

# Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No. 2) 2016

Explanatory notes for SL 2016 No. 184

made under the

*Queensland Building and Construction Commission Act 1991*  
*State Penalties Enforcement Act 1999*

## General Outline

### Short title

*Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No. 2) 2016*

### Authorising law

Sections 67WB(1)(f), 67WC(1)(e), 67WC(2)(e), 67WE(4), 67X(4), 67Y, 67Z(4), 67Z(5), 68(4), 68D(5), 68F(2), 70C, 71A(4), 71C, 71F and 116 of the *Queensland Building and Construction Commission Act 1991* (QBCC Act).

Section 165 of the *State Penalties Enforcement Act 1999* (SPE Act).

### Policy objectives and the reasons for them

The objective of the *Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No.2) 2016* (the Amendment Regulation) is to amend the *Queensland Building and Construction Commission Regulation 2003* (QBCC Regulation) to facilitate and implement changes made by the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014* (QBCCOLA Act) to the Queensland Home Warranty Scheme (the Scheme).

The main changes to the Scheme are:

- the inclusion of cover for the erection, construction or installation of residential swimming pools that are not related to construction of a building;
- the inclusion of cover for the installation of manufactured homes;
- the expansion of cover to include building work within the 'building envelope' (which would include, for example, painting and tiling work on the inside or outside of a residence);

- the inclusion of a process for payment of a premium where contract variations occur;
- the inclusion of an option for consumers to pay an increased premium in return for a higher monetary level of cover, known as ‘optional additional cover’; and
- transferring the Scheme’s terms and conditions from a policy document approved by the Queensland Building and Construction Board to the QBCC Regulation.

The changes will expand the coverage available and enhance the transparency and accessibility of the Scheme for consumers.

#### *Infringement notices and demerit points*

The provisions of the QBCC Act relating to the Scheme currently provide for a number of offences for which a penalty infringement notice (PIN) is able to be issued by an authorised representative of the Queensland Building and Construction Commission (QBCC) in accordance with the *State Penalties Enforcement Regulation 2014* (SPE Regulation). For some of these offence provisions, the QBCC Regulation also treats the relevant offence as a ‘demerit offence’ and provides for the number of demerit points to be allocated for the offence. Under the QBCC Act, a licensee who accumulates a certain number of demerit points in a particular period may potentially have their licence cancelled. The amendments to the QBCC Act for the Scheme will continue some of the existing offences, however the numbering of the offence sections will be changed when the QBCCOLA Act amendments come into effect on 28 October 2016.

Amendments to the SPE Regulation have been prepared to facilitate the issuing of PINs for the renumbered offences under the QBCC Act relating to the Scheme. Amendments to the QBCC Regulation have also been prepared to prescribe some of these offences as demerit offences. These amendments will ensure that the QBCC can issue infringement notices and impose demerit points for non-compliance with the QBCC Act.

## **Achievement of policy objectives**

The policy objectives are achieved by amending the QBCC Regulation and the SPE Regulation. The objectives can only be achieved by amendments to these regulations.

## **Consistency with policy objectives of authorising law**

The Amendment Regulation is consistent with the main objects of the QBCC Act and, in particular, with the objective of providing ‘remedies for defective building work’. The Scheme will provide monetary assistance to consumers of residential construction work where the work is found to be defective.

## **Inconsistency with policy objectives of other legislation**

The Amendment Regulation is consistent with the policy objectives of other State laws relating to required standards for residential construction work. Generally, residential construction work is required under State laws, such as the *Building Act 1975*, to comply with applicable building codes and standards. The Scheme which is provided for under the Amendment Regulation creates a mechanism for rectifying residential construction work which does not comply with relevant codes and standards where the relevant builder is unable or unwilling to do so, for example, due to insolvency.

## **Benefits and costs of implementation**

The Amendment Regulation facilitates and implements changes to the Scheme made by the QBCCOLA Act. The revised Scheme will provide a number of benefits including expanded Scheme coverage and optional additional cover for consumers.

Consumers contracting for work that now falls within the revised Scheme will incur the cost of Scheme cover.

It is anticipated that any costs incurred by the QBCC in implementing the revised Scheme will be met through QBCC's existing resources.

## **Consistency with fundamental legislative principles**

The Amendment Regulation is consistent with fundamental legislative principles.

## **Consultation**

The Queensland Competition Authority (QCA) was consulted and confirmed that a Regulatory Impact Statement is not required.

Peak industry bodies and stakeholders have also been consulted. Presentations and consultation sessions were held throughout 2015 and 2016 to seek feedback on the proposed Amendment Regulation.

Industry stakeholders are generally supportive of the Amendment Regulation.

## **Notes on provisions**

### **Part 1 - Preliminary**

#### **1 Short title**

*Clause 1* provides that the short title of the Amendment Regulation will be the *Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No.2) 2016*.

#### **2 Commencement**

*Clause 2* provides for commencement of the Amendment Regulation immediately after commencement of section 36 of the QBCCOLA.

### **Part 2 – Amendment of Queensland Building and Construction Commission Regulation 2003**

#### **3 Regulation amended**

*Clause 3* provides that the Amendment Regulation amends the *Queensland Building and Construction Commission Regulation 2003* (the Regulation).

#### **4 Omission of pt 2, div 1, hdg (General)**

*Clause 4* provides for the omission of the heading for division 1 of part 2 of the Regulation.

#### **5 Amendment of s 4 (Number of storeys of a building)**

*Clause 5* amends section 4 of the Regulation which deals with calculating the number of storeys of a building. The amendment clarifies that the method described in section 4 is not applicable for the purposes of section 67WE(4) of the Act which relates to the meaning of the term 'residence'.

#### **6 Omission of pt 2, div 2, hdg (Residential construction work)**

*Clause 6* omits division 2 of part 2 of the Regulation.

#### **7 Replacement of pt 5 (Statutory insurance scheme)**

*Clause 7* omits part 5 of the Regulation and inserts a new part 5 headed 'Statutory insurance scheme' comprising of five new divisions. The new divisions and the sections within them are as follows:

##### **New division 1 (Name of Scheme)**

New division 1 comprises new section 23 discussed below.

##### **New Section 23 (Name of statutory insurance scheme)**

New section 23 prescribes the name of the statutory insurance scheme as the Queensland Home Warranty Scheme.

##### **New division 2 (Work under the scheme)**

New division 2 comprises new sections 24 to 26A discussed below.

##### **New section 24 (Work not covered under the statutory insurance scheme)**

New section 24 prescribes, for section 67WB(1)(f) of the Act, various types of work that are not eligible for assistance from the statutory insurance scheme.

##### **New section 25 (Primary insurable work)**

New section 25 prescribes, for section 67WC(1)(e) of the Act, various categories of work that are primary insurable work. The categories of work referred to in this section augment the categories of work referred to in section 67WC(1) of the Act as being primary insurable work.

##### **New section 26 (Work that is not primary insurable work)**

New section 26 prescribes, for section 67WC(2)(e) of the Act, various categories of work that are not primary insurable work, but may nevertheless be associated insurable work (provided they meet the definition of that term in section 67WD of the Act).

##### **New section 26A (Calculating number of storeys of a building)**

New section 26A prescribes, for section 67WE(4) of the Act, the method of calculating the number of storeys of a building.

### **New division 3 (Assistance)**

New division 3 comprises new sections 26B to 26D discussed below.

#### **New section 26B (Terms of cover)**

New section 26B(1) provides that the terms of cover under which a consumer is entitled to assistance under the statutory insurance scheme are stated in schedule 2C.

New section 26B(2)(a) provides that the terms of cover apply to residential construction work and new section 26B(2)(b) provides that the terms of cover also apply to certain work performed by an architect in the architect's professional practice or an engineer in the engineer's professional practice. New section 26B(2)(b) means that cover may extend to cases where a defect in residential construction work is due to work performed by an architect or engineer – for example, faulty design of a slab or other structural element for a residence.

New section 26B(3) clarifies the version of schedule 2C that applies in instances where schedule 2C has been amended. The applicable version is the one in force at the time cover comes into force for the work. In this regard, a note below new section 26B(3) draws attention to section 68I of the Act.

#### **New section 26C (Optional additional cover)**

New section 26C(1) prescribes, for section 67Z(4) of the Act, that schedule 2C provides for other matters relating to optional additional cover. New section 26C(2) prescribes, for the definition of optional additional cover in section 67Z(5) of the Act, that the additional assistance provided to a person and the additional compensation to be paid under the statutory insurance scheme are stated in schedule 2C.

#### **New section 26D (Associate of building contractor not entitled to assistance under statutory insurance scheme)**

New section 26D(1) prescribes for section 68(4) of the Act, a particular circumstance under which a person is not entitled to assistance under the statutory insurance scheme. The circumstance is that the person seeking to make the claim is an associate of a building contractor and the claim is for residential construction work carried out by the building contractor for the person. New section 26D(2) defines the meaning of 'associate' of a person, for the section.

### **New division 4 (Calculating insurable value)**

New division 4 comprises new sections 26E to 26H discussed below.

#### **New section 26E (Application of division)**

New section 26E provides that the division prescribes, for section 68D(5) of the Act, the way to calculate the insurable value of particular residential construction work.

#### **New section 26F (Work for multiple dwelling)**

New section 26F stipulates a particular method for calculating the insurable value of residential construction work in certain cases where the work is for a multiple dwelling. Broadly, where the section applies, the total value of the residential construction work is divided by the number of living units to arrive at the insurable value of the residential construction work for each unit.

#### **New section 26G (Work for duplex)**

New section 26G stipulates a particular method for calculating the insurable value of residential construction work in certain cases where the work is for a duplex. Broadly, where the section applies, the total value of the residential construction work is divided by the number of living units, namely two, to arrive at the insurable value of the residential construction work for each unit.

#### **New section 26H (Work for 2 or more detached dwellings)**

New section 26H stipulates a particular method for calculating the insurable value of residential construction work in certain cases where the work includes building work for 2 or more detached dwellings. Broadly, where the section applies, the total value of the residential construction work is divided by the number of living units to arrive at the insurable value of the residential construction work for each detached dwelling.

#### **New division 5 (Miscellaneous)**

New division 5 comprises new sections 26I to 27 discussed below.

#### **New section 26I (Matters for notice of cover)**

New section 26I prescribes, for section 68F(2) of the Act, the matters to be included in a notice of cover for residential construction work.

#### **New section 26J (Refund of part of insurance premium)**

New section 26J prescribes, for section 70C of the Act, how to calculate the part of an insurance premium which is refundable because a variation of the value of residential construction work results in a decrease in the value of the work.

#### **New section 26K (Amount for tenders for rectification work)**

New section 26K prescribes the applicable amount for section 71A(4) of the Act which provides that if the estimate to rectify building work is less than the prescribed amount, the QBCC needs only seek a tender for carrying out the building work from one licensed contractor. The prescribed amount is \$20,000.

#### **New section 26L (When work is taken to have started)**

New section 26L prescribes, for section 71F of the Act, when residential construction work is taken to start for the purpose of part 5 of the Act.

#### **New section 26M (Residential unit for which residential construction work carried out)**

New section 26M provides that, subject to some exceptions, residential construction work for common property for a community titles scheme carried out in or on a duplex or

multiple dwelling is taken to be carried out for all residential units in the duplex or multiple dwelling. The section would not apply, for example, to work for a structure such as an outdoor swimming pool which is not located on or in a duplex or multiple dwelling.

This provision is relevant for the operation of the provisions relating to the maximum amounts that may be claimed under the Scheme (schedule 2C, part 4).

### **New section 26N (Living units)**

New section 26N provides clarification of the meaning of the expression 'living unit' for the regulation.

### **New section 27 (Insurance information statement)**

New section 27(1) states the circumstances under which an interested person for land or a manufactured home, may, on payment of the relevant fee, ask the QBCC for an insurance information statement about the land or a manufactured home.

New section 27(2) states that the QBCC must comply with a request for an insurance information statement as referred to in new section 27(1).

New section 27(3) defines the expressions 'home owner' 'interested person', 'owner' (of land), and 'prospective purchaser' for the purposes of the section.

### **8 Amendment of schedule 1A (Board's policies approved under section 19 of the Act)**

*Clause 8(1)* omits three items from schedule 1A of the Regulation. Schedule 1A is headed 'Board's policies approved under section 19 of the Act' and the three omitted items each describe a former edition of the 'Insurance Policy Conditions' relevant for the Scheme prior to commencement of the Amendment Regulation.

*Clause 8(2)* renumbers the remaining items in schedule 1A of the Regulation.

### **9 Amendment of schedule 2AA (Demerit offences)**

*Clause 9* removes the reference to section 68(1). References to section 68B(2), 68B(3) and 68C(2) have been included with 4 demerit points assigned to each, to correspond with amendments made by the QBCCOLA Act.

### **10 Insertion of new schedule 2C**

*Clause 10* inserts new schedule 2C into the Regulation. New schedule 2C contains the terms of cover under which a consumer is entitled to assistance under the Scheme. New schedule 2C replaces the 'Insurance Policy Conditions' which applied under the Scheme prior to commencement of the Amendment Regulation. An overview of schedule 2C follows.

#### **Part 1 of schedule 2C (Preliminary)**

*Part 1* of schedule 2C is preliminary in nature and includes an overview of the schedule and its application (section 1), definitions of various terms (section 2), the meaning of

'fixed price residential contract' (section 3) and clarification of when a fixed price residential contract ends (section 4).

Sections 3 and 4 are relevant for section 6 which deals with the application of part 2, division 2 dealing with assistance under the Scheme where work has started but remains incomplete.

## **Part 2 of schedule 2C (Incomplete residential construction work)**

*Part 2* of schedule 2C is comprised of divisions 1 and 2.

*Division 1* deals with assistance under the Scheme if work has not started. The assistance available in these circumstances is limited to recovery of the amount of the 'insurable deposit'. The expression 'insurable deposit' is defined in section 5(4).

*Division 2, subdivision 1* deals with the application of division 2.

*Division 2, subdivision 2* deals with assistance under the Scheme for completion of work. Section 7(1) provides that the consumer is entitled to claim assistance for the reasonable cost of completing the residential construction work. As an alternative, assistance may be available under section 7(3) in certain circumstances where completion of the work would be prohibited under heritage laws or planning laws and approval required to complete the work cannot be obtained. An example may be where, due to no fault of the consumer, a partially completed residence has been built too close to a boundary in breach of planning laws and approval to complete the residence cannot be obtained from the relevant local government.

Section 8 excludes cover for certain work carried out by a construction manager and section 9 allows assistance for accommodation, removal and storage costs in certain circumstances where a claim for completion of work has been allowed.

*Division 2, subdivision 3* allows assistance for vandalism, forcible removal, fire, storm or tempest in certain circumstances.

## **Part 3 of schedule 2C (Defective work)**

*Part 3* of schedule 2C deals with defective work.

Section 14 has the effect that assistance for defective work, and assistance for accommodation, removal and storage costs arising out of defective work is only available where the work constitutes primary insurable work.

Under section 15(1), assistance in cases of defective work is available for the reasonable cost of rectifying the defective work as well as the reasonable cost of certain other building work reasonably required to be carried out as a consequence of the defective work. Section 15(3) allows an alternative measure of assistance in the circumstances set out in section 15(2).

Section 16 specifies the time limits on assistance for defective work. The applicable timeframe is dependent on whether the work is substantially complete and whether the work is subject to a structural defect or otherwise.



Section 17 provides a formula for calculating the reasonable cost of rectification work under section 15(1) where the work includes work for common property in a community titles Scheme that includes a lot or lots used for a commercial purpose.

Section 18 provides that a consumer is not entitled to the assistance mentioned in section 15 in certain circumstances.

Section 19 provides that a consumer is not entitled to the assistance mentioned in section 15 for certain loss situations. These situations include certain work for swimming pools, the erection or construction of related roofed buildings not including the slab and certain damage arising from work for existing residences and related roofed buildings.

Section 20 allows assistance for accommodation, removal and storage costs in certain circumstances where a claim for defective work has been allowed.

#### **Part 4 of schedule 2C (Maximum amounts)**

*Part 4* of schedule 2C stipulates the maximum amount the QBCC may pay for all claims relating to residential construction work if cover under the Scheme is in force for the work.

#### **Part 5 of schedule 2C (General provisions about entitlement to assistance)**

*Part 5* of schedule 2C is comprised of divisions 1 and 2.

*Division 1* deals with the reasonable cost of work.

Section 49 provides for the application of the division.

Section 50 provides that the scheme covers the reasonable cost of using materials that, as far as possible, match materials already used for the built work or an adjoining building subject to certain exceptions where materials have been used that do not match materials already used for the built work or a building adjoining the work.

Section 51 provides that cover under the Scheme extends generally to the reasonable cost of obtaining a certificate in relation to the required work and any inspections for obtaining such a certificate.

Section 52 provides that the amount a consumer may claim under the Scheme must be reduced by the amount of any input tax credits the QBCC is satisfied the consumer is entitled to claim in relation to the work and does not include any GST payable for a supply made, or that may be made, by the consumer.

*Division 2* restricts claim entitlements under the Scheme in certain circumstances.

Section 53(1) excludes claims for assistance under the Scheme for loss caused or contributed to by a range of things. These include, for example, loss caused or contributed to, in certain circumstances, by defective design of built work, gradual deterioration of built work, failure to undertake reasonable maintenance, inspection and treatment, pressure waves caused by aircraft, earthquake, erosion, flood, landslip, tidal wave, failure of an artificial device for the storage or conveyance of water or gas, accidental damage, defective products, acts of third parties and terrorist acts.

Section 54 excludes claims for assistance under the Scheme for a range of ill effects on electronic data.

Section 55 excludes claims for assistance under the Scheme for electrical appliances.

Section 56 excludes claims for assistance under the Scheme for loss covered by a policy of insurance which is separate from the Scheme.

Section 57 excludes claims for assistance under the Scheme in certain circumstances where the consumer has released or indemnified the licensed contractor who carried out the work.

Section 58 excludes claims for assistance under the Scheme where the consumer unreasonably refuses the QBCC access to work for assessing a claim.

Section 59 excludes claims for assistance under the Scheme for a defect in work which is substantially complete where the defect was apparent, or ought to have been apparent, before the work was substantially complete.

Section 60 excludes claims for assistance under the Scheme by persons who purchase property on or for which residential construction work has been carried out where, before completing the contract for the purchase of the property, the person knew or ought reasonably to have known the built work was damaged, defective or destroyed.

Section 61 excludes claims for assistance under the Scheme where although the work was of a type covered by the Scheme at the time it was carried out, it is of a type excluded from cover under section 67WB of the Act by the time the claim is made.

Section 62 excludes claims for assistance under the Scheme for certain costs incurred by a consumer as a result of delays by the consumer in entering into a contract with a licensed contractor after a claim has been approved by the QBCC.

Section 63 excludes claims for assistance under the Scheme for a matter where the QBCC has already made a payment under the Scheme in settlement of the matter. An exception applies for cases where the QBCC paid a licensed contractor to carry out work and the work was carried out in a way approved by the QBCC, but did not rectify the matter.

Section 64 excludes claims for assistance under the Scheme in cases where the consumer demolishes the built work, rectifies the work or reinstates the built work without the prior written approval of the QBCC.

## **Part 6 of schedule 2C (Claims)**

*Part 6 of schedule 2C deals with claims under the Scheme.*

Section 65 sets out the requirements for a notice of claim under the Scheme.

Section 66 provides that a consumer making a claim for residential construction work that is substantially complete must serve a notice giving the licensed contractor who carried out the work a reasonable period to rectify the work. Some exceptions are

provided, such as the death of the licensed contractor or where the licensed contractor was a company and it ceases to exist.

Section 67 provides for circumstances where, before deciding to allow or disallow a claim, the QBCC must decide whether to give a direction to rectify or remedy the work.

Section 68 provides that where a direction to rectify has been given by the QBCC, it must not, subject to certain exceptions, make a decision to allow or disallow a claim for the work until the time for complying with the direction has ended.

Section 69 provides for certain notices to be given by the QBCC if it decides to allow or disallow a claim.

Section 70 imposes a duty on a consumer to act in good faith in relation to a claim for assistance under the scheme. Provision is made for the recovery by the QBCC of money paid to the consumer by the QBCC where the consumer has not acted in good faith.

Section 71 provides that the QBCC must not pay an amount under section 7(3)(b) until the built work has been demolished.

Section 72 deals with priority of payment on a claim.

Section 73 provides for the ways in which the QBCC may make payment on a claim.

Section 74 provides that payments made by the QBCC in settlement of claims are inclusive of any tax payable on the amount.

### **11 Amendment of schedule 3 (Dictionary)**

*Clause 11* omits certain defined terms from the Dictionary in schedule 3 and inserts certain new defined terms.

## **Part 3 - Amendment of State Penalties Enforcement Regulation 2014**

### **12 Regulation amended**

Clause 12 provides that the Amendment Regulation amends the *State Penalties Enforcement Regulation 2014*.

### **13 Amendment of schedule 1 (Infringement notice offences and fines for nominated laws)**

*Clause 13* removes references to sections 68(1) and 68(4) of the QBCC Act from Schedule 1 and includes references to 68B(2), 68B(3) and 68C(2) of the QBCC Act assigning 10 penalty units to each.