

QBCC CONFERENCE
EXCLUDED INDIVIDUALS
WHAT ARE THE CHANGES?



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1. INTRODUCTION

- 1.1 There are 2 tranches of recent amendments to the Excluded Individual and Permitted Individual provisions of the QBCC Act.
- 1.2 The first is contained in the *Professional Engineers & Other Legislation Amendments Act 2014* (“PEOLA”) which commenced on 10 November 2014.
- 1.3 Further amendments have been enacted by the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014* (“QBCC Amendment Act”).
- 1.4 Pursuant to section 2, the relevant parts of the QBCC Amendment Act commence on a date to be fixed by proclamation. It is not certain as to when this will occur, however, it is expected that the amendments will be operative from sometime between November 2014 and June 2015.

2. PEOLA AMENDMENTS

- 2.1 Prior to the PEOLA amendment, Section 56AC included (5) and (6) which relate to multiple Relevant Events to the one person, or to a company or companies where the event arose from the “one set of circumstances”.
- 2.2 The Government’s response to the Inquiry into the BSA recommended that “*a licensee ought not to be categorised as a permanently excluded individual as a result of a relevant bankruptcy event and a relevant company event arising out of the same incident.*”
- 2.3 One of the changes brought in by the *Professional Engineers & Other Legislation Amendments Act 2014* covers this issue, by removing (5) and (6) and inserting:

“*(5) An excluded individual for a relevant event does not also become an excluded individual for another relevant event if the commission is satisfied that both events are consequences flowing from what is, in substance, the one set of circumstances.*”
- 2.4 That section follows the formula from the previous sections, and clearly allows for the events, whether bankruptcy, company or a combination.

- 2.5 It does not follow that bankruptcy due to guarantees following a company event must automatically be consequences of the one set of circumstances.
- 2.6 There are no transitional provisions in relation to this change. As it changes substantive law, rather than mere procedure, it seems appropriate that this be interpreted to operate prospectively only.
- 2.7 There is also change to the Permitted Individual test.
- 2.8 Previously 56AD(8) provided:
- (8) The commission may categorise the individual as a permitted individual for the relevant event only if the commission is satisfied, on the basis of the application, that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.*
- 2.9 It now reads:
- “... on the basis of the application that:*
- (a) S. 56AC(5) applies to the individual for the relevant event; or*
- (b) The individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.”*
- 2.10 Therefore, if multiple excluded individual decisions have been made and a Permitted Individual application lodged, in considering that application the new version of s. 56AC(5) can be relied upon.
- 2.11 If the insertion to s. 56AD(8)(a) is triggered if s. 56AC(5) applies, then clearly it is only triggered during the period 56AC(5) is operative. If the approach discussed above is correct, that means prospectively only.

3. QBCC AMENDMENT ACT

3 year exclusion

- 3.1 Section 19(2) of the QBCC Amendment Act deletes the reference to 5 years and replaces it with 3 years in s 56AC.
- 3.2 In relation this, the explanatory note states *“by reducing the time frames mentioned in the section from 5 to 3 years, the amendments will relax the restrictions that currently exclude individuals from holding a contractor’s licence to work in the building industry”*.

Limited to “Construction Company”

- 3.3 Section 19(3) of the QBCC Amendment Act inserts reference to “a construction company”. This is a new term that is defined in newly inserted section 56AC(7).
- 3.4 The definition is:
- “(7) In this section –*
- construction company*** *means a company that directly or indirectly carries out building work or building work services.”*
- 3.5 In relation this, the explanatory note states:

Defining and including the term construction company ensures that a person will not be excluded if their insolvency event is the result of their being a director of a company unrelated to the construction industry. For example, if a contractor is a director of their spouse's hairdressing business, and that business becomes insolvent, the contractor will not be excluded. However, if the insolvent company is a construction company, as defined in the section, the contractor would be excluded.

- 3.6 The terms "Building Work", "Building Work Services" and "Carry out" are defined in the Dictionary to the Act. Those definitions have not changed.
- 3.7 The terms "directly or indirectly" are not defined.
- 3.8 However, similar words appear in a previous version s. 42(2) and the definition of "Carry out" in relation to building work as it appears in the Dictionary and in s. 67A.
- 3.9 The words "*directly or indirectly carries out building work*" were considered in *PJS Development Pty Ltd v Tong* [2003] QSC 337, where McMurdo J said:

[5] ... In my view the expression "carry out" when used in the contract to refer to building work, means 'perform or cause to be performed' the work. As I interpret the contract, it requires the building to be built, but it does not require the builder to be the plaintiff. Instead, the relevant obligations of construction could be performed by the plaintiff's causing that construction to be effected. In theory, parties could agree, even in the context of a relatively large commercial and residential development such as this, in terms which required the seller to be the actual builder. If such agreements are made, this is not one of them. To the extent that any term, taken alone, might indicate that it is, that indication is overtaken by a reading of the contract as a whole commencing with the recital that the plaintiff intends "to construct or have constructed" upon its land the relevant development.

[6] ... The expression "carry out building work" has a meaning derived from the Act as a whole, and having regard to the objects of the statute. Where a person is not an actual builder, but is simply engaging a builder to build, it seems curious that the Act would require that person to be the holder of a contractor's licence. In such a case, the builder must be a licensed contractor, so that the objects of the Act are apparently served.

[7] ... There must be, however, something done by the relevant person which can be characterised as the carrying out of building work in the sense that a building contractor does. The purpose of s 42 in requiring the relevant person to hold a contractor's licence shows the sense in which the term "carrying out" is used. In the case of a landowner who causes a builder to build upon the land, the landowner does not in any sense which is relevant for this legislation have the carriage of the work.

- 3.10 That was cited affirmatively in *Puerto Galera Pty Ltd v JM Jelly (Project Builders) Pty Ltd* [2008] QSC 356, in which Chesterman J also said:

[45] Section 42(2)(a) provides that a person carries out building work if he carries it out personally or causes it to be carried out, directly or indirectly. For the subsection to apply there must be foundation of fact from which one can say that the person whose conduct is in question 'built' the structure in question, or 'caused' it to be built. He must be the person who brings about the building, or construction.

...

[47] ... The contract here required the respondent to build the apartments and associated structures. The superintendent had a role in the adjustment of contractual rights between applicant and respondent and in achieving the efficient and timely performance of the

contract by the respondent, but his role was not to build. He did not carry out building work in the sense that a building contract would do.

- 3.11 These decisions were summarised in *Mackay Labour Hire Pty Ltd v JM Kelly (Project Builders) Pty Ltd* [2013] QDC 230 by Kingham DCJ as follows:

[23] In PJS Development Pty Ltd v Tong,[9] P. McMurdo J considered whether a landowner who had engaged a licensed builder to carry out building work on their land would contravene s 42 if the landowner did not hold a licence. He concluded s 42(2)(a) did not apply unless the landowner did something “which can be characterised as the carrying out of building work in the sense that a building contractor does...In the case of a landowner who causes a builder to build upon the land, the landowner does not in any sense which is relevant for this legislation have the carriage of the work”.[10]

[24] Chesterman J adopted that reasoning in Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd.[11] That case involved a superintendent appointed under a building contract between the plaintiff and the defendant. The superintendent’s contractual role was quite extensive. His Honour said the superintendent had a “role in the adjustment of contractual rights between applicant and respondent and in achieving the efficient and timely performance of the contract by the respondent, but his role was not to build. He did not carry out building work in the sense that a building contract (sic) would do”.[12]

[25] He observed that, for s 42(2)(a) to apply, there had to be a factual foundation upon which it could be said that the person in question built the structure or caused it to be built. “He must be the person who brings about the building, or construction.”[13] Respectfully, I agree with and apply their Honours’ reasoning to the Schedule 2 definition of carry out.

- 3.12 Accordingly, it would (without intending to substitute words for those used in the statute) seem that a company is a “Construction Company” if it performs or causes to be performed building work or building services work. There must be something that was done by the relevant company that can be characterised as building work in the sense that a building company does. There must be a foundation fact from which it could be said that the company “built” structures in question.
- 3.13 As a matter of concept, the definition would be triggered even where a company engaged in only one project. That is, “carries out” does not seem to require the carrying out of multiple projects.

The Permitted Individual Test

- 3.14 Section 20 of the QBCC Amendment Act deletes division 2, namely section 56AD. That removes the permitted individual test.

- 3.15 The explanatory note states:

Section 56AD has been omitted. That section prescribed the process by which an individual may make an application to the commission to become a person permitted to hold a contractor’s licence, following exclusion under section 56AC. The intent of this amendment is to repeal the previous permitted individual regime under which an excluded individual could apply to the commission to be taken as not excluded in certain circumstances.

- 3.16 There are transitional arrangements which are discussed below.

Procedure if Excluded Individual

- 3.17 It will be recalled that section 56AC is the definition section. The procedure if a licensee is considered an excluded individual is provided in section 56AF.

3.18 The Explanatory note states:

The amendments to 56AF remove all references to the categorisation of a person as a permitted individual. The clause introduces a new process to be followed when the Commission determines that a licensee is an excluded individual for a relevant event.

3.19 S 21 of the QBCC Amendment Act as follows:

(a) As to Section 56AF(2)(b) — omit, and insert:

(b) that the individual may make a submission to the commission about the relevant event within the reply period;

(b) As to Section 56AF(3) — omit, and insert:

(3) The commission must cancel the individual's licence, by written notice given to the individual,

if—

(a) after considering any submission about the notice made by the individual within the reply period, the commission still considers the individual is an excluded individual for a relevant event; or

(b) the individual does not make a submission about the notice within the reply period.

(c) To insert Section 56AF(5):

(5) In this section—

reply period, for a written notice given under subsection (2), means 28 days after the Commission gives an individual the written notice.

3.20 Section 56AG relates to the effect of the exclusion provisions on a company.

3.21 The amendments to this section are:

(a) Section 56AG(2)(c) —omit, and insert:

(c) within 28 days after the commission gives the company the written notice, the relevant individual must stop being a director, secretary or influential person;

(b) Section 56AG(3) — omit, and insert:

(3) The commission must cancel the company's licence by written notice given to the company if, within the 28 days mentioned in subsection (2)(c), the relevant individual does not stop being a director or secretary of, or an influential person for, the company.

(c) Section 56AG(4) to (6) — omit, and insert:

(4) Section 49 does not apply to a cancellation under subsection (3).

3.22 Section 58 regarding permanent exclusion are modified as follows:

(a) Section 58(1)(b)(ii) and (iii) — *omit*, and *insert*.

(ii) why the commission considers the individual is an excluded individual for the relevant event.

(b) Omit Section 58(1)(c).

3.23 Sections 56AG and 58 are amended respectively to reflect the repeal of the previous 'permitted individual' regime under which an excluded individual could apply to the commission to be taken as not excluded in particular circumstances.

4.0 Transitional Arrangements for QBCC Amendment Act

4.1 The QBCC Amendment Act inserts Schedule 1 part 11 which provides for transitional arrangements.

What happens if a person is within the 28 day time limit to apply to QBCC or QCAT?

4.2 Paragraph 54 of that schedule provides that if, before the amendments commence, a person could have applied to the Commission or the Tribunal for review of a decision not to categorise them as a permitted individual, then such person may make the application in compliance with the former legislation.

What happens if a person has applied to QBCC or QCAT and the matter has not yet been decided and resolved?

4.3 If the person has applied before the commencement, the Commission or the Tribunal may start, continue and decide the view.

4.4 A decision of the Commission or Tribunal made in relation to such decision has effect despite the abolition of the permitted individual test, and such decision is a reviewable decision.

4.5 If, prior to commencement, QBCC gave a excluded individual notice under the old legislation, and 28 days have not elapsed from when the notice was given, that person may apply to the Commission and the commission may consider and decide such application under the old legislation.

4.6 If the QBCC has not completed consideration of an application received prior to commencement, the Commission may continue to consider and decide the application under the former legislation.

What happens to people previously categorised as Excluded or Permitted Individuals?

4.7 Part 57 of the schedule provides that a person who was categorised as an Excluded Individual before the commencement of the section, continues to be Excluded in accordance with the repealed legislation – hence for 5 years.

4.8 A person categorised previously as a permitted individual continues to be categorised and such event must not be counted in deciding whether a person should be permanently excluded.