

AMENDMENTS TO QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT 1991

BUILDING INDUSTRY FAIRNESS



KEY TAKEAWAYS:

- 1 New provisions directed towards preventing corporate phoenixing so that persons of influence who were in a position to control or influence a construction company that failed, will be excluded from obtaining a QBCC licence.
- 2 Providing the regulator with greater oversight of the financial affairs of construction companies.
- 3 Introduction of new penalties for non-compliance with the QBCC Act.

1 KEY AMENDMENTS

1.1 CORPORATE PHOENIXING

As part of the amendments to address corporate phoenixing, the *Building Industry Fairness (Security of Payment) Act 2017* (the **Act**) amended the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**) by:

- (a) Expanding the definition of an “influential person” to include individuals in positions to control or substantially influence the company’s conduct. The Act identifies the following persons as potentially being influential persons:
- (i) a chief executive officer, or general manager, or equivalent, or someone acting in those positions, in the company; or
 - (ii) a person who directly owns, holds or controls 50% or more of the shares in the company, or 50% or more of the class of shares in the company; or
 - (iii) someone who gives instructions to an officer of the company and the officer generally acts on those instructions; or
 - (iv) someone who makes, or participates in making, decisions that affect the whole or a substantial part of the company’s business or financial standing; or
 - (v) someone who engages in conduct or makes representations that would cause someone else to reasonably believe the person controls or substantially influences, the company’s business.

The expanded definition of “influential person” increases the scope of provisions which prevent influential persons from holding QBCC licences and/or holding positions of influence in the business of another QBCC licensee.

- (b) Extending from one year to two years the period for which an individual is an “excluded individual” (and unable to be granted a contractor’s licence) if he/she was a director, secretary or influential person for a construction company which:
- (i) had a provisional liquidator, liquidator, administrator or controller appointed; or
 - (ii) was wound up or ordered to be wound up.

The individual will be an excluded individual unless he/she can satisfy the Commissioner that at the time he/she ceased to be an influential person, director or secretary for the construction company, the company was solvent.

1.2 GREATER FINANCIAL OVERSIGHT

As part of the amendments to give the QBCC greater financial oversight of construction companies, the QBCC Act now requires holders of, and applicants for, QBCC licences to satisfy ‘minimum financial requirements’. This is a change in language to the QBCC Act which previously only required licensees to meet the ‘financial requirements’ stated in the board’s policies. Although what the Regulations identifying what the minimum financial requirements will be are yet to be released, it is anticipated that they will be tougher than the current financial requirements licensees must meet.

This amendment is carried through the QBCC Act, so that if, for example, a licensee is audited by the QBCC, it may be required to give to the QBCC financial records evidencing that the licensee meets the minimum financial requirements.

1.3 OTHER AMENDMENTS TO WATCH OUT FOR

Some of the other amendments to the QBCC Act include:

- (a) The introduction of escalating maximum penalties for unlawful carrying out of building work without a contractor's licence. It is expected that the higher penalties will act as a deterrent against unlicensed builders entering the market, which will assist in ensuring compliance with standards and in protecting other members of the construction industry and consumers from loss.¹
- (b) The introduction of a statutory defects liability period, to apply in circumstances in which a retention or security amount may be withheld after practical completion but the building contract does not provide for the release of those amounts at the end of an identifiable period. In these circumstances, the building contract will now be subject to a condition that the retention amount or security must be released to the person entitled to it at the end of 12 months starting on the day of practical completion for the contract.
- (c) The introduction of mandatory conditions prescribed by regulation for inclusion into building contracts as well as the requirement that a building contractor must not enter into a building contract that includes certain prohibited conditions, also prescribed by regulation. The Regulations identifying these conditions have not, as yet, been released, however the Explanatory Notes indicate that the purpose of mandating certain conditions is to ensure greater consistency across the industry, while the prohibition of certain conditions is to address unconscionable or unfair contract provisions in building contracts and improve fairness in the building and construction industry.²
- (d) The requirement that a person must not, without reasonable excuse, delay rectifying building work that is defective or incomplete, or remedying consequential damage, as required by a direction given under section 72A of the QBCC Act. Similarly, a person must not, without reasonable excuse, obstruct another person from rectifying or remedying work, as required by a direction given under that section. It is expected that the Regulations will provide that a person who fails to comply with either of these requirements will receive 4 demerit points.
- (e) The introduction of new penalty provisions including that:
 - (i) A person who is a party to a building contract must not, without reasonable excuse, cause another party to the building contract to suffer a significant financial loss because the person deliberately avoids complying with, or fails to comply with, the contract.
Maximum penalty: 350 penalty units for an individual (equivalent to a fine of \$45,692.50) or 1750 for a body corporate (equivalent to a fine of \$228,462.50).
 - (ii) A licensee who publishes or causes to be published any advertisement in connection with the licensee's business must ensure that the advertisement:
 - (A) does not include any false or misleading information; and
 - (B) does not omit any information, if the omission of the information causes the advertisement to be misleading.
Maximum penalty: 35 penalty units for an individual (equivalent to a fine of \$4,569.25) or 175 penalty units for a body corporate (equivalent to a fine of \$22,846.25).

With respect to the second of these penalty provisions, any advertisement that includes false or misleading information, or omits information resulting in the advertisement being misleading, could also fall foul of, among other things, the provisions of the *Australian Consumer Law*.³

This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

1. Explanatory Notes, *Building Industry Fairness (Security of Payment) Bill 2017*(Qld), 56
2. Explanatory Notes, *Building Industry Fairness (Security of Payment) Bill 2017*(Qld), 61
3. *Competition and Consumer Act 2010*(Cth), Schedule 2