



fair trading



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EXPLANATORY MEMORANDUM

BUILDING LEGISLATION AMENDMENT BILL 2000

The purpose of this Bill is to amend the *Builders' Registration Act 1939* ('BRA') and the *Home Building Contracts Act 1991* ('HBCA') to enhance the ability of the Builders' Registration Board ('Board') to maintain high building standards in Western Australia, and to improve the operation of the Building Disputes Committee to a level of service which is acceptable to both Government and the community.

In particular, the amendments in this Bill will:

- assist the Board in the administration of both the BRA and the HBCA, including strengthening its powers to deal with the failure, fraud or misconduct of a builder;
- introduce measures which will streamline the dispute resolution procedures resulting in reduced waiting periods for the resolution of building disputes referred to the Building Disputes Committee (to be renamed the Building Disputes Tribunal and hereafter referred to as the 'Disputes Tribunal'); and
- provide additional revenue sources for the Board to alleviate funding problems that have developed since the introduction in 1992 of the HBCA and the establishment of the Disputes Tribunal.

In Western Australia, the activities of builders are regulated by the BRA. The BRA establishes the Board which is primarily funded by registration fees paid by builders. The main function of the Board is to register and regulate the conduct of builders.

The HBCA came into effect in April 1992. This Act regulates contracts between home owners and builders and provides for contractual disputes to be referred to the Disputes Tribunal. The Disputes Tribunal was established in 1992 and is administered and funded by the Board. The Disputes Tribunal has the jurisdiction to deal with both contractual disputes under the HBCA and workmanship disputes under the BRA.

Detailed below is an explanation of the contents of the Bill on a clause by clause basis.

Part 1 - Preliminary

- Clause 1: Short title and citation.
- Clause 2: Provides that the *Building Legislation Amendment Act 2000* will come into operation on such day or days as fixed by proclamation.

Part 2 - Builders' Registration Act 1939

- Clause 3: Explains that the amendments in Part 2 are to the *Builders' Registration Act 1939* ('BRA').
- Clause 4: Amends the long title in the BRA as a consequence of the change in the name of the Building Disputes Committee to the Building Disputes Tribunal [see clause 5].
- Clause 5: Deletes the definition of 'Disputes Committee' in section 2 of the BRA and inserts a new definition of 'Disputes Tribunal' to provide that the Building Disputes Committee established by section 26 of the BRA is to be known as the Building Disputes Tribunal.
- Inserts into section 2 of the BRA a definition of 'legal practitioner' by adopting the definition in the *Legal Practitioners Act 1893*. This is necessary as reference is made to a 'legal practitioner' in clauses 37 and 40 in the Bill.
- Clause 6: Deletes existing section 4(1aa) and inserts new section 4(1aa) to provide that the penalty for an offence against all provisions of section 4(1) by an unregistered builder will be \$10 000 with a daily penalty of \$250 for a continuing offence.

The existing section 4(1aa)(a) provides a \$10 000 penalty with a daily penalty of \$100 for a continuing offence, for an offence against section 4(1)(A)(b) which prohibits an unregistered builder from entering into a contract to construct a building for another person.

Section 4(1aa)(b) provides that the penalty for an offence against any other provision of section 4(1)(A) by an unregistered builder (ie. constructing a building for oneself or another person for immediate sale, constructing for oneself a building which comprises more than 2 dwellings on ground level and holding oneself out as a registered builder), is \$400 for a first offence and a minimum of \$400 and a maximum of \$2 000 for a later offence. This is not considered to be an appropriate penalty for such offences.

The amendment will provide a uniform penalty for breaches of section 4(1).

Clause 7(1): Amends section 4A(1)(c) in the BRA to provide that persons who are seeking to construct or alter buildings as owner-builders will be required to pay a fee to the Board as determined by the responsible Minister. The fee is to be paid prior to the issue of the building licence by the local government authority.

Section 4A(1)(c) is further amended to provide that the statutory declaration under subparagraph (ii) verifying that the person has not been issued with such a building licence in the preceding 6 years, shall be furnished to the Board instead of the local government authority.

Clause 7(2): Amends section 4A(2)(c) to provide that a person who, for the purposes of obtaining or attempting to obtain a building licence from a local government authority, makes a false representation or statement that he or she is registered under the BRA, commits an offence. Currently the section only creates an offence where a false statement or representation is made in respect of qualifications held by a person.

Clause 8:

Inserts a new section 4B in the BRA to provide for a building licence fee to be paid by any person to whom a building licence is issued by a local government authority. The fee will be determined by the Minister and will be payable in addition to any fee which a person is currently required to pay to a local government authority under the *Local Government (Miscellaneous Provisions) Act 1960*.

To ensure compliance and for ease of administration, it is proposed that the fee be collected by the local government authority at the time of issuing a building licence and then remitted to the Board less a reasonable administration charge to be retained by local government for the collection of the fee.

All fees collected will be remitted to the Board by the local government authority on a monthly basis, together with particulars of all the building licences issued during the month as is currently required under regulation 16A of the *Builders' Registration Regulations*.

Clause 9:

Amends section 5B(1)(f) in the BRA to provide that the office of a member of the Board shall become vacant if the member is absent without leave of the Board from 3 consecutive meetings of the Board.

Section 5B(1)(f) currently provides that the office of a member of the Board shall become vacant if the member is absent without leave of the Board from 6 consecutive meetings of the Board. This period is considered too long for a member to be absent from participation in Board affairs without leave of the Board.

Clauses 10(1)
&(2):

Amend section 6(2) in the BRA and insert a new section 6(2a) to provide that at any meeting of the Board, the chairperson will have a deliberative vote only and any matter put to a vote of the Board shall be resolved in the negative where there is an equality of votes.

Section 6(2) currently provides that at any meeting of the Board, the chairperson shall have a second or casting vote in the case of an equality of votes.

Clause 10(3): Amends section 6(3) in the BRA as a consequence of the amendment to section 13(4) which provides that an inquiry into the conduct or activities of a registered builder may be held by a panel comprising at least 3 members of the Board [see clause 21(6)]. Currently, section 6(3) requires at least 4 members to be present for the conduct of all the business of the Board and this will continue to be the case other than for inquiries under section 13.

Clause 11: Amends section 8(1) in the BRA to make it a function of the Board to undertake building information and educational activities associated with its registration and dispute resolution responsibilities.

Clause 12: Inserts new sections 8B and 8C to require the Board to provide to the responsible Minister an annual corporate plan commencing with the 2001/2002 financial year. The corporate plan is to incorporate separate plans in relation to the administrative functions of the Board and the management by the Board of the disputes resolution procedures under the BRA.

In relation to each of these areas of operation, the corporate plan will include statements of the Board's objectives and the policies and strategies that will be adopted to achieve these objectives; an estimate of the Board's income and expenditure; details of the activities and planned improvements; and the resources that the Board proposes to allocate to these activities and improvements.

The Board will be required, as far as practicable, to give effect to its current corporate plan and may with the approval of the Minister revise a corporate plan at any time.

Clause 13: Inserts a new section 9AA to require a person registered under the BRA to notify the Board if there is a change in the residential or business address of that person no later than 14 days after the change occurs. A penalty of \$1 000 will apply for a failure to comply with this requirement.

Clause 14: Inserts a new section 9A(3) to provide the Board with the discretionary power to refuse to register an architect or engineer if the person has been declared to be ineligible for registration under the new section 13(1ba) [see clause 21(3)].

Clauses 15(1)-(3): Amend sections 10(1) and 10(2) and insert new sections 10(2b) and 10(2c) to provide the Board with the discretionary power to:

- refuse to register under the BRA a natural person if the person has been declared to be ineligible for registration under the new section 13(1ba) [see clause 21(3)]; and
- refuse to register under the BRA any partnership, company or body corporate if an ineligible person is associated with the entity as a partner, director, member of the board of management or otherwise involved in its management.

Clause 15(4): Inserts new sections 10(3aa) and 10(3ab) to provide that in the case of a registered builder which is a partnership, company or a body corporate:

- where a person registered under the BRA and employed to manage and supervise the building works undertaken by the entity ceases to be so employed, both that person and the entity must notify the Board of the cessation of the employment no later than 14 days after this occurs; or
- where the partner, director or member of the board of management who is registered under the BRA and whose duties include management and supervision of the building works undertaken by the entity ceases to perform that function, both that person and the entity must notify the Board of that fact no later than 14 days after this occurs.

A penalty of \$5000 will apply for a failure to comply with this requirement.

Section 10(3) in the BRA currently provides that the registration of a partnership, a company or a body corporate is conditional upon at least one partner, director or member of the board of management or a person employed by the entity, being a registered builder.

Sections 10B and 10C also require that the building work carried out by the entity be managed and supervised by such a person. However there is no current requirement for the Board to be notified when this person ceases to be employed by the entity.

Clause 16: Inserts a new section 10AA to provide that where any building work is carried out by a natural person registered under the BRA, then that person must either personally manage and supervise the work or ensure that it is managed and supervised. A penalty of \$250 will apply for a breach of this requirement.

This section is consistent with sections 10B and 10C in the BRA, which currently provide that any building work undertaken by a partnership, company or body corporate must be managed and supervised by a registered builder.

Clause 17: Makes a consequential amendment to section 10CA as a result of new section 10AA. Section 10CA will provide that a builder, including a builder who is a natural person, shall be taken not to have complied with the requirement for building work to be managed and supervised unless the builder can show that the management and supervision was sufficient to ensure that the building work was carried out in a proficient and workmanlike manner.

Clause 18: Makes a further consequential amendment to section 10D as a result of new section 10AA to make it clear that the penalty provided by section 10AA is in addition to, and not in derogation of, any other penalty, suspension or cancellation of registration which may be imposed under any other section of the BRA.

Clause 19: Inserts new sections 12A(2), (3) and (3a) to provide that a complaint cannot be made to the Disputes Tribunal under section 12A(1) or (1a) of the BRA unless the complainant has given written notice of the complaint, in the prescribed form, to the person who has carried out the building work, setting out the complaint matters and requesting their rectification. If a complaint is subsequently made to the Disputes Tribunal, a copy of this notice must be given to the Disputes Tribunal at that time.

These sections will be consistent with the current sections 17(2), (3) and (3a) in the HBCA that require a person to give a preliminary notice of a contractual dispute to the other party before lodging a complaint with the Disputes Tribunal.

Clause 20:

Inserts a new section 12C in the BRA to provide that where a complaint has been made to the Disputes Tribunal under section 12A, the Disputes Tribunal may:

- if it considers it just and expedient to do so, order the person who carried out the building work to pay an amount of money for placement in an interest-bearing account;
- review and vary or cancel this order at any time before the matter is determined; and
- strike out the defence of the person if they fail to comply with the order.

This section will be similar to the amended section 18 in the HBCA.

Clause 21(1)(a):

Amends section 13(1)(ca) in the BRA to provide the Board with the discretionary power to cancel or suspend the registration of a natural person who has failed to comply with new section 10AA [see clause 16] which requires that a natural person who is registered under the BRA must either personally manage and supervise any building work carried out or ensure that such work is properly managed or supervised.

Section 13(1)(ca) currently provides the Board with the power to cancel or suspend the registration of a partnership, company or body corporate that fails to comply with similar requirements under section 10B and 10C.

The amendment at clause 22 in this Bill (new section 13A in the BRA) will also give the Board the discretionary power to impose a fine instead of, or in addition to, cancelling or suspending the registration of a builder for breaching sections 10AA, 10B or 10C.

Clause 21(1)(b):

Inserts new sections 13(da) and 13(db) in the BRA to provide the Board with the discretionary power to cancel or suspend the registration of any builder who:

- has been guilty of conduct that is harsh, unconscionable, oppressive, misleading or deceptive in relation to the formation, execution or variation of a building contract or the carrying out of building work under that contract; or
- has failed to comply with an order of the Disputes Tribunal.

The discretionary power of the Board to impose a fine instead of, or in addition to, cancelling or suspending the registration of a builder as provided for at clause 22 in this Bill (new section 13A in the BRA), will also apply to sections 13(da) and 13(db).

Clause 21(1)(c): Inserts a new section 13(1)(g) in the BRA to provide the Board with the discretionary power to cancel or suspend the registration of any partnership, company or body corporate where, after the registration, a person who has been declared ineligible under the new section 13(1ba) [see clause 21(3)] to be registered under the BRA is involved in the management of the entity.

Clause 21(2): Amends section 13(1a) in the BRA to provide the Board with the discretionary power to cancel or suspend the registration of any person who is a partner, director, member of the board of management or employee of a partnership, company or body corporate, in all cases where:

- after the holding of an inquiry, the registration of the partnership, company or body corporate has been cancelled or suspended by the Board; and
- the person was required by the BRA to manage and supervise the building work to which the inquiry related.

Currently, the Board can only take this action in cases where the registration of the partnership, company or body corporate has been cancelled or suspended because of negligence or incompetence in the performance of the building work or fraudulent conduct.

Clause 21(3): Inserts new sections 13(1ba) and 13(1bb) in the BRA to provide the Board with the discretionary power to declare any person who is involved in the management of a partnership, company or body corporate which has been deregistered, ineligible to be registered under the BRA for a period not exceeding 3 years, where the Board believes such a person has contributed to the circumstances giving rise to the deregistration of the entity.

The declaration can be revoked by the Board on its own motion or on the application of the 'ineligible' person.

Together with the amendments in clauses 15(3) and 21(1)(c), this will have the effect of preventing such a person from becoming involved in any management capacity with another registered builder or simply setting up a new entity which is then able to apply for registration under the BRA.

Clause 21(4): Amends section 13(1c) in the BRA to provide that before imposing a fine under the new section 13A [see clause 22] on a person required to manage and supervise building work undertaken by a builder whose registration has been cancelled or suspended after due inquiry, the Board must:

- (a) send to that person a copy of the notice of complaint sent to the builder; and
- (b) afford the person an opportunity of giving an explanation at the inquiry or in writing.

The current obligation of the Board to comply with these requirements before cancelling or suspending the registration of such a person will not be affected by this amendment.

Clauses 21(5)(a): Amends section 13(3) in the BRA to provide that before imposing a fine on a builder under the new section 13A [see clause 22] the Board must:

- (a) send to the builder a notice in writing of the complaint against the builder; and
- (b) hold a full inquiry into the matter.

The current obligation of the Board to comply with these requirements before cancelling or suspending the registration of a builder will not be affected by this amendment.

Clause 21(5)(b): Amends section 13(3)(a) in the BRA by deleting the mode of service of complaints and notices required to be given under section 13 of the BRA. The effect of the amendment is that the service provisions in the *Interpretation Act 1984* will govern the service of such documents.

Clause 21(6): Inserts a new section 13(4) in the BRA to provide that an inquiry into the conduct or activities of a registered builder under section 13 may be held by a panel comprising 3 or more members of the Board, one of which must be a member appointed to represent the interests of builders. Currently, section 6(3) requires 4 members to be present for the conduct of all the business of the Board, including an inquiry under section 13.

Clause 22: Inserts a new section 13A in the BRA to provide that after the holding of an inquiry under section 13, the Board may impose a fine (not exceeding the prescribed amount) instead of, or in addition to, cancelling or suspending the registration of a builder on the grounds provided in paragraphs (a) and (c) to (f) in section 13(1). In the case of a registered builder which is a partnership, company or body corporate, the Board may also impose the fine on the person was required to supervise and manage the building work to which the inquiry related.

Currently, the Board can only cancel or suspend the registration of the builder or the person required to supervise and manage the building work.

Clause 23: Amends section 14(1) in the BRA to provide a person with a right of appeal against a decision of the Board to declare the person ineligible under the new section 13(1ba) [see clause 21(3)] and impose a fine under the new section 13A [see clause 22].

Clause 24: Inserts a new section 16(2) in the BRA to provide that a person who fails to comply with any lawful order or requirement of the Board made under the new section 17 [see clause 25] commits an offence and is liable for a penalty of \$2 000.

Currently, section 16(a) only applies to a failure of a person to comply with any lawful direction of the Board. This amendment will make it clear that it is an offence to fail to comply with any lawful order or requirement of the Board under section 17, which deals with the Board's powers when conducting an investigation or inquiry under the BRA.

Clause 25:

Repeals the existing section 17 in the BRA and inserts a new section 17 to:

- extend the powers of the Board when conducting an investigation or inquiry, to require the production of documents, to inspect any document and to require any person attending before the Board to answer relevant questions;
- provide the Board with the discretionary power to order a builder found guilty after an inquiry to pay to the Board the costs of the investigation and the determination of the matter;
- provide the Board with the discretionary power to suspend the registration of a builder until any fines or costs imposed by the Board have been paid; and
- provide that the amount of any costs ordered to be paid under the section and fines imposed under section 13A may be recovered by the Board as a judgement debt in a court of competent jurisdiction.

Clause 26:

Inserts a new section 20B to provide that a person authorised by the Board can issue an infringement notice for a prescribed offence under the BRA. The alleged offender can choose to pay the modified penalty as prescribed (which shall not exceed 20% of the maximum fine under the section) or have the alleged offence heard and determined by a court.

Clause 27:

Inserts a new section 21(3) in the BRA to authorise the registrar of the Board to sign a certificate issued under section 21(2) in relation to any civil or criminal proceedings instituted by or against the Board.

This will provide for a certificate to be signed by either the chairperson or the registrar of the Board. Currently, only the chairperson can sign certificates.

Clause 28:

Amends section 21A to provide that where an offence is committed under the BRA, proceedings may be commenced within 3 years from the time that the offence was committed. Currently, proceedings must be commenced within 12 months from the time the offence was committed.

This amendment will make section 21A consistent with section 31 in the HBCA.

Clause 29:

Inserts a new section 21B to provide that where a body corporate has committed an offence under the BRA and it is proved that the offence occurred with the consent or connivance of, or was as a result of neglect of, an officer of the body corporate, then that officer also commits an offence.

This provision is consistent with section 30 in the HBCA.

Clause 30(1):

Amends section 22(3) in the BRA to provide that the fee the Board can impose for the late payment by a builder of the annual registration fee, shall be a maximum of \$25 or such amount as the Minister determines. Currently, the BRA provides that the fee must not exceed \$1.

Clauses 30(2)
& (3):

Amend sections 22(4) and 22(5) to provide that all fees, costs or monetary penalties paid or recovered under the BRA (other than the fee to be paid to local government authorities under the new section 4B), are to be paid to the Board and applied to the purposes specified in section 22(5).

Clause 31(1):

Amends section 32B(1) in the BRA to provide that the Board shall submit to the Minister before 30 September in each year an annual report of its proceedings for the preceding year ending on 30 June. Currently, the date for submitting the report to the Minister is 31 March and the reporting period is for the year ending 31 December.

Clause 31(2): Inserts a new section 23B(1a) to require the Board to report separately in its annual report on its administrative functions and its management of the disputes resolution procedures under the BRA.

Clauses 32 & 33: Amends section 33 by repealing subsections (2), (3), (4) and (5) and inserts a new section 33A in the BRA to provide for:

- such jurisdiction of the Disputes Tribunal as is prescribed to be exercised by an authorised officer of the Board with the written approval of the chairperson of the Disputes Tribunal (this will be in addition to the current powers of delegation to the registrar of the Disputes Tribunal by the chairperson or the Disputes Tribunal); and
- a request for a review by the Disputes Tribunal of an order or decision made under delegation by the registrar of the Disputes Tribunal or an authorised person, to be made within 10 working days of the decision or order.

Clause 34: Inserts new section 34 in the BRA to clarify the Board's obligation to provide the administrative support for the Disputes Tribunal and to meet the expenditure necessary for its functioning.

Clause 35: Inserts new sections 34A, 34B, 34C 34D and 34E in the BRA to provide that:

- a person who makes a complaint under the BRA or an application under the *Home Building Contracts Act 1991* to the Disputes Tribunal, shall pay the prescribed fee;
- the chairperson or a deputy chairperson of the Disputes Tribunal can appoint a mediator from a panel of suitably qualified persons to attempt to achieve a negotiated settlement of any complaint or application made;
- the chairperson or a deputy chairperson can at any time cancel a mediation for any reason, including a request to do so by any party to the dispute;
- the Disputes Tribunal shall make an order giving effect to the terms of any settlement achieved at mediation;

- if any of the matters in dispute are not settled by mediation, the Disputes Tribunal may hear and determine the matters;
- the Board shall establish a panel of suitably qualified persons from which mediators are to be selected;
- the Board shall pay such remuneration to mediators as it determines; and
- mediators will have the same immunity from civil suit as members of the Building Disputes Tribunal.

Clause 36:

Amends sections 35(1) and 35(2) in the BRA to provide the chairperson or a deputy chairperson of the Disputes Tribunal with the discretionary power to sit alone to deal with interlocutory or procedural matters and simple disputes. This will not prevent a matter from being dealt with by the full Disputes Tribunal.

Clause 37:

Amends section 38(3) and inserts new sections 38(4), 38(5) and 38(6) in the BRA to:

- prohibit the awarding of costs for legal representation in proceedings before the Disputes Tribunal, except where it is determined by the Disputes Tribunal that the complaint or the defence is vexatious, frivolous or without substance;
- provide the Disputes Tribunal with the discretionary power to order a person who is not registered under the BRA but who has carried out building work under this Act or the *Home Building Contracts Act 1991*, to pay to the Disputes Tribunal the costs associated with the consideration and determination of the matter by the Disputes Tribunal, if the person is found to be at fault.

Clause 38:

Amends section 41(2) in the BRA to provide for leave to appeal against a decision of the Disputes Tribunal to be sought from the District Court only, rather than the Disputes Tribunal or the District Court as this section currently provides for.

Clause 39: Amends section 44(1) in the BRA to provide that an order made by the Disputes Tribunal under the HBCA for the payment of a pecuniary sum, can be enforced through the Local Court as is currently the case with any such order made under the BRA.

Clause 40: Inserts a new section 45A in the BRA as a consequence of the repeal of section 25 in the *Home Building Contracts Act 1991* ('HBCA') [clause 55 in this Bill]. Subsections (1), (2) and (3) of section 25 in the HBCA restrict legal representation for any party in proceedings before the Disputes Tribunal under that BRA. These subsections are to be repealed to allow a party the unrestricted right to have legal representation in all matters brought before the Disputes Tribunal.

The remaining subsections (4) and (5) of section 25 in the HBCA prohibit any person who is not a legal practitioner, an officer or employee of a body corporate or an interpreter, from demanding or receiving any payment for representing, or assisting in the representation of, a party. This prohibition is to be retained and to ensure consistency in the rules for all matters brought before the Disputes Tribunal, it will apply to complaints made under both the BRA and the HBCA. This is covered by the general terms of the new section 45A in the BRA.

Clause 41: Amends section 46(2) in the BRA to make provision for the making of any regulations which may be necessary to enable the Disputes Tribunal to exercise the jurisdiction conferred on it by the new mediation provisions at sections 34B, 34C, 34C 34D and 34E in the BRA.

Clause 42: Amends various sections in the BRA by deleting 'Committee' in each place that it occurs and inserting 'Tribunal' instead. This a consequence of the change in the name of the Building Disputes Committee to the Building Disputes Tribunal [the principal amendment for this in the BRA is at clause 5 in this Bill].

Part 3 - Home Building Contracts Act 1991

Clause 43: Explains that the amendments in Part 3 are to the *Home Building Contracts Act 1991* ('HBCA').

Clause 44(a): Deletes the definition of 'Disputes Committee' in section 3(1) of the HBCA and inserts a new definition of 'Disputes Tribunal' to provide that the Building Disputes Committee established by section 26 of the BRA is to be known as the Building Disputes Tribunal.

Clause 44(b): Amends the definition of 'home building work contract' in section 3(1) of the HBCA to provide that for the purposes of determining the application of the HBCA, the value of the contract is to be the 'amount stated in the contract' rather than the 'amount payable under the contract' which is the term used in the current definition.

The provisions of the HBCA apply to home building work where the value of the contract is above \$6 000 and below \$200 000. As the amount payable under a contract is invariably not known until the building work has been completed, the current definition can cause uncertainty as to whether a contract is regulated by the HBCA.

Clause 45: Amends section 5(3) in the HBCA by replacing '14 days' with '10 working days'.

The terms 'working days' and 'days' are both used in the HBCA to indicate when specific requirements under the Act have to be complied with. To avoid confusion with the use of the different terms, all references to 'days' are to be replaced by reference to 'working days', except in relation to the minimum defects liability period in section 11(1) which will change from '120 days' to '4 months'.

Clause 46: Amends sections 8(2) and 8(3) in the HBCA by replacing '14 days' with '10 working days'. See the explanation for this amendment at clause 45.

Clause 47(1): Amends section 9(1) in the HBCA to provide that the owner and builder are required to acknowledge in writing the acceptance of any condition attached to the building licence by the local government authority or a direction given by the Water Corporation, only where this will result in a variation of the contract both in terms of the work to be carried out and the cost.

Currently, section 9(1) provides that the owner and the builder must accept in writing all such conditions and directions even though many of these are standard requirements which are already included in the contract and do not vary the work to be performed or the cost of that work.

Clause 47(2): Amends section 9(3) in the HBCA by replacing '30 days' with '20 working days'. See the explanation for this amendment at clause 45.

Clause 48: Inserts a new section 10(5) in the HBCA to provide that after the commencement of building work to be performed under a contract, it is an offence for a builder to demand or receive from the owner any payment unless it is either a genuine progress payment for work performed or a payment of a prescribed kind.

A penalty of \$10 000 will apply to a breach of this requirement.

This provision will complement section 10(1)(b) which makes it an offence for a builder to enter into a contract which enables the builder to demand or receive a payment other than a genuine progress payment.

Clause 49(1): Amends section 11(1) in the HBCA by replacing '120 days' with '4 months'. See the explanation for this amendment at clause 45.

Clause 49(2): Inserts a new section 11(1a) to make it clear that the stated defects period in section 11(1) is the minimum required and does not preclude a contract from providing for a greater period.

Clause 50(1): Amends section 15(1)(a) in the HBCA to provide that a builder must not engage in conduct that is unconscionable, harsh or oppressive during negotiations to vary a contract. Currently, this section only prohibits such conduct in the formation and execution of the contract.

Clause 50(2): Amends section 15(3)(c) in the HBCA by replacing '10 days' with '7 working days'. See the explanation for this amendment at clause 45.

Clause 51: Inserts a new section 15A in the HBCA to provide that both a builder and an owner must not engage in conduct that is misleading or deceptive in the formation and execution of a contract and in negotiations to vary a contract after execution.

Both parties will be able to seek redress through the Disputes Tribunal where there has been a breach of this provision. Currently, the Tribunal does not have jurisdiction to grant a remedy for misleading or deceptive conduct.

Clauses 52(1) & (2): Amends section 17(3) and insert a new section 17(3a) in the HBCA to provide that:

- the preliminary written notice required to be given by an applicant to the other party prior to making of an application to the Disputes Tribunal must be in the prescribed form; and
- if an application is subsequently made to the Disputes Tribunal, a copy of this notice must be given to the Disputes Tribunal at that time.

These amendments will make the requirements for making a complaint to the Disputes Tribunal consistent under both the HBCA and the *Builders' Registration Act 1939* ('BRA').

Clause 52(3): Amends section 17(3) by inserting paragraph (ba) in the HBCA to provide the Disputes Tribunal with the power to order a party to a home building contract to repay an amount of money where the amount was not payable under the contract.

Section 17(4)(d) currently gives the the Disputes Tribunal the power to order that a specified amount of money is not payable by a person but there is no provision to order the repayment of the amount if it has already been paid.

Clause 53: Amends section 18(1) and inserts new sections 18(2a) and 18(4) in the HBCA to provide that where a matter has been referred to the Disputes Tribunal under section 17, the Disputes Tribunal may:

- on its own motion or upon the application of any party to the dispute, order any party to pay an amount of money for placement into an interest-bearing account, if it considers it just and expedient to do so;
- review and vary or cancel this order at any time before the matter is determined; and
- strike out the claim or the defence of a person who fails to comply with the order.

Section 18(1) currently only provides for the party who made the complaint to apply for such an order and the Disputes Tribunal can only make the order against the other party.

Clause 54:

Amends section 20(b) in the HBCA to provide that if a contract is terminated in accordance with the provisions in the HBCA, the Disputes Tribunal may, if it considers it appropriate, order an owner to pay a portion of the builder's profit margin and overhead expenses in relation to the contract. This is in addition to the payment of the costs of materials supplied or any work performed by the builder at the date of termination, as currently provided for in section 20(b).

Clause 55:

Repeals section 25 in the HBCA to remove the restrictions on legal representation for the parties where a contractual dispute is brought to the Disputes Tribunal under the HBCA. This will make the HBCA consistent with the BRA, which does not impose restrictions on legal representation for workmanship complaints made to the Disputes Tribunal.

As provided by the new section 38(4) in the BRA, there will be a restriction on the awarding of costs for legal representation in proceedings before the Disputes Tribunal and this will apply to matters brought under both the BRA and the HBCA [see clause 37(2)]. The restriction currently imposed by subsection (4) in section 25 of the HBCA on which persons can demand or receive payment for representing a party before the Disputes Tribunal, will continue to apply [see clause 40].

- Clause 56: Inserts new sections 31A and 31B in the HBCA to:
- provide that all penalties or costs paid or recovered under the HBCA shall be paid to the Board; and
 - provide that a person authorised by the Board can issue an infringement notice for a prescribed offence under the HBCA. The alleged offender can choose to pay the modified penalty as prescribed (which shall not exceed 20% of the maximum penalty under the Act) or have the alleged offence heard and determined by a court.
- Clause 57: Amends various sections in the HBCA by deleting 'Committee' in each place that it occurs and inserting 'Tribunal' instead. This is a consequence of the change in the name of the Building Disputes Committee to the Building Disputes Tribunal [the principal amendment for this in the HBCA is at clause 44(a) in this Bill].
- Clause 58: Amends Schedule 1 of the HBCA by:
- removing the rights of an owner under clause 2, and both the owner and builder under clause 3, to terminate a contract by reason of their own failures to comply with their obligations with respect to local government and Water Corporation requirements contained in section 9; and
 - deleting 'Committee's' in clause 5(3) and inserting 'Tribunal's'.

Part 4 - Transitional and consequential provisions

- Clause 59: This clause is a consequential provision to provide that a reference in any written law to the Building Disputes Committee is to be read and construed as a reference to the Building Disputes Tribunal.
- Clause 60: This clause is a transitional provision to provide that:
- the Board shall make a report under the amended section 23B in the BRA for the period from 1 January preceding the coming into operation of section 29 of this Bill ('the commencement day') to the following 30 June as if the period were a full year; and

- the first annual report under section 23B of the BRA after the commencement day is to be made in respect of the period from the 1 July after the commencement day.

Clause 61:

This clause is a consequential amendment to Part 3 of Schedule V in the *Constitutions Act 1899* to delete 'The Building Disputes Committee' and insert instead 'The Building Disputes Tribunal.

Part 5 -Review

Clause 62:

This clause provides that the Minister shall carry out a review of the operation and effectiveness of the *Building Legislation Amendment Act 2000* as soon as is practicable after the expiration of 3 years from the commencement of section 1 of the Act.