EXPLANATORY MEMORANDUM

Building and Construction Industry (Security of Payment) Bill 2020

ABBREVIATIONS LIST

Board……..Building Services Board

BSCRA Act…….*Building Services (Complaint Resolution and Administration) Act 2011* (WA)

BSR Act……*Building Services (Registration) Act 2011* (WA)

CCA……*Construction Contracts Act 2004* (WA)

Corporations Act……....*Corporations Act 2001* (Cth)

HBC Act……*Home Building Contracts Act 1991* (WA)

The Bill……*Building and Construction Industry (Security of Payment) Bill 2020*

OVERVIEW OF THE BILL

The purpose of the Bill is to provide better payment protections to contractors working in Western Australia's (WA) building and construction industry to ensure they get paid on time, every time.

The Bill also implements many of the recommendations made by barrister and Adjunct Associate Professor of Law John Fiocco in his report to the Government titled – *Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry* (October 2018).

To achieve its purpose the Bill proposes reform across three key areas, including:

1. New security of payment laws that are more consistent with those in other Australian states and territories, including some of the best practice recommendations from the Commonwealth Governments' national review in 2017 – *Review of Security of Payment Laws: Building Trust and Harmony* (December 2017).
2. Protecting retention money in the event of insolvency through a deemed trust scheme that will apply across the contracting chain.
3. Expanding the powers of the Board to take action against building service providers who fail to pay court and adjudication debts, and to exclude those with a history of financial failure from holding a registration.

An explanation of the policy intent with respect to each of these reforms is as follows.

1. New security of payment laws to speed up cash flow to contractors

Parts 2, 3, 5 and 6 of the Bill introduce new security of payment laws in WA to ensure those who carry out construction work can get paid, and any disputes can be resolved quickly and inexpensively so works can continue.

These laws will apply only to construction contracts entered into in WA after the date of commencement. WA's existing security of payment laws, the CCA, will continue to apply to any contracts entered into prior to the date of commencement.

Part 2 of the Bill will introduce measures to improve fairness in contracting, including voiding unfair time-bars and a broader prohibition on 'paid-when-paid' provisions, as well as requiring certain contracts to be in writing and meet minimum standards.

Consistent with security of payment laws in other Australian states and territories, a party who carries out or undertakes to carry out construction work or to supply related goods and services will have a statutory right to receive payment and to make a claim for payment every month, or more frequently if provided for in the contract.

A payment claim can include a progress claim, final payment claim, single/one-off claim or milestone payment. Importantly, a payment claim can also seek the return of any performance security withheld under the construction contract (e.g. bank guarantee or retention money) that is due to be released, or the substitution of retention money for other performance security.

Construction work and related goods and services are defined as broadly as possible to ensure the laws will apply to the vast majority of construction contracts entered into in the industry, irrespective of whether the contract is in writing, oral or a combination of both, or is only for some construction work.

However, some minor exclusions apply to:

- contracts between residential homeowners and contractors for home building works (as defined in the HBC Act) valued less than $500,000, as an alternative dispute resolution process is already available through the Building Commissioner and/or the State Administrative Tribunal;
- contracts between employers and employees for construction work or related goods and services;
- contracts that form part of, or are a condition of, loan agreements with banks and other financial institutions, or provisions of contracts that agree to lend money, guarantee payment or provide indemnity which themselves give separate rights to claim payment;
- contracts for certain mining and oil/gas related works or goods and services; and
- contracts involving works or goods and services where a party is required to hold a registration under the BSR Act, but fails to do so.

Where a party to a construction contract who is entitled to payment (the claimant), makes a payment claim, the party who receives the claim (the respondent) will be required to either pay the claim in full within the required time, or provide a payment schedule within 15 business days setting out any reasons for withholding payment. This ensures the claimant is fully aware of any issues as to why payment may be being withheld.

Payment claims from contractors to residential homeowners where the value of the contracted works is greater than $500,000 will need to be accompanied by an additional notice advising the homeowner of the requirements to respond with a payment schedule or make payment. All payment claims will need to be endorsed, but can be itemised invoices.

Progress payment claims can be made by the claimant up to 6 months after the day the works were last carried out or goods and services supplied.

The time for payment of the claim will depend upon the claimants' position in the contracting chain. Claims from head contractors to principals will now need to be paid within 20 business days of the claim (or any lesser period specified in the contract); claims by subcontractors to head contractors (or subcontractors to sub-subcontractors) paid within 25 business days (or any lesser period specified in the contract); and claims involving certain types of home building works within the period specified in the contract, or 10 business days, if there is no period in the contract.

These payment timeframes are some of the shortest in Australia, and are intended to ensure payment flows through the contracting chain with minimum disruption.

If a respondent fails to provide a payment schedule within 15 business days and make payment, the claimant will be entitled to elect to refer the matter for rapid adjudication, or recover the amount claimed as a debt in an appropriate court.

The rapid adjudication process is a 'pay now-argue later system', where a registered adjudicator agreed by the parties, or otherwise appointed by an authorised nominating authority, can determine the payment claim within a truncated timeframe and issue a binding decision, ensuring money continues to flow and works can continue. However, the parties still retain their full rights to litigate or refer the matter to some other form of final dispute resolution if unsatisfied with the decision.

The rapid adjudication process will now be more consistent with those in other Australian states and territories, and will be familiar to parties who operate across Australia.

Claimants will need to make an application for adjudication within 20 business days of receiving the payment schedule. If no payment is received by the due date, claimants will need to provide the respondent with a further opportunity to provide a payment schedule within 5 business days, before the application for adjudication can be made.

Respondents who fail to give a payment schedule will not be entitled to provide an adjudication response, but respondents that do provide a payment schedule will be limited to only the reasons for withholding payment in the adjudication response, that were included in the payment schedule. This will ensure claimants are fully aware of the reasons for withholding payment before seeking rapid adjudication.

Once the adjudication application is made, the registered adjudicator (appointed by the parties, or by an authorised nominating authority) can make a decision within as little as 10 business days if no adjudication response is provided or permitted, or within 10 business days if a valid adjudication response is provided.

The adjudication procedures in Part 3 of the Bill are similar to those in the CCA, but with a greater focus on ensuring payments owed are made.

Once the adjudication determination is made, any payment determined by the registered adjudicator to be owed, including the return of performance security, is binding on the parties and can be enforced through the appropriate court. Claimants and respondents will be liable in equal shares for the registered adjudicator's fees, unless determined otherwise. Neither party is entitled to any legal costs from the other.

Adjudication determinations are not amenable to appeal, and can be enforced as an order of an appropriate court. However, Part 3 of the Bill will introduce a new adjudication review mechanism for certain types of decisions. Reviews will be conducted by a senior adjudicator on the application of one of the parties within 5 business days of the original adjudication determination.

The new review mechanism is based on the recommendations from the Commonwealth Government's national review of security of payment laws, and partially replicates the existing limited right of review to the State Administrative Tribunal for adjudication decisions made under the CCA. The review mechanism is intended to be of a very limited scope, but provides an aggrieved party with an alternative remedy to be exhausted away from any curial proceedings.

Any amount owed under the original adjudication determination will need to be paid into a relevant trust account pending the outcome of the review, to ensure the mechanism is not used to simply delay making payments.

2. Retention trust scheme to protect retention monies in insolvency

Part 4 of the Bill introduces a new deemed retention trust scheme in WA. This scheme will reduce the risks to builders, subcontractors and suppliers where their immediate contractual counterpart on a project becomes insolvent by ring-fencing retention money to ensure it is not available for distribution to general creditors. This will be achieved through deeming, by force of law, retention money to be held on trust from the moment it is held or withheld as performance security under a construction contract.

The scheme will apply across the supply chain in WA whenever retention money or cash security is held or withheld under a construction contract, despite any term in a contract to the contrary. Some minor exclusions will apply to contracts directly with government principals, homeowners, and where the value of the works is below a prescribed threshold. The threshold will be set by regulations to be adjusted over time where necessary.

Where a party to the construction contract is withholding retention money or cash security (the trustee), they will be obliged to hold those funds in a dedicated trust account with a recognised financial institution (e.g. bank) for the benefit of the party who provided the money (the beneficiary). Trustees will have the option of opening one trust account, or multiple trust accounts for each beneficiary or project.

The trustee will only be entitled to withdraw the money from the trust account to the extent they have a contractual entitlement to do so (e.g. to fix defective works). The money cannot be withdrawn to cover the other debts of the trustee (e.g. business overheads, wages etc.) or invested.

Unless agreed otherwise, the trustee will be entitled to any interest earned on the money held in the trust account to cover any additional account-keeping or administrative costs.

Trustees will be required to maintain account records, and make them available for inspection on reasonable notice by the beneficiary.

Where a trustee fails to fulfil their obligations, beneficiaries will have access to existing general law remedies, and in some cases a statutory right to suspend on-going construction work or the supply of related goods and services.

3. Strengthening WA's building services legislation

Part 7 of the Bill will enhance the powers of the Board to manage the commercial conduct and behaviour of registered building service providers under the BSR Act, to better protect the industry and consumers against incompetent and predatory operators.

Insolvency events and phoenixing

The Board will have the power to exclude an individual, non-corporate body or corporate body as from registration where an 'insolvency event' has occurred. This will enable the Board to target problematic 'phoenixing' behaviour brought to its attention. The power may be exercised by the Board at the point in time of an application for the grant or renewal of building contractor registration, or in relation to a building service contractor who is already registered, through the issuance of a 'show cause' notice.

An important feature of the provisions in the Bill is that a corporation or non-corporate body may be declared to be excluded in connection with an insolvency event that is tied to an officer of that body; allowing for the 'corporate veil' to be pierced. The term officer includes persons defined as such under the Corporations Act, as well as a person who controls or substantially influences the conduct of the corporation, construction company or non-corporate body.

The duration of an exclusion may either be temporary (3 years), or permanent in the case of repeated insolvency events. Where it exercises the power, the Board will be required to issue a show cause notice to provide the respondent an opportunity to demonstrate to the Board why they should not be excluded. Each case will be considered on its own merits, and in reaching its decision the Board may have regard to a number of considerations and the evidence provided in response to the notice.

Unpaid building service debts and other offence penalties

Failure by a building service provider to pay a 'building service debt', being an unsatisfied court judgement debt or adjudication determination, will now also be a disciplinary matter for which the Board can take action against the provider.

An applicant for the grant or renewal of registration will also need to demonstrate to the satisfaction of the Board that they do not, at the time of making the application, have a building service debt.

The maximum fine penalty for the offences of obstruction or failing to comply with directions of an authorised officer under the BSCRA Act has also been increased to $25,000 to reduce the incentive for deliberate obstruction of investigations into other offences under the Bill.

CLAUSE NOTES

A clause-by-clause commentary of the Bill is as follows:

Part 1 – Preliminary

Division 1 – Introductory

This Division deals with introductory matters, including the short title, commencement and objects of this Bill.

Clause 1. Short title

This clause provides that the name of this Bill when enacted is the *Building and Construction Industry (Security of Payment) Act 2020*.

Clause 2. Commencement

This clause sets out when different provisions of the Bill become operational.

When the Bill is passed and receives Royal Assent, Part 1 Division 1 – comprising of clauses 1 (short title), 2 (commencement) and 3 (object of Act) commence on the day of Assent.

Clause 98 (making and determining applications for authorisation before commencement of Division), will commence on the day after Assent to enable applications for authorisation as a nominating authority to be made and determined before the substantive provisions of the Bill come into operation.

All other clauses will commence operation on a day fixed by proclamation, and different days may be fixed for different provisions. A staged proclamation is necessary to:

- allow for the drafting and approval of supporting regulations;
- put administrative arrangements in place before some provisions can commence; and
- provide information and education to the industry to ensure businesses are afforded an adequate opportunity to adjust to the reforms.

Clause 3. Object of Act

The main purpose of the Bill is to provide an effective and fair process for securing payments to persons who undertake to carry out construction work, or to supply related goods and services, in the building and construction industry. This is to be achieved through a number of key components to the Bill which will ensure payments owed are made quickly so work and supply can continue, and performance security is protected.

Division 2 – Interpretation

This Division defines certain words and expressions that are used in the Bill.

These include the core concepts of construction contract (which is defined in clause 5), construction work (which is defined in clause 6), related goods and services (which is defined in clause 7), and principal, head contractor and subcontractor (which are defined in clause 4).

Clause 4. Term used: general

This clause defines a number of general words and expressions for the purposes of the Bill. Importantly:

"principal" is defined to capture the owner of the construction project for whom construction work is to be carried out, or related goods and services supplied under the main contract.

"head contractor" is the person whom the principal contracts for the construction work to be carried out (or related goods and services supplied) under the main contract, but who themselves then contracts for some or all of that work to be carried out by another person (a subcontractor) under a separate contract. There can only be one head contractor for the project.

"subcontractor" is defined to mean any person other than a head contractor who undertakes to carry out construction work, or to supply related goods and services, under a construction contract.

Where there is no head contractor for the work or supply, the principal is the person who contracts with the subcontractor.

Where there is a head contractor and subcontractor for the work or supply, and the work or supply is further contracted to another person, that person is also a subcontractor.

Clause 5. Term used: construction contract

Clause 5 provides that a construction contract is a contract, agreement or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. Contract is to have its common law meaning.

The term 'other arrangement' is intended to encompass transactions or relationships which are not legally enforceable as contracts. This includes something in the nature of an understanding between two or more persons.

Clause 6. Term used: construction work

Clause 6(1) defines what is included in the definition of "construction work". The substance of this definition is the same as how 'construction work' is defined under the CCA. The definition is also generally consistent with that used in laws elsewhere.

Clause 6(2) defines "civil works" for the purposes of the definition of 'construction work'. The substance of this definition is the same as how 'civil works' are defined under the CCA.

Clause 6(3) details what is excluded from the meaning of construction work and therefore not covered by the Act. The excluded types of works are very limited, and reflect exclusions applied elsewhere in Australia. The clause also clarifies that the construction or fitting out of watercraft is not construction work to which the Act applies. Watercraft is to have its ordinary meaning as a thing capable of floating and being navigated on water (e.g. a boat or ship).

Clause 6 also allows for regulations to prescribe other work that is or is not construction work to provide flexibility to deal with new or unforeseen types of activity that could be characterised as construction work. Similar provision is made in security of payment laws elsewhere.

Clause 7. Term used: related goods and services

Clause 7 outlines where goods are related to construction work and therefore covered by the Bill.

The clause also outlines where on-site services and professional services are related to construction work and therefore covered by the Bill. It is intended that 'professional services' will include professional services such as quantity surveying, project superintendence, and project management.

Clause 7 also allows for goods and services to be prescribed as 'related goods and services' to provide some flexibility to deal with new or unforeseen types of activity. Similar provision is made in security of payment laws elsewhere.

Clause 8. Term used: value of construction contract

Clause 8 outlines how the value of a construction contract at any relevant time is to be valued.

The application of clause 13 ("Construction contracts that are to be in writing and contain mandatory information") and Part 4 ("Retention money trusts") are tied to the value of the construction contract.

Division 3 – Application of Act

This Division deals with the types of contracts to which the Bill applies.

Clause 9. Construction contracts to which Act applies

Clause 9(1) provides that the Bill will apply to a construction contract which is entered into after the Bill is proclaimed to commence operation. It does not have retrospective effect.

The CCA will continue to apply to construction contracts entered into prior to commencement.

Clause 9(2) makes the Bill apply to construction work in WA, regardless of where the contract is made, or whether it is in writing or not, or expressed to be governed by the law of another jurisdiction.

Clause 10. Construction contracts to which Act does not apply

Clause 10(1) provides that the Bill does not apply to certain types of construction contracts for home building work (as defined in the HBC Act) directly for a residential homeowner valued below $500,000. However, the Bill will still apply in respect of home building works for property developers, on multiple dwellings and as between a builder (as a head contractor) and their subcontractors.

Clause 10(2) makes the Bill not apply to construction contracts that are for employment only.

Clause 10(3) makes the Bill not apply to construction contracts where a borrower undertakes to carry out construction work as a condition of a loan agreement with their financier, such as in the case of a construction loan. A borrower cannot then pursue the financier for payment under Part 2 of the Bill.

Clause 10(4) ensures that the rights and liabilities created by the Bill, and the enforcement of mechanisms that it provides, are confined to and operate only between the actual parties to the construction contract – that is, those who do the work, and those who receive the benefit of it. To this end, clause 10(4) restricts the operation of the Bill so that it does not affect construction contracts insofar as they may form part of a loan agreement, guarantee or insurance agreement involving a recognised financial institution; meaning a contractor does not have a concurrent right to make a claim for payment against a proprietor, and the proprietor's financier. The Bill will also not apply insofar as a loan agreement, guarantee or insurance agreement involving a recognised financial institution or other party forms part of the construction contract.

Clause 10(5) makes the Bill not apply to the extent that the payment under the construction contract is not made, or cannot be calculated, in monetary terms. For example, the Bill will not apply to a construction contract to the extent that in return for carrying out construction work, the contractor is to receive payment by way of a right to lease or operate a building or structure.

Clause 10(6) specifies that the Bill does not apply to contracts for construction works, or related goods and services, carried out beyond the territorial limits of the State. The Bill will however apply to adjacent waters outside the territorial limits, but only if the contract is governed by the law of the State.

Clause 11. Act binds the Crown

Clause 11 makes the Bill apply to the Crown in right of Western Australia.

Part 2 – Construction contracts and right to progress payments

Division 1 – Form and content of construction contracts

This Division deals with certain matters concerning the form and content of construction contracts.

Clause 12. Model forms of construction contracts

Clause 12 provides that the Building Commissioner may prepare and publish suggested forms for construction contracts to assist parties in the industry.

Clause 13. Construction contracts that are to be in writing and contain mandatory information

Clause 13 requires certain contracts involving registered building service contractors to be put in writing and meet minimum standards where the value of the contract is above the prescribed amount. It is necessary to prescribe the value so the Bill can respond to changes in prices for work and goods expected to occur over time.

A fine penalty will apply to the registered building service contractor, unless the contracted works are needed urgently. However, a contract will not be voided, voidable or otherwise invalid because of a failure to comply with the requirements.

Clause 14. Prohibited terms: "pay when paid" provisions

Clause 14 provides that a "pay when paid" provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract.

A "pay when paid" provision is broadly defined and includes a provision that makes the liability for payment, or date for payment, contingent or dependent on the operation of another contract. For example, a provision in a construction contract that links the date for release of any performance security (including retention money and bank guarantees) under one construction contract to an event in another contract, will be a 'pay when paid' provision.

The prohibition in clause 14 replicates similar provisions made elsewhere in Australia.

Clause 15. Other prohibited terms prescribed by regulations

Clause 15 provides that regulations may prescribe other contractual provisions which are prohibited for the purposes of the Bill with the consequence that they have no effect. This allows the regulations to respond to problematic provisions and contracting practices as they arise, or contracting parties seek to circumvent the intent of the Bill. The clause substantially reflects section 11 of the CCA.

Clause 16. Notice-based time bar has no effect if declared unfair in particular case

Clause 16 provides that a notice-based time bar provision in a construction contract has no effect if its exercise is declared to be unfair in a particular case. A notice-based time bar provision may be declared as unfair where compliance with the provision is not reasonably possible or would be unreasonably onerous.

The purpose of clause 16 is to ensure a better balance is struck between upholding the contractual rights and interests of the relevant parties to the contract, but at the same time not permitting one party to use its position to deny an entitlement under the contract on the basis of an unreasonably short, or otherwise unnecessarily onerous (in form or effect) notice requirement.

A range of decision-makers may determine a notice-based time bar provision to be unfair in proceedings related to the construction contract.

Clauses 16(6) and (7) stipulates the matters that must, or must not, be considered by the relevant decision-maker in determining if the notice-based time bar is unfair or not. The purpose of these matters is to guide a decision-makers' reasoning on whether the notice-based time bar provision in the contract is unfair in the particular circumstances.

A notice-based bar provision may be declared unfair in respect to a particular entitlement (or exercise), but this does not affect the operation of the provision in respect to other another entitlement claimed or circumstance that arises under the contract.

Division 2 – Right to progress payments

Clause 17. Right to progress payments

Clause 17(1) provides that a person who has undertaken to carry out construction work, or to supply related goods and services, is entitled to a progress payment.

Clause 17(2) provides that a progress payment to which a person is entitled under clause 17(1) includes a final payment, a single or one-off payment, or a milestone payment based on an event or date, under a construction contract.

Clause 17(3) clarifies that a progress payment that a person is entitled to under clause 17(1) will not generally extend to a claim that is purely for general damages for breach of contract (e.g. damages for repudiation). This does not apply however if a person is entitled to make a claim under clause 63(3) of the Bill.

Clause 17(4) clarifies that the entitlement to a progress payment established by clause 17(1) is a separate and additional entitlement to any entitlement to payment under the construction contract itself. The effect is that the statutory entitlement to a progress payment is not limited by any contractual entitlement in this regard.

Clause 17(5) ensures that the entitlement to receive a progress payment under clause 17(1) does not extend to where the person has carried out a prescribed building service when not registered under the BSR Act.

Clause 18. Amount of progress payment

Clause 18 provides for the amount of a progress payment to be ascertained in accordance with the terms of the construction contract, or if the contract contains no such terms, according to the value of construction work carried out, or related goods and services supplied. Subclause (a) does not however enliven contractual preconditions for calculating the work performed (e.g. a superintendent's certificate).

Clause 19. Valuation of construction work and related goods and services

Clause 19 provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract are to be valued.

Clause 20. Due date for payment

Clause 20(1) provides that a progress payment (other than for home building work) becomes due and payable, after a payment claim is made:

- 20 business days when the payment claim is from a head contractor to a principal; or
- 25 business days when the payment claim is from a subcontractor to a head contractor (and likewise in respect of all other construction contracts).

Clause 20(2) enables the construction contract to provide for an earlier time for payment.

Clause 20(3) provides that a progress payment for home building work (as defined in the HBC Act) becomes payable in accordance with the terms of the construction contract or, if the contract contains no such terms, at the end of 10 business days after the payment claim is made under Part 3 of the Bill.

Clause 21. Interest on payment after due date

Clause 21 entitles a claimant to interest on the unpaid amount of a progress payment.

The interest rate is the higher of the amount specified in the construction contract, or the rate prescribed under the *Civil Judgements Enforcement Act 2004* (WA).

Part 3 – Procedure for obtaining progress payments

Division 1 – Payment claims and schedules

Clause 22. Making payment claims

Clause 22 enables a person who is, or who claims to be, entitled to a progress payment under Part 2 of the Bill to serve a payment claim on the person who is liable to make the payment.

Clause 23. When payment claims may be made

Clause 23(1) provides that a party may make a claim for a progress payment at the end of every named month in which construction work is carried out (or related goods and services supplied), or more frequently if provided for in the contract. Named month is defined in clause 4 of the Bill to mean each month of the calendar year.

A progress payment can be made by the claimant up to 6 months after the day the works were last carried out or goods and services supplied, or such longer period provided in the contract. Clause 23(5) of the Bill stipulates when payment claims for final payments may be made.

Clauses 23(8) and (9) provide that a claimant can only make one payment claim under the Bill in respect to each named month (unless the contract provides for more claims to be made), but importantly, this does not prevent the making of a single payment claim covering amounts in respect of more than one progress payment (e.g. amounts for a milestone payment), or an amount the subject of a previous payment claim.

Clause 24. Content of payment claims

Clause 24(1) provides that a payment claim is to be in written form, and outlines the information to be included in the payment claim.

All payment claims will need to be endorsed as being made under the Bill.

Payment claims do not need to be detailed documents, but should provide enough information to allow a respondent to identify the basis of the claim. The sufficiency of a payment claim is a matter for an adjudicator to decide if later raised in determining an adjudication application.

Clause 24(2) provides that payment claims from builders/contractors to homeowners, where the value of the home building works (as defined in the HBC Act) is greater than $500,000, must be accompanied by an additional notice advising the homeowner of the requirements to respond or make payment. This ensures homeowners are aware of their obligations in respect to giving payment schedules and the time for making any payments owed.

Clause 25(3) confirms that a payment claim can be in the form of an invoice. Clause 25(4) provides that a payment claim need not be signed by the claimant.

Clause 25. Response to payment claim: payment schedule

Clause 25 enables a person on whom a payment claim is made (the "respondent") to reply to the claim by providing a payment schedule to the claimant before the earlier of the time required in the construction contract or, 15 business days after the payment claim is made. The schedule must set out how much (if any) the respondent proposes to pay the claimant and when.

If the respondent does not propose to make any payment, or proposes to pay less than the amount claimed, the payment schedule must stipulate why, and indicate the reasons for withholding payment.

The respondent cannot raise additional reasons for withholding payment not indicated in the payment schedule, should the claim be referred for rapid adjudication. A payment schedule need not be a detailed document, but does need to be reasonably comprehensible to the party receiving it.

Clause 26. Claimed amount becomes payable if payment schedule not duly given

Clause 26 provides that the claimant is able to recover the whole amount of their claim, if the respondent fails to provide a payment schedule within the time allowed under clause 25.

Clause 27. Consequences of not paying claimed or scheduled amount

Clause 27 provides that if a respondent fails to provide a payment schedule within 15 business days of receiving the payment claim and make payment, the claimant will be entitled to elect to either refer the matter for adjudication, or recover the amount claimed as a debt in an appropriate court, but cannot do both.

Equally, if a respondent provides a payment schedule within the time required that indicates that an amount that will be paid, but the respondent fails to pay that same amount by the due date, the claimant can elect to recover that amount as a debt through the courts, or refer the matter for adjudication.

If a respondent indicates in the payment schedule that no amount will be paid, the claimant can only elect to refer the matter for rapid adjudication.

Clauses 27(3) and (4) set out the matters a court is to be satisfied exist before granting judgment for the debt.

Division 2 – Adjudication of payment disputes

Clause 28. When claimant may apply for adjudication of payment claim

Clause 28 enables a claimant to apply for adjudication of the amount of a progress payment. A claimant will need to make an application for adjudication within 20 business days of receiving a payment schedule.

If no payment schedule is given and no payment is made by the due date, a claimant will need to provide the respondent with a further opportunity to provide a payment schedule by giving a notice of intention to apply for adjudication. The notice is to be given anytime within 20 business days after the due date for payment. Once the notice is given by the claimant, the respondent is afforded another opportunity to provide a payment schedule within 5 business days. The claimant can make an application for adjudication within 20 business days after the end of that 5-day period.

Clause 28(3) clarifies that the giving of the notice of intention by the claimant to the respondent does not have the effect of extending the due date for payment.

Clause 29. To whom adjudication application made

Clause 29 provides that an application for adjudication is to be made directly to an adjudicator named in the construction contract, or if an adjudicator is not named in the construction contract, to an authorised nominating authority of the claimant's choice.

A claimant may make another application to an authorised nominating authority, if:

- the adjudicator named in the construction contract declines the appointment; or
- the authorised nominating authority to whom an initial application was made fails to make an appointment within the time required by clause 32(7) of the Bill; or
- the adjudicator fails to make a determination within the time required by clause 37 of the Bill.

Clause 30. Requirements relating to adjudication application

Clause 30 sets out the manner in which an application for adjudication is to be made.

Clause 31. Withdrawal of adjudication application

Clause 31 enables the claimant to withdraw an application for adjudication at any time prior to the making of a determination.

An application is taken to be withdrawn if the respondent pays the claimed amount in full before the determination is made.

Clause 32. Appointment of adjudicator

Clause 32 provides that the appointment of an adjudicator to whom an application for adjudication is made is effected by the adjudicator causing notice of their acceptance to be served on the claimant and the respondent.

If the application for adjudication is made to an authorised nominating authority, the adjudicator is taken to be appointed when written notice of the appointment is given by the authority to the claimant and the respondent.

In either case, if an adjudicator is not taken to be appointed within 5 business days of the application for adjudication having been made, the claimant may make another application within 5 business days.

Clause 33. Disqualification of adjudicator with conflict of interest in adjudication application

Clause 33 outlines how adjudicators and authorised nominating authorities are required to deal with conflicts of interest. An authorised nominating authority must not appoint an adjudicator if they are aware that the adjudicator has a conflict of interest. Likewise, an adjudicator must not accept an appointment if they are aware of a conflict of interest. The clause prescribes certain circumstance that constitute a conflict of interest for an adjudicator.

If an adjudicator becomes aware of a conflict of interest after being appointed to determine an application, the adjudicator must withdraw. The adjudicator is entitled to any fees and expenses up to the point of the withdrawal.

Clause 34. Adjudication response

Clause 34 sets out the manner in which, and the time within which, an adjudication response may be given by a respondent. The adjudication response must be given to the adjudicator within 10 business days of receiving the adjudication application.

A respondent who fails to give a payment schedule in accordance with clauses 25(1) and 28(2) is not entitled to provide an adjudication response, but a respondent that does provide a payment schedule is limited to only the reasons for withholding payment in the adjudication response that were included in the payment schedule. This ensures a claimant is aware of the respondent's reasons for withholding payment, before applying for adjudication.

Clause 35. Adjudication procedures

Clause 35 deals with the procedures for the conduct of the adjudication. The overarching purpose is to ensure applications for adjudication are determined with speed and efficiency so payments continue to flow down the contracting chain with minimum disruption and complex disputes are sidelined.

Clause 36. Jurisdiction to make determination, frivolous or vexatious applications and complex applications

Clause 36 sets out the requirements for a determination where the adjudicator considers they do not have jurisdiction to determine the application for adjudication.

Clause 36(3) provides that the adjudicator may also determine that the application for adjudication is frivolous or vexatious, or, in their opinion, too complex to make a fair determination within the time available under clause 37 of the Bill (including any extension agreed by the parties).

If an adjudicator makes a decision that he/she does not have jurisdiction, or the application is frivolous or vexatious, or too complex, reasons must be included in the adjudication determination. The adjudication determination may still deal with the applicable fees and expenses payable.

Clause 37. Time allowed for adjudicator to determine adjudication application

Clause 37 provides that once the application for adjudication is made, the adjudicator (appointed by the parties, or by an authorised nominating authority) must determine the application within 10 business days (if no adjudication response is provided or permitted), or within 10 business days if a valid adjudication response is provided. However, an adjudicator may determine an adjudication application at any time after it is made if they decide they do not have jurisdiction, or the application is frivolous and vexatious.

The parties may agree to extend the time for determining the application by up to an additional 20 business days. Either party must not unreasonably withhold their agreement, and could be liable for a greater proportion of the adjudication fees and expenses if they do.

Clause 37(5) clarifies that an adjudication determination made outside of the time prescribed in clause 37(2), or any extension agreed under clause 37(4), is valid. But, the adjudicator is not entitled to their fees and expenses in these circumstances.

Clause 38. Adjudicator's determination

Clause 38 provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid.

The adjudication determination must, in accordance with clause 38(4), be in writing, include reasons, and be given to the claimant, respondent, and the Building Commissioner. The constrained timeframes (and other requirements) mean the adjudicator's reasons are not expected to treat minutely and in detail each and every consideration, but should provide sufficient explanation to allow the parties to understand the reasoning and decision making.

Clauses 38(2) and (3) prescribe the matters that the adjudicator must only consider in determining the application. This is intended to confine the scope of the adjudicator's task.

Clause 38(5) stipulates how an adjudicator is to deal with construction work and related goods and services that *has* been valued by another adjudicator in an earlier adjudication determination. It applies in the situation where an adjudicator has previously decided the value of any construction work under a construction contract or the value of any related goods and services supplied under a construction contract, and is intended to prevent 'adjudicator shopping'. The clause provides that the adjudicator, or another adjudicator, must in any later application that involves the same work or the same goods and services, give the work or the goods and services the same value as that previously decided. The exception is where the parties satisfy the adjudicator concerned that the value of the work or of the goods and services has changed since the previous decision.

Clause 38(6) provides that the adjudicator may amend an adjudication determination for accidental slips, omissions or mistakes.

Division 3 – Review of adjudications

Clause 39. When claimant or respondent may apply for review of adjudication

Clause 39 introduces an adjudication review mechanism that replaces the existing limited right of review to the State Administrative Tribunal for adjudication determinations made under the CCA.

Reviews will be conducted by a senior adjudicator on the application of the claimant or respondent within 5 business days of receiving the original adjudication determination, and provides an alternative remedy for an aggrieved party outside of curial proceedings.

Adjudication review is limited; confined to circumstances where minimum prescribed values are met; and not intended to be in the nature of a hearing de novo.

A claimant may only apply for adjudication review where the adjudicator determined they did not have jurisdiction, and the claimed amount is above the minimum prescribed amount, or the difference between the adjudicated amount and the claimed amount is greater than the minimum prescribed amount. The minimum amounts will be prescribed following further

industry consultation to ensure it is appropriately set, and can be further fine-tuned over time if necessary.

A respondent may only apply for adjudication review where the difference between the adjudicated amount and the scheduled amount is greater than the minimum prescribed amount.

A respondent cannot apply for adjudication review if they did not serve a payment schedule, and cannot apply for review of an adjudicator's decision on jurisdiction.

Clause 40. Adjudicated amount in dispute to be paid into trust account before respondent may make adjudication review application

Clause 40 provides that a respondent cannot make an adjudication review application unless they have paid any undisputed portion of the adjudicated amount to the claimant and paid the disputed portion into a trust account established by the respondent or an authorised nominating authority.

The portion paid into a trust account will continue to be held on trust pending the outcome of the adjudication review application. Clause 40(3) and (4) stipulates the requirements for the trust account and who is entitled to any interest earned on the money placed therein.

Clause 41. To whom adjudication review application is made

Clause 41 provides that the adjudication review application is to be made to the authorised nominating authority chosen by the claimant or the respondent making the review application.

Clause 42. Requirements relating to adjudication review application

Clause 42 sets out what the adjudication review application must contain. A copy of the application must be given to the other party within 1 business day after the application is made.

The adjudication review application cannot include any reasons that were not raised in the original adjudication (either in the application for adjudication, or in submissions requested by the adjudicator).

Clause 43. Withdrawal of adjudication review application

Clause 43 enables the claimant or respondent to withdraw the review application at any time prior to it being determined.

Clause 44. Appointment of review adjudicator

Clause 44 provides for acceptance of an adjudication review application to take effect when notice of the appointment of the review adjudicator by the authorised nominating authority is given to the claimant and respondent. A review adjudicator must be appointed within 5 business days after the application is made. The review adjudicator cannot be the same adjudicator who made the original adjudication determination.

The same conflict of interest requirements under clause 33, apply to review adjudicators and authorised nominating authorities.

Clause 45. Adjudication review response

Clause 45 enables a person against whom an adjudication review application is made to respond to the adjudication review application by providing an adjudication review response to the review adjudicator. The response must also be given to the other party within 1 business day after the response is given to the review adjudicator.

The adjudication review response cannot include any reasons that were not raised in the original adjudication (either in the adjudication response, or in submissions requested by the adjudicator).

Clause 46. Adjudication review procedures

Clause 46 sets out the rules the review adjudicator has to follow when making a review determination. Clauses 46(1) and (2) prescribe the matters that the review adjudicator must only consider in determining a review application.

Clause 47. Time allowed for review adjudicator to determine adjudication review application

Clause 47 sets out the time within which a review adjudicator is to determine the adjudication review application.

Clause 48. Review adjudicator's determination

Clause 48 sets out the manner in which a review adjudicator is to determine the adjudication review application.

Division 4 – Adjudication fees and expenses

Clause 49. Terms used

Clause 49 defines the terms "adjudicating" and "adjudication fees and expenses" for the purposes of Division 4 of the Bill.

Adjudication fees and expenses relate only to those charged by the adjudicator or review adjudicator, not other expenses or fees incurred by the claimant or respondent.

Clause 50. Adjudication fees and expenses

Clause 50 outlines the types of fees and expenses that an adjudicator or review adjudicator is entitled to be paid.

The claimant and respondent are jointly and severally liable for the adjudication fees and expenses, and liable to contribute in equal proportions, unless otherwise determined by the adjudicator or review adjudicator.

The clause prescribes the matters the adjudicator or review adjudicator may have regard to in determining that one party should pay a greater proportion of the adjudication fees and expenses. The parties are liable for their own costs in preparing for, or participating in, the adjudication process and cannot recover these costs from each other.

Where an adjudication application or review application is taken to be withdrawn under other clauses of the Bill, the adjudicator (or review adjudicator) is entitled to any adjudication fees and expenses up to the time of the withdrawal. This is for the discretion of the adjudicator (or review adjudicator).

Clause 51. Miscellaneous provisions relating to adjudication fees and expenses

Clause 51 empowers an adjudicator or review adjudicator to withhold their determination or review determination until such time as their fees are paid in full, and to collect and hold reasonable deposits for adjudication fees and expenses.

Division 5 – Payment and recovery of adjudicated and other amounts

Clause 52. Requirement to pay adjudicated amount or to repay excess amount

Clause 52(1) provides that if the adjudicator or review adjudicator determines an amount that the respondent must pay, the respondent must pay that amount to the claimant within the stipulated time.

Clause 52(3) provides that if the review adjudicator determines that the claimant must repay an excess amount to the respondent, the claimant must pay that amount within the stipulated time.

Clause 52(4) deals with the interest payable on the amounts not paid within the time stipulated in clauses 51(1) and (2).

Clause 52(5) provides a process for adjusting an adjudication determination or review determination where one party has paid a greater share of the adjudication fees and expenses.

Clause 53. Certification of determination if adjudicated amount not paid or excess amount not repaid

Clause 53 provides that if the respondent fails to pay the adjudicated amount in full, then the claimant may request a certified copy of the determination from the Building Commissioner in order to recover the amount and interest as a debt due in a court of competent jurisdiction.

If the claimant fails to pay an excess amount (determined by a review adjudicator), then the respondent may request a certified copy of the review determination from the Building Commissioner in order to recover the amount and interest as a debt due in a court of competent jurisdiction. The Building Commissioner must not however certify a determination if an adjudication review application has been made, but not yet determined.

The Building Commissioner may charge a reasonable fee for certifying determinations.

Clause 54. Certified copy of determination enforceable as monetary judgment

Clause 54 sets out the process for recovering an adjudicated amount (or excess amount) as a judgment debt in a court of competent jurisdiction.

If a person commences proceedings to have the judgment debt set aside they must pay the judgment debt into court and are not entitled in those proceedings to bring any cross-claim against the claimant, raise any defence in relation to any matters arising under the construction contract, or challenge the adjudication determination or review determination. The court has the discretion to order the judgment debt be paid to the party owed the money, pending the outcome of the proceedings. This ensures money continues to flow through the contracting chain.

Clause 55. Effect of this Part on civil proceedings

Clause 55 is intended to ensure Part 3 of the Bill is a ‘pay now, argue later’ scheme that does not limit the final entitlements that a person may have under a construction contract or any other remedy that a person may have for recovering that other entitlement.

Clause 55(1) provides that nothing in Part 3 of the Bill affects any rights that a party to a construction contract may have under the contract or may have under the Bill in respect of anything done or omitted to be done under the contract.

Clause 55(2) provides that nothing done under Part 3 of the Bill affects any civil proceedings arising under a construction contract, except as provided for by subclause (3).

Clause 55(3) provides that in any proceedings before a court or tribunal in relation to a matter arising under a construction contract, the court or tribunal must allow for any amount paid to a party to the contract under Part 3 of the Bill in any order, determination or award it makes in those proceedings and may make orders for the restitution of any amount so paid and other ancillary orders.

Clause 55(4) provides that anything said or done during an adjudication or review adjudication is not admissible in other proceedings, unless both parties consent to the admission of the evidence.

Clause 55(5) provides that clause 55 does not affect the operation of: Clause 111 (no contracting out); the proceedings referred to in clauses 27(3) (for default judgement) or 54(4) (for enforcement of an adjudicated amount in a court of competent jurisdiction); and an entitlement conferred by Division 7 (right to suspend work) or Division 8 (right to exercise a lien over unfixed plant and materials) or anything arising from the exercise of such an entitlement.

Division 6 – Claimant's rights with respect to performance security

Clause 56. Terms used

Clause 56 defines certain words and expressions that are used in Division 6 of the Bill. These include the core concepts of "compliant performance bond", "performance bond", and "performance security".

"***compliant performance bond***" is defined to mean a bond that meets the requirements stipulated in clause 60 of the Bill, that can be substituted for retention money.

"***performance bond***" is a legally binding instrument however so described issued by a recognised financial institution to pay a party to the construction contract an amount of money up to a specified limit as security for the performance of the obligations of another party under the contract.

"***performance security***" is a performance bond or retention money. Retention money is further defined in clause 69 of the Bill.

Clause 57. Right to receive notice before recourse to performance security

Clause 57 requires a party holding performance security to give the party to the contract a notice of their intention to have recourse to the performance security within 5 business days prior to having recourse to the performance security.

This clause overrides any contrary term in a construction contract. The clause is intended to work in conjunction with the requirements in Part 4 of the Bill as to retention money.

Clause 58. Right to release of performance security

Clause 58 provides that a payment claim may seek the release of performance security to which the progress payment relates. In turn, an adjudicator (or review adjudicator) may decide that performance security is due to be released under the contract in determining a payment claim.

Clause 59. Right to substitute performance security

Clause 59 creates a right to substitute a compliant performance bond for retention money. The intent of the clause is to provide a claimant with the ability to access retention money (as a liquid asset in cash) in exchange for a compliant performance bond.

The position of the respondent is not prejudiced by this right as they are still entitled to have recourse to the performance bond in the event of default in the performance of obligations under the construction contract, and there is no change to the respondent's underlying contractual entitlement to recourse (but for the requirements for notice in clause 57 of the Bill).

Clause 60. Requirements for compliant performance bond for substitution of performance security

Clause 60 sets out the criteria for when a performance bond will be a compliant performance bond for the purposes of exercising the right of substitution.

Clause 61. Application of Division where third parties involved in performance securities

Clause 61 provides a right of redress for third parties where a party to a construction contract has recourse to performance security in contravention of clause 57 and the security is secured over the property of that third party.

Clause 61 also makes clear that the right of substitution in clause 59 does not extend to performance security held by or provided to (as the case may be) a third party to the construction contract.

Division 7 – Claimant's right to suspend work or supply

Clause 62. Claimant's right to suspend work or supply for non-payment

Clause 62 provides that a claimant is entitled to suspend carrying out construction work or supplying related goods and services, if

- the respondent does not pay the claimed amount (i.e. does not give a payment schedule and does not pay the full amount claimed by the due date); or
- the respondent does not pay the scheduled amount (i.e. gives the claimant a payment schedule, but does not pay the full amount specified in the payment schedule by the due date); or
- does not pay the adjudicated amount in full by the required date; or
- fails to pay retention money into a retention money trust account as required by Part 4 of the Bill.

Clauses 62(2) to (6) set out the process to be followed when a claimant suspends carrying out the construction work or supplying related goods and services.

Clause 63. Provisions relating to suspension of work or supply

Clause 63 provides, among other things, that a claimant who suspends the carrying out of construction work or the supply of related goods and services under the Bill is immune from civil liability as a consequence of doing so.

If in exercising the right of suspension, the claimant suffers a loss because the respondent removes or takes any part of the works or supply away, the respondent is liable for any loss

suffered by the claimant. The claimant may make a payment claim under Part 3 of the Bill for the loss (despite the payment claim otherwise including a claim for general damages).

Division 8 – Claimant's right to lien

Clause 64. Lien over unfixed plant and materials in respect of unpaid progress payments

Clause 64 provides a claimant a right to exercise a lien over unfixed plant and material in respect of the unpaid amount of any progress payment that becomes due and payable.

Division 9 – Miscellaneous provisions relating to payment claims

Clause 65. Offence: threatening or intimidating claimants

Clause 65 makes it an offence for a person to threaten or intimidate a claimant in relation to the claimant's entitlement to, or claim for, a progress payment or to the claimant's exercise of any other rights conferred under Part 3 of the Bill.

It is intended that 'threaten' and 'intimidate' are to take their plain and ordinary meaning. In this regard, to threaten will include the creation of a reasonable apprehension of adverse consequences to a claimant and/or their business, and to intimidate will include a direct or indirect act of compulsion to dissuade a claimant from exercising their rights under the Bill.

The offence applies only in circumstances where the claimant is a person entitled to a progress payment under the Bill. The maximum fine penalty reflects the seriousness of conduct which seeks to prevent a person exercising a right they are entitled to under the Bill.

Clause 66. Jurisdictional error in determination of adjudicator or review adjudicator

Clause 66 provides a power for the Supreme Court in proceedings related to jurisdictional error in a determination to sever, or set aside, only that part of the determination it identifies as being affected by jurisdictional error.

Clause 67. No appeal or review of determination of adjudicator or review adjudicator except under this Part

Clause 67 has the effect that a decision or determination of an adjudicator or review adjudicator, may not be appealed or reviewed.

Clause 68. Application of Part to corporate claimant in liquidation

Clause 68 provides that Part 3 of the Bill does not apply to a claimant corporation in liquidation.

Part 4 – Retention money trusts

Clause 69. Terms used

Clause 69 defines certain words and expressions that are used in this Part of the Bill. This includes the core concepts of "retention money", "retention money trust commencement date" and "retention money trust end date".

"***retention*** **money**" is defined to mean money retained by a party to a construction contract (party A) out of money payable under the contract by party A to another party to the contract (party B), or money paid to a party to a construction contract (party A) by or on behalf of another party to the contract (party B), as security for the performance of obligations of party B under the contract in relation to the carrying out of construction work, or the supply of related

goods and services, by party B. It does not matter how this money is described in the construction contract.

The definition captures both money withheld from progress payments, and money provided up front at the start of the construction work (or supply of related goods and services) as performance security.

"***retention money trust commencement date***" stipulates when retention money is taken to be held on trust for the purposes of this Part of the Bill.

In the case of money retained from payments owed under the contract, the money is taken to be held on trust from the time it would otherwise have been first payable to party B, but for party A's contractual right to retain the money (i.e. the time when the progress payment was due to be paid, a stipulated component of which is to be retained under the contract). It does not matter whether party B has in fact made a payment claim, or whether the retention money has been paid into a retention money trust account.

In the case of money paid up front as security for the performance of party B's obligations under the construction contract, the money is taken to be held on trust from the time it is paid to party A. It does not matter whether the retention money has been paid into a retention money trust account.

"***retention money trust end date***" stipulates when retention money is taken to no longer be held on trust for the purposes of Part 4 of the Bill due to a defined event having occurred. These events are:

- the date on which the retention money is paid by party A to party B (i.e. the time when it is due to be released under the construction contract, and is actually paid by party A); or
- the date on which party B gives written notice to party A that they will no longer make a claim for the release of the retention money; or
- the date on which party A becomes entitled under the terms of the construction contract to have recourse to the retention money; or
- the date the retention money is no longer due to be paid to party B because of a determination under Part 3 of the Bill, or the decision of another person, body or tribunal; or
- the date 2 years after a notice is given to party B that the retention money is due to be released (i.e. party B is taken to have abandoned the retention money held on trust).

Clause 70. Construction contracts to which Part applies

Clause 70 outlines the construction contracts to which this Part of the Bill applies. This Part does not apply to construction contracts;

- directly with a government party (as defined in clause 69);
- where the value of the contract at the time it is first entered into, or at any later time, does not exceed the prescribed 'retention money threshold'; or
- for home building work (as defined in the HBC Act) valued above $500,000 (or any higher amount prescribed under clause 10(1)(c)), and the contract is directly with the homeowner; or
- the contract is for a type of work otherwise excluded by regulations.

Clauses 70(3) and (4) describe the application of this Part of the Bill where the value of the contract exceeds the prescribed retention money threshold at a later time.

The retention money threshold is to be prescribed by regulation so to only exclude small value contracts (likely to be $20,000 or less) where the benefit of the scheme is likely to prove negligible, and to allow for any fine tuning required at a later date. Further consultation will be conducted with industry on the threshold.

Clause 71. Retention money to be held on trust

Clause 71 provides that retention money under a construction contract to which this Part of the Bill applies is taken to be held on trust by the party to the contract who retains the retention money (the trustee) for the benefit of the party who has provided the retention money (the beneficiary). This applies even if the money is not placed in a retention money trust account by a party as required by clause 74 (i.e. it is a charge over money even if it is held elsewhere).

Retention money held on trust is not available for payment to third-party creditors of the trustee or beneficiary, or liable to be attached or taken in execution for satisfying a monetary judgment entered for a third-party creditor.

Clause 72. Beneficial interests of parties to contract in retention money trusts

Clause 72 ensures that the beneficial interests of parties to a construction contract in retention money trusts are always defined by their contractual entitlements.

Clause 72(2) prohibits cross-contractual set-off against retention money held on trust under this Part of the Bill.

Clause 72(3) provides that if retention money is assigned, the retention money continues to be held on trust under this Part of the Bill, and the assignment does not affect the beneficial interests of the parties.

Clause 73. Requirement to draw down debt facility or otherwise set aside retention money required to be held on trust

Clause 73 is intended to deal with a situation where party A to the construction contract does not have money of its own, such as when it is making progress payments to party B for the construction work or related goods and services by drawing down on a debt facility.

In this situation, clause 73 imposes a requirement such that if party A makes or proposes to make payments due under the construction contract out of a debt facility, then it must, to the extent necessary, draw down on the debt facility or hold an amount equal to the amount it is entitled to withhold as retention money under the construction contract. The money must then be paid into a retention trust account in accordance with the other requirements of this Part of the Bill.

Where party A fails to draw down on a debt facility and place the retention money into a trust account, party B may apply to a court of competent jurisdiction for an order compelling party A to draw down on the facility or access any other available source of money. Party B may also suspend construction work or the supply of related goods and services in accordance with clause 62 of the Bill.

Clause 74. Establishment of retention money trust accounts and payments into trust accounts

Clause 74 establishes certain requirements for a party to a construction contract who retains retention money to which this Part of the Bill applies to establish a dedicated trust account and pay the retention trust money into that account.

A retention money trust account may be established in respect of each beneficiary, or one trust account for all beneficiaries.

While retention money to which this Part of the Bill applies is held on trust, it is critical to ensure the money is held in a separate trust account to avoid the mixing of trust property and non-trust property, and that the money is easily traceable.

Clause 75. Requirements relating to establishment of retention money trust accounts

Clause 75 outlines the formal requirements in respect of a retention money trust account.

Clause 76. Withdrawals from retention money trust accounts

Clause 76 is intended to ensure that trust property is not misappropriated by setting out the circumstances for when and how funds may be withdrawn from the retention money trust account.

The building and construction industry has a culture of late or non-payment and it is important that parties withholding retention money to which this Part of the Bill applies meet their obligations. This clause ensures that the funds held on trust are not misused, and will help encourage proper business practices and bring about cultural change. As trust property, a beneficiary has access to general law remedies to restrain or deal with the misappropriation of retention money.

Clause 77. Decisions on payments into or out of retention money trust accounts by adjudicators, courts, arbitrators and experts

Clause 77 grants jurisdiction to adjudicators, courts, arbitrators and expert determiners to make decisions with respect to the payments into or out of retention money trust accounts.

Clause 78. Trust account interest and fees

Clause 78 sets out the rules in respect of trust account interest and fees.

Clause 79. Trust records

Clause 78 outlines the trustee's responsibilities with respect to the keeping of proper records in relation to trust property, together with the rights of beneficiaries to view and audit these records.

The trustee must keep written records of all transactions involving amounts held on trust that will sufficiently explain the transactions, provide a true position in relation to the outcome of the transactions, enable accurate accounts to be prepared from time to time and enable convenient and proper audit of transactions.

The trustee must also provide any person with a beneficial interest in money held in a retention trust account, upon notice and without charge, with access to records and other information to enable them to confirm the money is being held in accordance with the requirements of this Part of the Bill.

Clause 80. Power to employ agents

Clause 80 entitles a party to a construction contract who establishes and operates a retention money trust account to engage an agent to act on their behalf in the administration of the account, however they remain liable for the agent's acts and defaults.

Clause 81. Recognised financial institutions not subject to certain obligations and liabilities

Clause 81 is intended to ensure that a recognised financial institution has no rights or liabilities in respect of retention trust money held in the retention trust money account.

Clause 82. Application of *Personal Property Securities Act 2009* (Cth)

The purpose of clause 82 is to ensure that the protection offered to retention money by this Part of the Bill cannot be diminished or negated by the operation of the *Personal Property Securities Act 2009* (Cth).

Clause 82(1) provides that the interests of the parties to a construction contract in money held on trust have priority over any other security interests (within the meaning of the *Personal Property Securities Act 2009* (Cth)) in that money. An interest created by the Part of the Bill is therefore to have priority over any other security interest in the same money (e.g. a security interest held by the contracting parties' financier over all property).

Clause 82(2) makes a declaration for the purposes of section 73(2) of the *Personal Property Securities Act 2009* (Cth) that an interest created by the retention trust scheme under Part 4 of the Bill is a statutory interest and thus has priority over any other security interest in the same property. The effect of clause 82(2) is that registration of the interest on the Personal Property Security Register is not required.

Clause 83. Trusts under this Part prevail over construction or other contracts

Clause 83 ensures a provision of a construction contract cannot displace the operation of this Part of the Bill.

Clause 84. General jurisdiction of courts to supervise trusts preserved

Clause 84 preserves the general jurisdiction of the courts to supervise trusts, including with respect to the replacement of a trustee.

Clause 85. Application of *Trustees Act 1962*

Clause 85 provides that except as otherwise expressly stated in the Bill, the *Trustees Act 1962* (WA) and any other written law or equitable principles relating to trusts apply to the trusts created by this Part and to the trustees and beneficiaries of the trusts. This is to avoid conflict between the obligations of a trustee under the Bill with obligations imposed under the *Trustees Act 1962*.

Clause 86. Indemnity of trustee from trust under this Part

Clause 86 outlines the specific rules with respect to a trustee's right of indemnity in relation to trust property. The clause includes rules to deal with a corporation in liquidation, and the need to administer the affairs and distribution of the trust property.

Clause 87. Offence for failing to comply with certain requirements of this Part

Clause 87 establishes an offence for a deliberate failure to comply with certain requirements of this Part of the Bill. The penalty reflects the seriousness of the need to comply with the requirements.

Part 5 – Nominating authorities, adjudicators and review adjudicators

Division 1 – Authorisation of nominating authorities

Clause 88. Application for authorisation

Clause 88 empowers the Building Commissioner to authorise a person as a nominating authority for the purposes of the Bill.

It enables a person to apply to the Building Commissioner for authorisation, and that application must be in the approved form and be accompanied by the prescribed fee for the application. It must also include the information and documents necessary for the Building Commissioner to make a decision as to eligibility under clause 91 of the Bill.

The Building Commissioner may request further information to assess the person's eligibility, and failure to provide that information within the time specified may result in the application being rejected.

Clause 89. Maximum number of persons who may be authorised

Clause 89 allows regulations to prescribe the maximum number of persons who may be authorised as nominating authorities for the purposes of the Bill.

Clause 90. Authorisation of nominating authorities

Clause 90 provides that the Building Commissioner may authorise a person to be a nominating authority in the circumstances outlined therein. A register of authorised nominating authorities is to be kept and published on an appropriate website.

Clause 91. Eligibility to be authorised

Clause 91 sets out the eligibility requirements a person must satisfy the Building Commissioner of in order to become authorised as a nominating authority.

A person cannot be authorised as a nominating authority and registered as an adjudicator or review adjudicator, or be appointed by an authorised nominating authority as an adjudicator or review adjudicator if they are an officer, as defined in the Corporations Act, of the nominating authority. These provisions ensure a complete separation between the functions of a nominating authority and that of an adjudicator or review adjudicator.

Clause 92. Conditions of authorisation

Clause 92 empowers the Building Commissioner to impose or vary or revoke conditions on any authorisation of a person as a nominating authority.

Clause 93. Term of authorisation

Clause 93 provides that authorisation as a nominating authority is for a period of no greater than 5 years. A person may apply for authorisation as a nominating authority within 6 months of the expiry of an existing authorisation.

Clause 94. Revocation of authorisation

Clause 94 empowers the Building Commissioner to revoke the authorisation of a person as a nominating authority in the circumstances set out therein. A person may surrender their authorisation at any time after it is granted.

Clause 95. Review by State Administrative Tribunal of decisions of Building Commissioner

Clause 95 provides that a person aggrieved by any of the decisions of the Building Commissioner as outlined therein may apply to the State Administrative Tribunal for a review of the decision.

Clause 96. Information to be provided to Building Commissioner by authorised nominating authorities

Clause 96 requires authorised nominating authorities to provide certain information to the Building Commissioner.

This information will be used by the Building Commissioner in carrying out any investigation into the conduct of the authorised nominating authority, adjudicators, review adjudicators, and completing the report required under clause 115 of the Bill.

Clause 97. Code of practice for nominating authorities

Clause 97 allows regulations to prescribe a code of practice for authorised nominating authorities to ensure the manner in which they carry out their functions is consistent with the purpose of the Bill.

Clause 98. Making and determining applications for authorisation before commencement of Division

Clause 98 allows for the Building Commissioner to determine an application for authorisation of a person as a nominating authority before all of the provisions of Division 1 of Part 5 of the Bill come into operation.

This is a necessary transitional arrangement to ensure the authorisation of nominating authorities can take place before Part 3 of the Bill is proclaimed to commence operation.

Division 2 – Registration of adjudicators and review adjudicators

Clause 99. Registration of individual as adjudicator, review adjudicator or both

Clause 99 empowers the Building Commissioner to register individuals as an adjudicator or review adjudicator, or both.

Clause 100. Application for registration

Clause 100 sets out the process for applying to the Building Commissioner for registration as an adjudicator or review adjudicator. It enables a person to apply for registration as an adjudicator or review adjudicator (or both) and that the application must be in the approved form (if any), accompanied by the prescribed fee for the application. It must include information as to the person's eligibility for registration, including the relevant experience and qualifications of the applicant required under clause 102.

Clause 101. Registration as adjudicator or review adjudicator

Clause 101 sets out the requirements for registration as an adjudicator or review adjudicator.

Clause 102. Eligibility to be registered

Clause 102 sets out the eligibility requirements to become registered as an adjudicator or review adjudicator. It also sets out the matters that the Building Commissioner must consider when deciding if a person is suitable to be registered as an adjudicator or review adjudicator. These include whether the applicant has been convicted of a serious offence, or had a previous registration suspended or cancelled, or declared a bankrupt.

Clause 103. Conditions of registration

Clause 103 empowers the Building Commissioner to impose or vary or revoke conditions on any registration of a person as an adjudicator or review adjudicator.

These include completion of any Continuing Professional Development (or other training) requirements, compliance with a code of practice, and compliance with the requirements in Part 3 of the Bill as to fees and expenses.

Clause 104. Renewal of registration

Clause 104 sets out the process and requirements for applying for renewal of registration as an adjudicator or review adjudicator. In deciding an application for renewal, the Building Commissioner must consider the suitability criteria in clause 102.

The clause also provides that where an adjudicator or review adjudicator has made a renewal application, their registration will continue until the application is decided, regardless of whether it would have otherwise expired.

Clause 105. Term of registration

Clause 105 provides for the registration of adjudicators or review adjudicators for a period not exceeding 3 years.

Clause 106. Suspension or cancellation of registration

Clause 106 empowers the Building Commissioner to suspend or cancel the registration of a person as an adjudicator or review adjudicator in circumstances where they:

- have provided false or misleading information in the application for registration; or
- are no longer eligible to be registered under clause 102; or
- have contravened a condition of registration.

The Building Commissioner must give the adjudicator or review adjudicator an opportunity to respond within a stipulated period before suspending or cancelling the registration.

A person may surrender their registration at any time after it is granted.

Clause 107. Public register of adjudicators and review adjudicators

Clause 107 requires the Building Commissioner to maintain a public register of adjudicators and review adjudicators.

Clause 108. Review by State Administrative Tribunal of decisions of Building Commissioner

Clause 108 provides that a person aggrieved by any of the decisions of the Building Commissioner as outlined therein may apply to the State Administrative Tribunal for a review of the decision.

Clause 109. Code of practice for adjudicators and review adjudicators

Clause 109 allows regulations to prescribe a code of practice for adjudicators and review adjudicators.

Clause 110. Transitional registration on commencement of Division

Clause 110 makes temporary and provisional arrangements to accommodate the registration of adjudicators under the CCA. It does so by providing that a person who holds a registration as an adjudicator is entitled to be provisionally registered as an adjudicator under the proposed Act for a period of 12 months, provided certain conditions are satisfied.

A person will not be eligible for a provisional registration unless they have undertaken and completed an appropriate training course that the Building Commissioner is satisfied provides the person with sufficient knowledge and skill to carry out adjudications.

Part 6 – Miscellaneous

Clause 111. No contracting out

Clause 111 is intended to ensure that the Bill has effect despite any provision in any contract, agreement or other arrangement that in some manner impedes or attempts to impede the purpose of the Bill, or is an attempt to otherwise contract out of the responsibilities under the Bill.

It is intended that this is a matter to be decided by a court, adjudicator, review adjudicator or other person dealing with proceedings under the Bill or rights under the contract.

Clause 112. Immunity from civil liability

Clause 112 is intended to ensure that adjudicators, authorised nominating authorities, and the Building Commissioner are immune from civil liability in connection with the performance of functions under the Bill. The clause substantially replicates an existing provision in section 54 of the CCA.

Clause 113. Service of documents

Clause 113 provides for specific rules with respect to the service of any document that is authorised or is required to be given under the Bill.

Clause 114. Approved forms

Clause 114 provides the power for the Building Commissioner to approve certain forms that must be used, and to prepare and publish other suggested forms.

Clause 115. Annual report on operation of Act

Clause 115 requires the annual report of the department principally assisting with the administration of this Bill to include information on its operation.

Clause 116. Use or disclosure of confidential information

Clause 116 prescribes limitations on any disclosure of information by a relevant officer obtained for the purposes of the Bill

Clause 117. Criminal proceedings generally

Clause 117 empowers the Building Commissioner to commence prosecutions in respect of offences under the Bill.

Clause 118. Liability of directors and others for offences by bodies corporate

Clause 118 provides that if a body corporate is guilty of an offence under clause 65 or 87 of the Bill, then an officer of the body corporate is also guilty of the offence if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

The clause substantially replicates director liability provisions made in the *Biodiversity Conservation Act 2016* (WA) and other enactments.

Clause 119. Regulations

Clause 119 provides a head of power to permit the making of regulations in respect of any matter that is necessary or convenient for carrying out or giving effect to the Bill.

Clause 120. Review of Act

Clause 120 requires a review to be carried out as soon as practicable after the fifth anniversary of the commencement of all sections. The clause substantially reflects provisions made in other enactments.

Part 7 – Consequential amendments to other Acts

Division 1 – Building Services (Complaint Resolution and Administration) Act 2011 amended

Clause 121. Act amended

Clause 121 operates such that Division 2 of Part 7 of the Bill amends the BSCRA Act.

Clause 122. Section 3 amended

Clause 122 amends section 3 of the BSCRA Act such that the definition of "building service Act" is amended to include the Bill and the amended title of the CCA.

The Building Commissioner has various functions and powers with respect to the building services Acts, including investigation and enforcement powers.

Clause 123. Section 70 amended

Clause 123 amends section 70 of the BSCRA Act to increase the maximum fine penalty for obstructing or hindering an authorised person, or a person assisting an authorised person, exercising a power conferred by that Act from $10,000 to $25,000.

The increase in the maximum fine penalty reflects the seriousness of the offence where an authorised officer is obstructed or hindered in the investigation of another offence under the Bill.

Clause 124. Section 71 amended

Clause 124 amends section 71 of the BSCRA Act to increase the maximum fine penalty for not complying with a direction given by an authorised person under that Act from $10,000 to $25,000.

The increase in the maximum fine penalty reflects the seriousness of the offence where a person does not comply with the direction of an authorised officer investigating another offence under the Bill.

Division 2 – Building Services (Registration) Act 2011 amended

Clause 125. Act amended

Clause 125 operates such that Division 2 of Part 7 of the Bill amends the BSR Act.

Clause 126. Section 3 amended

Clause 126 amends section 3 of the BSR Act to substitute the definition of "insolvent" with the definition of that term in the proposed Part 5A that is to be inserted by clause 132 of the Bill.

Clause 127. Section 18 amended

Clause 127 amends section 18 of the BSR Act such that the Board must not register, or renew the registration of, an applicant as a building service contractor if the Board is satisfied that the applicant has not paid any building service debt of a kind referred to in the new section 53(4), inserted by clause 129, that the applicant has incurred.

Clause 128. Section 32A inserted

Clause 128 inserts a new section 32A in the BSR Act to the effect that a registered building service contractor that is a body must notify the Board in writing of any new director of the provider. This new section is intended to support the operation of the new Part 5A inserted by clause 132 of the Bill by alerting the Board of any change in directors that may warrant consideration of a show cause notice.

The maximum fine penalty for failing to notify the Board of a change in director is $5,000.

Clause 129. Section 53 amended

Clause 129 amends section 53 of the BSR Act such that:

- the commission of an offence under the Bill is a disciplinary matter; and/or
- a failure by a building service provider to pay a "building service debt" that it has incurred is a disciplinary matter.

The term "***building service debt***" is defined in the new section 53(4) of the BSR Act, inserted by clause 129(2), to include a judgement debt or an amount that an adjudicator or review adjudicator determines is payable by the provider and which has not been paid, or proceedings have not been commenced to review or set aside that debt, or, in the case of a judgment debt, the provider has not entered into any payment arrangement or has failed to comply with that arrangement.

Clause 130. Section 57 amended

Clause 130 amends section 57(1) of the BSR Act to remove the requirement for the building service provider to consent where the Board decides it is appropriate to deal directly with a disciplinary complaint of failing to pay a building service debt, rather than refer the complaint to the State Administrative Tribunal.

Clause 131. Section 58 amended

Clause 131 amends section 58 of the BSR Act to provide that in circumstances where the State Administrative Tribunal decides to cancel the registration of a building service contractor partly or wholly on the basis that the contractor no longer meets the financial requirements for

registration under section 18(1) of that Act, the State Administrative Tribunal may in its order certify such.

This amendment operates in conjunction with the definition of "insolvent" inserted by clause 132 of the Bill. The effect is that the Board's power to declare an individual, non-corporate body or corporation as an excluded contractor is enlivened in circumstances where the State Administrative Tribunal has previously made a certification under the new section 58(4) in the orders cancelling the registration of a building service contractor.

Clause 132. Part 5A inserted

Clause 132 inserts a new Part 5A into the BSR Act. The effect is to provide the Board with powers to declare an individual, non-corporate body or corporation to be an "excluded contractor" where an "insolvency event" has occurred. The provisions are intended to give the Board the ability to more adequately deal with instances of 'phoenixing'.

Part 5A of the BSR Act is to comprise of the following new sections:

Section 63A

This section establishes the framework for the operation of the provisions, including introducing the definitions of "construction company", "excluded contractor", "insolvent" and "insolvency event" and "officer".

"***construction company***" is defined to capture a non-corporate body or corporation who carries out construction work (as defined in clause 6 of the Bill) in WA or elsewhere in Australia, or who carried out construction work at any time in the preceding 2 years before becoming insolvent. The definition is intended to allow the Board to exercise its powers under Part 5A in circumstances where an officer of a building service contractor, was an officer of an insolvent company that carried out works for which a registration was not necessarily required. For example, a tiling, bricklaying or carpentry business.

"***excluded contractor***" is defined to be a contractor declared by the Board to be temporarily or permanently excluded under the new sections 63C, 63D and 63E.

"***insolvent***" and "***insolvency event***" are defined to include the events that trigger the Board's ability to decide to exercise its powers of exclusion under the new Part 5A.

These events are:

- an individual or officer of a non-corporate body was declared a bankrupt or a person whose affairs are under insolvency laws; or
- a corporation has entered into one or more forms of external administration or receivership as defined in the Corporations Act; or
- a building service contractors' registration was cancelled by the State Administration Tribunal partly or wholly on the basis that the contractor did not meet the financial requirements under section 18(1), and this was certified by the Tribunal under the new section 58(4).

The definitions of "***officer***" in relation to a non-corporate body, corporation or construction company includes an officer as defined by the Corporations Act, as well as an "***influential person***", being an individual who controls or substantially influences the conduct of the affairs of the corporation or construction company.

Whether a person is an influential person will depend upon the circumstances, but examples could include:

- a person who holds a controlling shareholding or stake in the company; or
- a person who instructs an officer of the company on the financial management, and the officer is accustomed to acting upon those instructions; or
- a person who regularly makes representations to others that they substantially influence the company's business and financial management.

The intent of this definition is to ensure a person cannot seek to circumvent the operation of the new Part 5A by installing a spouse or family member as a 'straw' or 'dummy' director of the company. However, a professional giving advice (e.g. a lawyer or accountant) or a regulator exercising a function under a written law is *not* an influential person.

Section 63B

This section provides that the Board must refuse to register or renew the registration of an "excluded contractor" as a building service contractor, and must cancel the registration of an excluded contractor as a building service contractor. The procedure for declaring a person to be an excluded contractor is prescribed by the new section 63F.

Section 63C

This section sets up the process for how a person, being an individual, corporation or non-corporate body, applying for the grant or renewal of registration as a building service contractor or who is registered as a building service contractor, *may* be declared by the Board as an excluded contractor. An excluded contractor means a "temporarily excluded contractor" or a "permanently excluded contractor".

The procedure for declaring a person to be an excluded contractor is prescribed by the new section 63F.

Section 63D

This section establishes how an individual or non-corporate body *may* be declared by the Board to be a temporarily excluded contractor or a permanently excluded contractor in terms of an insolvency event.

In this case, the insolvency event happens when they become a person who is a bankrupt or a person whose affairs are under insolvency laws. The trigger for an individual or an officer of a non-corporate body to be declared a temporarily excluded contractor is tied to whether they became an insolvent on at least one occasion, and the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency. In the case of a permanently excluded contractor, an individual or non-corporate body may be declared to be a permanently excluded contractor if they became an insolvent on 2 separate occasions, and the insolvency event that resulted in the second insolvency occurred within 5 years after the insolvency event that resulted in the first insolvency.

The procedure for declaring a person to be an excluded contractor is prescribed by the new section 63F.

Section 63E

This section establishes how a corporation *may* be declared by the Board to be a temporarily excluded contractor or a permanently excluded contractor in terms of an insolvency event. In this case, the insolvency event happens where the corporation has a liquidator, provisional liquidator, administrator (including an administrator of a deed of company arrangement) or receiver appointed or is otherwise wound up. The trigger for a corporation to be declared a

temporarily excluded contractor is tied to whether they became an insolvent on at least one occasion and the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency.

This section also establishes that a corporation may be declared to be a temporarily excluded contractor if the insolvency event is tied to an officer of the corporation, or if the officer was an officer of a construction company at the time that an insolvency event occurred in relation to that construction company (within 2 years immediately before the insolvency of that construction company) and 3 years has not elapsed since the insolvency event that resulted in the insolvency. In the case of a permanently excluded contractor, a corporation may be declared to be a permanently excluded contractor if 2 or more insolvency events are tied to an officer of the corporation that occurred within 5 years after the insolvency event that resulted in the first insolvency.

However, a permanent exclusion cannot be applied by the Board if the corporation satisfies the Board that the 2 insolvency events that occurred within 5 years arose out of the same set of circumstances. For example, the insolvency of one construction company led to the insolvency of part or all of a group of companies.

Section 63F

This section sets out the procedure for declaring a person to be an excluded contractor.

Section 63F(1) requires the Board to give the person a 'show cause notice' that identifies the insolvency event or events on which a declaration would be based. The Board must also give the person the opportunity to make a submission to the Board on the matter within 28 days or such longer period as is specified in the show cause notice.

The purpose of this provision is to allow persons who have undergone an insolvency event through no fault of their own to make a case to the Board as to why they should not be declared to be an excluded contractor. The Board must not declare a person to be an excluded contractor if the person satisfies the Board in their response to a 'show cause notice' that "reasonable steps" were taken to avoid the circumstances that resulted in the insolvency or insolvencies concerned, and "sufficient arrangements" are in place to ensure that the person's business will be managed in a competent and professional manner.

Section 63F(2) to (7) provide guidance to the Board as to what reasonable steps and sufficient arrangements may include.

The matters listed in subsections (4) and (7) are a non-exhaustive list intended to guide the Board's decision making on whether to issue a declaration.

If no response is received to a show cause notice within the time allowed, the Board may still declare a person to be an excluded contractor.

Section 63G

This section provides that the declaration of an excluded contractor does not take effect until the expiration of 28 days after written notice of the declaration is given to the person concerned.

Clause 133. Section 64 amended

Clause 129 amends section 64(1) of the BSR Act such that a decision of the Board to declare that a person is excluded from being registered as a building service contractor because of an insolvency event under section 63C(2), is reviewable by the State Administrative Tribunal.

Division 3 – Construction Contracts Act 2004 amended

Clause 134. Act amended

Clause 134 operates such that Division 3 of Part 7 of the Bill makes consequential amendments to the CCA.

Clause 135. Section 1 amended

Clause 135 amends the name of the CCA to the *Construction Contracts (Former Provisions) Act 2004*.

Clause 136. Section 7 amended

Clause 136 operates such that the *Construction Contracts (Former Provisions) Act 2004* applies to a construction contract entered into after the CCA commenced operation, but before Part 3 of the Bill came into operation.

Clause 137. Section 48 amended

Clause 137 provides that the Building Commissioner:

- is not to register an individual as an adjudicator under the *Construction Contracts (Former Provisions) Act 2004* after Part 5 Division 2 of the Bill comes into operation; and
- must cancel the registration of an individual under the *Construction Contracts (Former Provisions) Act 2004*, if the individual's registration as an adjudicator (or review adjudicator) is subsequently cancelled under Part 5 Division 2 of the Bill.

The effect is that once Part 5 Division 2 of the Bill commences operation, the Building Commissioner cannot register any more individuals as adjudicators under the CCA, and must cancel the registration of an adjudicator under the CCA, if their registration is cancelled under clause 106 of the Bill.

Clause 138. Section 52 deleted

Clause 138 deletes section 52 of the *Construction Contracts (Former Provisions) Act 2004* with the consequence that an annual report under the *Construction Contracts (Former Provisions) Act 2004* to the Minister for Commerce is no longer required. Any substantial activity under this Act may be included in the report required under clause 115.

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