registry staff, for chapter 5, see section 149(2).

related entity, for chapter 2, see section 19.

related goods and services, for chapter 3, see section 66.

relevant construction contract, for chapter 3, see section 64.

respondent, for chapter 3, see section 75(1).

retention amount means an amount that—

- (a) is payable under a contract, but may, under that contract, be withheld from payment—
 - (i) during the progress of the work to be carried out under the contract; or
 - (ii) during the defects liability period for the contract; or
 - (iii) both during the progress of the work to be carried out under the contract and during the defects liability period; and
- (b) is withheld from payment under a contract for the purpose of giving financial protection to the person making the payment in relation to the need to correct defects in the work to be carried out under the contract, or otherwise to secure, wholly or partly, the performance of the contract.

retention trust account, for chapter 2, see section 23(1)(b).

review decision, for chapter 5, see section 178(2).

review notice, for chapter 5, see section 178(3).

second tier subcontract see section 6(6).

security, for chapter 4, see section 104.

show cause notice, for chapter 5, see section 171(2).

show cause period, for chapter 5, see section 171(3)(e).

spent conviction, for chapter 5, see section 158.

standard payment claim, for chapter 3, see section 64.

State authority, for chapter 2, see section 8.

structure, for chapter 4, see section 104.

subcontract see section 6(1).

subcontracted work see section 6(3)(c).

subcontractor see section 6(3)(b).

subcontractor beneficiary, for chapter 2, see section 8.

subcontractor's charge, for chapter 4, see section 109(4).

supplier, for chapter 2, see section 11.

trustee in bankruptcy, for chapter 2, part 5, see section 53.

valuable instrument, for chapter 4, see section 104.

variation—

(a) of a building contract, for chapter 2, see section 8; and

(b) of a contract, for chapter 4, see section 104.

work, for a contract, for chapter 4, see section 105.