

SUSPENSIONS & CANCELLATIONS OF LICENSES ISSUED PURSUANT TO THE *QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT*



[based on a paper presented at the 2012 BSA conference]

1. INTRODUCTION

- 1.1 The holder of a licence issued by the Queensland Building and Construction Commission (“the Commission”) pursuant to the *Queensland Building and Construction Commission Act* (the “Act”), is entitled to continue holding the licence unless and until circumstances arise which mean that it may or must be suspended and/or cancelled.
- 1.2 Various provisions in the Act provide for suspension or cancellation of a licence where specific triggers occur. These triggers are:

Type of event	Trigger	Section in the Act
(a) Cancellation	Where the Applicant is an excluded individual or an excluded company and five (5) years have not expired since the relevant event	S. 56AF + S56AG
(b) Suspension or cancellation	If one of the criteria in that section is satisfied and the licensee fails to comply with a “show-cause notice”	S. 48
(c) Suspension or cancellation	Failure to comply with an order of the Tribunal	S. 49B
(d) Suspension	By decision of the Tribunal	S. 97C
(e) Suspension and later cancellation	If, upon renewal of licence, the Applicant fails to pay the renewal fee upon renewal of licence	S. 38
(f) Suspension and later cancellation	If, upon renewal of licence, the Applicant fails to deliver to the Commission documents in prescribed form which relate to the licensee’s compliance with the FRL	S. 53A
(g) Immediate suspension	If the Commission believes, on reasonable grounds, there is a real likelihood that serious financial loss or other serious harm will be suffered if the licence is not suspended immediately	S. 49A

- 1.3 In this paper, it is proposed to cover the last six (6) items. The excluded individual process has been considered in a previous paper.
- 1.4 It should also be noted that there is provision for suspension or cancellation of an owner-builder permit pursuant to section 44G. That issue will also not be considered in this paper.

2. GENERAL CONSIDERATIONS

2.1 Administrative discretion

- 2.1.1 Whilst the decision to suspend or cancel a licence is discretionary, any decision needs to be made within the framework of the licensing scheme contained in the legislation.
- 2.1.2 The Commission is responsible to regulate the building industry to ensure proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers.

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2.1.3 Therefore, where circumstances exist that that warrant suspension or cancellation, the Commission has a positive duty to make a decision to suspend or cancel the licence.

2.1.4 Conversely, if such circumstances do not exist, the Commission should not suspend or cancel the licence.

2.2 Suspension vs. Cancellation – which should occur?

2.2.1 In concept, suspension is a temporary measure pending an event or step, whereas cancellation is final.

2.2.2 Therefore, it could be expected that a suspension would occur where there is an issue or concern that is possible to fix. If however, a problem cannot or will not be fixed, then the licence should be cancelled.

2.3 Does a licence expire if not renewed?

2.3.1 Licences are renewed for a period of twelve (12) months. Section 37(1) provides:

(1) A contractor's licence and a nominee supervisor's licence must be renewed 1 year after their issue or their previous renewal day.

2.3.2 This suggests that a licence expires, unless renewed. The concept of expiry of licence however is inconsistent with the concept of suspension of an expired licence. Therefore, section 37(1) seems inconsistent with sections 38 and 53A.

2.3.3 A number of cases have discussed the apparent inconsistency of sections of the Act – e.g. see *Thomas v QBSA* [2001] QBT 73:

“Strangely section 53A(3) provides that if the financial information is not provided, despite the fact that the licence has not been renewed, it may be suspended. Such a suspension in circumstances where the licence has not been renewed is even more nonsensical than the suspension or cancellation provided for under section 38, a state of affairs was identified by the former chairperson in Bain v QBSA (R002-98, unreported QBT, 29 April 1988). Nonetheless that is clearly the intent of the legislature.”

2.3.4 Considered in the context of the building industry, it can be expected that at renewal time each year, a licensee will have numerous ongoing contracts. Therefore, if a licence expired and could not be used whilst a licensee and the Commission dealt with the licensing renewal, third parties would be prejudiced – and irredeemably so.

2.3.5 The renewal process requires provision of documentation (i.e. section 53A) and payment of the fee (i.e. section 38). However, it would not be workable if the Commission was required to be satisfied with the accuracy of the financial documentation before the renewal occurred.

2.3.6 Consequently, as confirmed in *J & MD Milligan v QBSA* [2012] QSC 213, the combination of the sections indicates that the clear intent of the legislature is:

(a) A licensee must be renewed annually;

(b) A license does not expire if not renewed;

(c) If a licensee fails to pay the renewal fee or lodge the necessary documentation, the license should be suspended. It can be expected that this is something capable of being fixed; and

(d) If the issue is not fixed, then the licensee should be cancelled.

3. FAILURE TO RESPOND ADEQUATELY TO A SHOW CAUSE NOTICE – S. 48

3.1 General

3.1.1 Section 48 of the Act provides discretion to suspend or cancel a licence in the following instances:

- (a) the licence was obtained on the basis of incorrect information supplied to the Commission, whether or not fraud was intended; or
- (b) the licence was obtained by fraud or other improper means; or
- (c) the licensee is convicted of an indictable offence or an offence that, if committed in Queensland, would be an indictable offence; or
- (d) the licensee is a company and it ceases, for a period exceeding twenty-eight (28) days, to have a nominee holding a licence authorising supervision of building work of the appropriate class or classes; or
- (e) the licensee is convicted of an offence against this Act; or
- (f) the licensee contravened a condition to which the licence is subject under section 35 or that is imposed under section 36 on the licensee's licence; or
- (g) the licensee owes an amount to the Commission and fails to comply with a demand by the Commission to discharge the debt; or
- (h) the licensee fails to comply with a written request by the Commission under this Act; or
- (i) the Commission becomes aware of the existence of facts that, having regard to section 31(1)(a) or (2)(a), or 32(1)(g), or 32AA(1)(d), or 32AB(1)(d):
 - (i) would allow the Commission to refuse to issue the licence if it were now being applied for by the licensee; or
 - (ii) would have allowed the Commission to refuse to issue the licence originally.

3.1.2 By section 49, this can only occur after:

- (a) The Commission gives notice of reasons for the proposed suspension or cancellation (i.e. the Show Cause Notice); and
- (b) The Commission allows twenty-one (21) days for a response from the licensee; and
- (c) The Commission considers any written representations made by the licensee.

3.1.3 Whilst most of above seems clear, a number of issues benefit from scrutiny:

- (a) What form requirements are there for the Show Cause Notice?
- (b) What detail is required to be included in respect of the ground relied upon?
- (c) Under what circumstances would the Commission refuse to issue a licence? [i.e. section 48(i)(i)]
- (d) What does "fit and proper person to hold a licence" mean? [relevant to section 31(1)]
- (e) What are the conditions imposed upon the licence under section 35? [i.e. section 48(f)]

3.2 Form of a Show Cause Notice

3.2.1 A number of provisions provide for the Commission to issue a notice to "suspend or cancel" a licence. Does that mean that Commission must select which and state that item only in the notice?

3.2.2 This issue was discussed in the case of *Morrow v. Queensland Building Services Authority* [2005] QDC 261. His Honour Judge Robin QC stated:

"The purpose of the appeal is to establish the invalidity or insufficiency of that notice. Two grounds are assigned ... the second that it fails to specify which course was under consideration by the Authority, either cancellation or suspension.

There has been no occasion for the Court to go in detail into the intricacies of proceedings before the Authority or on appeal to the Tribunal against the determination of the Authority communicated in a letter of 2nd July 2003, Exhibit 2, that Mr Morrow's licence be suspended for a period of 60 days from that day. The penalty appears modest but that is not presently the point.

*Members of the Tribunal have taken different views in respect of whether the section 49(1) notice ought to elect between cancellation and suspension. That was the view of the Tribunal Member, Mr Sweeney, in *O'Toole v. Queensland Building Services Authority* [1996] QBT 266 12 December 1996.*

*His approach was followed by Mr Lorsch in *Hanson v Queensland Building Services Authority* [1999] QBT 85. In the determination under appeal Mr Coyne differed to the extent of determining that it was incumbent on the Authority in issuing the notice to include reference to "cancelling or suspending" - in the sense of both being included.*

*The Member referred to *Burnham v The City of Mordialloc* [1956] VLR 239 and concluded that by parity of reasoning section 49(1) properly construed required the Authority to state both alternatives - that is, cancellation or suspension - in its show cause notice.*

If reference is made to the Victorian decision at page 242, one finds Mr Coyne is correct in his view of it. Lowe J said after some consideration of the matter that:

'Three alternatives are set out in the regulation and in my opinion they must be set out in the notice. The cause which may be shown may differ in regard to each alternative. The notice must inform the recipient that he must show cause in relation to all these alternatives. If the alternatives are not brought to his knowledge he may not be prepared to show cause as to one or more of the alternatives. The notice of the 26th of May 1953 gave one alternative only: take notice that the Council hereby requires you to show cause why such building should not be demolished.' "The form of the notice suggests that the Council has already considered the alternatives and resolved (provisionally at any rate) that of the three alternatives, that of the demolition should be chosen unless good reason was shown to the contrary.'

*I would think that as a practical matter recipients of s 49(1) notices would be grateful if one of the alternatives open was identified, in particular if the penalty faced was identified as suspension. I would have some difficulty in concluding that a notice foreshadowing suspension only was invalid. Of course such a notice would limit what might follow. I do however think that Mr Coyne has correctly applied *Burnham* and that in the present circumstances the relevant notice cannot be successfully challenged on that ground."*

3.2.3 Therefore, it is necessary and appropriate for a notice issued pursuant to section 49 to include both suspension and cancellation.

3.3 Reasons or Grounds required to be stated in Show Cause Notice

3.3.1 The amount of detail required to be included in a show cause notice was discussed in *Morrow*:

"Mr Davis' argument is that the reasons referred to in section 49(1) correspond with the circumstances - whether they be regarded as grounds or reasons, in the absence of categorisation, does not matter - in paragraphs (a) to (j) in section 48.

This is a somewhat difficult question. It is brought to the Court on a hypothetical basis in the sense that Mr Morrow could hardly have been in any doubt what the "reasons" of the Authority were. What influences my approach is that there can be no necessary or even prima facie consequence of occurrence of any of the events in (a) to (j), (j) perhaps excepted, and suspension or cancellation of a licence being appropriate.

The circumstances which bring about the existence of the conditions or grounds may be minor in the extreme and on any reasonable approach have no relevance to the licensee's being a fit and proper person or a sufficiently qualified and experienced person or a sufficiently sound person financially to deserve the privilege of becoming or continuing licensed.

In my opinion, the statement of reasons ought to show why it is considered that the condition relied on from section 48 makes suspension or cancellation of the licence appropriate. It may well be enough to refer to one of the sub paragraphs of section 31(1) no longer applying (or in other circumstances the sub paragraphs of other subsections).

I think the notice was, as a matter of form, deficient and that the Court should so rule notwithstanding that if Mr Morrow's case is looked at on the merits, he may not command much sympathy."

3.3.2 This raises a number of important points:

- (a) Suspension or cancellation of a licence is a significant issue that affects the licensee's ability to earn an income, but also affects employees, subcontractors and members of the public;
- (b) Therefore, before a decision is made to suspend or cancel a license, the licensee must be provided natural justice. This means, the licensee must be apprised of the nature of the concerns which must be answered, and provided with time to respond to those issues;
- (c) The Commission should therefore be limited to grounds raised in the notice in making its decision;
- (d) Such grounds could be amplified by further evidence on the point, provided that does not change the nature of the ground relied upon;
- (e) If the Commission wishes to rely upon a further ground, a fresh show cause notice should be issued.

3.4 Under what circumstances would the Commission refuse to issue a licence?

3.4.1 The person is entitled to a contractor's licence if that person can satisfy the Commission of the matters listed in section 31, namely:

"(1) A person (not being a company) is entitled to a contractor's licence if the Commission is, on application by that person, satisfied that:

- (a) the applicant is a fit and proper person to hold the licence; and*
- (b) the applicant has the qualifications and experience required by regulation in relation to a licence of the relevant class; and*
- (c) the applicant satisfies the relevant financial requirements stated in the board's policies; and*
- (d) the applicant can lawfully work in Queensland; and*
- (e) the applicant is not an excluded individual for a relevant event or a permanently excluded individual; and*
- (f) the applicant is not a disqualified individual; and*
- (g) the applicant is not a banned individual; and*
- (h) the applicant does not have an unpaid judgment debt for an amount the Commission may recover under section 71."*

3.5 What does "fit and proper person to hold a licence" mean?

3.5.1 Pursuant to section 31 of the Act, a person is entitled to a contractor's licence if the Commission is satisfied that person is, amongst other things, a fit and proper person to hold the licence.

3.5.2 Section 31(3) provides:

"In deciding whether a particular person is a fit and proper person to hold a contractor's licence or to exercise control or influence over a company that holds a contractor's licence, the Commission may have regard to:

- (a) Commercial and other dealing in which that person has been involved and the standard of honesty and integrity demonstrated in those dealings; and*

- (b) Any failure by that person to carry out commercial or statutory obligations and the reasons for the failure; and
- (c) Tier 1 detective work carried out by the person, whether or not the person received a notice under section 67AH, 67AI, 67AL or 67AM stating a term of ban for the work; and
- (ca) if the person is an enforcement debtor under an enforcement order for an infringement notice offence for this Act or the Domestic Building Contract Act 2000—whether the person has taken steps under the State Penalties Enforcement Act 1999 to discharge the amount stated in the enforcement order; and
- (d) any other relevant factor.”

3.5.3 The expression “fit and proper person” was discussed in *Amour v Queensland Building Services Authority* [2012] QCAT 360 and in *Pop v Queensland Building Services Authority* [2012] QCAT 388 as follows (note – quoting from *Pop*):

[37] *The expression “fit and proper person” is one often used in statutes and it is a very broad concept. It is not defined in the QBSA Act.*

[38] *What is often quoted as “the classic” Australian statement as to the meaning of the words “fit and proper person” appears in the joint judgment of Dixon CJ, McTiernan and Webb JJ in the High Court’s decision in Hughes and Vale Pty Ltd v The State of New South Wales:*

‘The expression “fit and proper person” is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. “Fit” (or “idoneus”) with respect to an office is said to involve three things, honesty knowledge and ability; “Honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it— Coke.’

[39] *This statement has subsequently been adopted on numerous occasions in relation to the QBSA Act.*

[40] *Further assistance in interpreting this term has been given by the High Court, in Australian Broadcasting Tribunal v Bond (Bond Media case) where Toohey and Gaudron JJ noted:*

‘The expression “fit and proper person standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of “fit and proper” cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain context, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.’

[41] *Also in Bond Media case, Chief Justice Mason said:*

‘The question whether a person is fit and proper is one of value judgement. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring a person whose fitness and propriety are under consideration.’

[42] *The QBSA in submissions rightly conceded that the “power to grant or withhold a licence is protective, and there is no element of punishment involved.” The QBSA submissions went on to indicate that the “primary consideration is the protection of persons with whom the licensee might deal, primarily consumers” which is a submission I adopt.*

[43] *The QBSA submitted that the ‘concept of fitness and propriety should not be narrowly construed or confined and must extend to any aspects of fitness and propriety that is relevant to the public interest’ and noted that in the matter of Weedon v Builders’ Licencing Board (NSW), Redapple DCJ stated that:*

'In order to show that a person is a fit and proper person to hold a licence, the applicant must establish that in a business sense he is a person of honesty and integrity in his dealings with others, that he is possessed of the characteristics of stability, and of sound judgment which he can and will exercise in the interests of his clients; he must show that he is otherwise of good character.'

[44] *I adopt this as one reasonable summary in broad of the law regarding fit and proper person as it applies to this application and accept that the term fit and proper is to be construed widely."*

3.5.4 In *Alford v Auctioneers and Agents Committee* [2002] QDC 130 at [5]:

"[5] The concept of fitness and propriety is a broad one. It has been said that the very purpose of the expression is to give the widest scope for judgment and indeed for rejection, and that fitness for something involves honesty, knowledge of what is required of a person in such a position, and the ability or capacity to do what is required, in terms of physical, mental and financial capacity: Hughes & Vale Pty Ltd v New South Wales (No 2) (1955) 93 CLR 127 at 156-7 per Dixon CJ, McTiernan and Webb JJ."

3.5.5 In *A Solicitor v. NSW Law Society* [2004] HCA 1 the question was whether a solicitor who had been convicted of four (4) counts of indecent assault was a fit and proper person to be a solicitor. The court considered these were circumstances so remote from anything to do with professional practice that the characterisation of the solicitor's personal misconduct as professional misconduct was erroneous.

3.5.6 In the Queensland Building Tribunal, the case of *O'Toole v QBSA* [1996] QBT 257 quoted affirmatively the case *Petracaro v Commissioner of Consumer Affairs* (1994) 62 SASR 387 as follows:

"It cannot be stressed too strongly that the Act is not preoccupied with general character aspects, except to the extent that these may directly be relevant to the clear purposes of the statute, which essentially focuses on the fitness of a person to discharge the responsibilities applicable to a particular type of licence. The statute is primarily concerned with the protection of the public by ensuring that building work is not carried out by persons who are not suitably skilled or who are, or are likely to be, dishonest with those with whom they enter into contracts. It goes without saying that, in the case of a subcontract bricklayer who usually gives a firm price to a builder for quite specific work, is to be assessed mainly on his reliability and skill to do the job, whereas in the case of a category 1 building contractor, the public concern must relate not only to technical ability but also general trustworthiness and honesty in negotiating and discharging contractual obligations."

3.5.7 He continued:

"True it is that his more general conduct has been regrettable but, not only has this had no bearing on his work as a bricklayer in the building industry, but also there is clear uncontroverted evidence of a major change in his personal situation and character since 1991. ... I am left with the firm impression that it has, in effect, denied this man the possibility of pursuing a livelihood by reason of considerations which, at best, were very peripheral to the consideration of whether he was a fit and proper person to be a category 3 bricklayer and stonemason within the meaning intended by the Act ... Whilst I am sympathetic to the desire of the tribunal to ensure that only persons of the highest personal character are licensed, I do not think that in relation to this level and type of employment, that is the real focus of the legislation. This man is patently a skilled and reliable tradesman who has not set a foot wrong in the work environment - whatever else he may have done. It is not a function of the tribunal to certify to his general good conduct, but as to his trade qualifications and reliability."

3.5.8 Accordingly, the concept of fitness and propriety involves:

- (a) Honesty knowledge and ability.
- (b) Consideration of fitness and propriety in the context of the holding of a licence pursuant to the Act - that is, consideration of matters relevant to the nature of the work that occurs through having the licence.
- (c) The character and reputation as this indicates the likely future actions.

3.5.9 The cases of *O'Toole* and *Petrecaro* are obvious authority that general character aspects are not the criteria upon which an applicant's fitness are to be assessed. The fitness to hold a licence will depend upon the applicant's fitness to discharge the responsibilities applicable to the particular type of licence, and not the general character – except to the extent that the character is directly relevant to such work.

3.5.10 On the basis of the above, convictions in relation to the matters that are not relevant to fitness to discharge responsibilities as a licensee, do not preclude the granting of a licence.

3.5.11 One of the most common instances however where suspension for fitness and propriety is raised is where a licensee gives a false declaration to the Commission.

3.6 What are the conditions imposed upon the licence?

3.6.1 Section 35 the Act provides:

“(1) A licence may be granted subject to such conditions as the Commission considers appropriate.

(2) Without limiting subsection (1), a licence for which an occupational licence is required is taken to be subject to the condition that the licensee hold, and continue to hold, for the term of the licence, the occupational licence.

(3) Without limiting subsection (1), a contractor's licence is subject to the condition that:

(a) the licensee's financial circumstances must at all times satisfy the relevant financial requirements stated in the board's policies; and

(b) variations of the contractor's turnover and assets must be notified, or notified and approved, in accordance with the relevant financial requirements stated in the board's policies.”

3.6.2 The most significant and also the most common condition that affects license is the *Financial Requirements for Licensing* (the “FRL”). The requirements of the FRL is a large topic in itself. In general terms however, the FRL provides that a licensee:

(a) Must have a minimum Net Tangible Assets;

(b) Must have a Current Ratio is not less than 1:1; and

(c) Must not exceed the Annual Allowable Turnover.

3.6.3 A breach of either of the first two (2) would be a breach of the FRL that would cause concern and investigation by QBCC. Normally, exceeding the AATO would not be considered grounds for suspension.

3.6.4 As from 1 October 2012, the FRL has been amended to include a requirement that a licensee not have an unsatisfied judgment debt. Note that paragraph 10.2 indicates that this only refers to judgments debts in relation to:

“(a) a building contract or a domestic building contract;

(b) goods or services supplied for:

(i) building work to be carried out under a building contract; or

(ii) domestic building work to be carried out under a domestic building contract.”

3.6.5 Paragraph 10.3 of the FRL requires that the judgment debt be paid within twenty-eight (28) days (or any longer period allowed).

3.6.6 This does not apply where there is an appeal, the judgment is set aside or a payment arrangement is entered with the creditor.

3.6.7 Accordingly, as from 1 October 2012, the failure to satisfy a judgment debt relating to building work is a trigger for a section 48 Show Cause Notice.

4. FAILURE TO COMPLY WITH AN ORDER FROM QCAT – S. 49B

4.1 Section 49B provides:

- “(1) The tribunal may, in a proceeding to which a licensee is a party, order that the licensee's licence be suspended or cancelled if the licensee fails to comply with an order or direction of the tribunal within the time allowed by the tribunal.*
- (2) Before ordering that a licence be suspended or cancelled, the tribunal must give the licensee a reasonable opportunity to show cause why it should not be cancelled or suspended.*
- (3) Subsection (2) does not apply to an order or direction made in a disciplinary proceeding under part 7, division 4.*
- (4) An order under this section operates, of its own force, to suspend or cancel the licence if the licensee fails to comply with the tribunal's order or direction within the time allowed by the tribunal.”*

4.2 It can be seen that this raises a suspension or cancellation that is triggered by the Tribunal – not by the Commission.

4.3 This section has been used on a number of occasions – though by CCT, not by QCAT. Interestingly, many of the CCT cases did not involve the Commission, but were brought by home owners.

4.4 In *Johnstone, W.A. v Waddell, B. & J.* [2004] QCCTB 93, Member Lorisich stated:

“It is always with considerable reluctance that I make orders suspending or cancelling a licence, as clearly that is a most serious order, given that it affects the licensee's livelihood. Nonetheless the Tribunal's orders have not been complied with by this applicant and the Tribunal is essentially being ignored by the applicant's dismissive attitude and his continued failure to attend directions hearings. In those circumstances, the applicant presents the Tribunal with no alternative other than to look to the processes of section 49B. I do however consider that the applicant should be given one last opportunity to redeem himself and adjust his conduct and to have these works appropriately rectified. In the circumstances I am not satisfied that the applicant has shown cause why his licence should not be suspended or cancelled and, accordingly I make the following orders...”

4.5 The cases require clear and repeated breach of Tribunal directions hence are treated in effect as a penalty for contempt.

5. FAILURE TO PAY FEE ON RENEWAL – S. 38

5.1 Section 38 of the Act provides:

- “(1) If a licensee fails to pay the appropriate licence fee within the time allowed under the regulations, the Commission may, by notice to the licensee, suspend the licence.*
- (2) A suspension imposed under this section terminates on payment of the appropriate fee.*
- (3) If a licence has remained in suspension under this section for more than 3 months, the Commission may, by notice to the licensee, cancel the licence.*
- (4) In this section—licence fee includes any amount by which the renewal fee is increased under section 37C.”*

5.2 In *Bain v QBSA* [1998] QBT 41 it was stated:

“[30] I have concluded that section 38 does not have to be read in conjunction with section 49, as section 38 provides a unique procedure for suspension and cancellation in the event that a licensee fails to pay.

[31] Section 38 also provides a procedure which the QBSA is required to use in the event that a licensee fails to pay in order to cancel the licence which simply does not expire through

the failure to pay. That is not to say that the QBSA could not ask the licensee if they wished to continue to hold a licence and, if not, if they would return it to the QBSA and, thereby, the QBSA could avoid the necessity of proceeding under section 38.

[32] *While it would have been more administratively tidy for section 37 to have simply provided for the automatic expiry of the licence if the annual fee was not paid by the required date, the QBSA and the Tribunal are bound to interpret the Act and comply with what it says and not with what we might wish it said to satisfy administrative convenience.”*

6. FAILURE TO PROVIDE INFORMATION IN RELATION TO THE COMPLIANCE WITH THE FRL

6.1 Section 53A provides:

- "(1) The Commission must not renew a contractor's licence if the Commission is not given information, in a form approved by the board, and within the time allowed under a regulation, about the contractor's continued satisfaction of the relevant financial requirements stated in the board's policies.*
- (2) The form approved by the board may require some or all of the information to be given by a person suitably qualified and experienced in accountancy.*
- (3) If the contractor does not give the Commission the information mentioned in subsection (1), the Commission may, by written notice given to the licensee, suspend the licence.*
- (4) A suspension imposed under this section ends when the Commission is given the information.*
- (5) If a licence has remained in suspension under this section for more than 3 months, the Commission may, by notice to the licensee, cancel the licence.*

6.2 The intent of section 53A, as discussed in *J & MD Milligan v QBSA* [2012] QSC 213 at [13], is:

- (a) A license must not be renewed if information is not given “*about the contractor's continued satisfaction*” with the FRL. If no information is given, the licence may be suspended;
- (b) QBCC is not required by section 53A to determine whether or not the FRL has been satisfied; and
- (c) If such information is given, then the reason for suspension is removed, and suspension is automatically lifted.

6.3 Documentation in the approved form relates to compliance is clearly “*about the contractors continued satisfaction*” with the FRL. If the documentation on its face is not properly completed or does not purport to demonstrate compliance, then arguably the documentation is not in the approved form.

6.4 Where, after review of the documentation, QBCC is concerned that the licensee does not comply with the FRL, it should trigger the show cause procedure provided in section 48.

6.5 Cancellation pursuant to section 53A does not require compliance with section 49 (i.e. it does not require the giving of a twenty-one (21) day show cause notice and consideration of submissions). The section is similar in wording to the suspension from non-payment of renewal fee provided in section 38. As discussed in the case of *Bain v QBSA* [1998] QBT 41, this section provides a separate mechanism for suspension of license and therefore section 49 is not relevant.

6.6 The cases of *Bain v QBSA* (cited above) and *Thomas v QBSA* [2001] QBT 73 suggest that a license cancellation in accordance with 53A(5) is a decision that needs to be made after the licensee has been accorded procedural fairness.

6.7 Suspension by Tribunal

6.7.1 Section 97C provides for the Commission to obtain an order from the Tribunal suspending a licence:

- “(1) If the Tribunal is satisfied, on application by the Commission, that a licence should be suspended, the Tribunal may, by order, suspend the licence:*
- (a) for the period the tribunal considers reasonable; or*
 - (b) until the holder of the licence (the suspended person) complies with a condition imposed on the licence by the tribunal.*
- (2) The order may direct the suspended person to deliver the licence to the Commission and include any other directions the Tribunal considers necessary or convenient to give effect to the order.*
- (3) The Tribunal may make an order under this section on application made without notice to the suspended person but, in that case, the tribunal must allow the suspended person a reasonable opportunity to show cause why the order should be rescinded.*
- (4) If the Tribunal after considering the suspended person's evidence and submissions, if any, and any further evidence or submissions of the Commission, is not satisfied the order should continue in force, the tribunal must rescind the order.*
- (5) The holder of a licence who contravenes a direction under subsection (2) commits an offence. Maximum penalty--80 penalty unit.”*

6.7.2 There are no decided cases on this section of which I am aware.

6.7.3 Normally, there is no reason to undertake this process as the Commission has the power to suspend pursuant to section 48.

6.7.4 It seems feasible that, following a contentious hearing, if the Tribunal makes findings that would justify suspension, that the Commission might ask the Tribunal also to make a suspension order.

7. IMMEDIATE SUSPENSION

7.1 Section 49A provides for immediate suspension in certain circumstances :

- “(1) The Commission may suspend a licensee's licence without allowing the licensee time to make written representations before the suspension takes effect if the Commission believes, on reasonable grounds, there is a real likelihood that serious financial loss or other serious harm will happen to any of the following if the licence is not immediately suspended:*
- (a) other licensees;*
 - (b) the employees of other licensees;*
 - (c) consumers;*
 - (d) suppliers of building materials or services.*
- (2) The suspension under subsection (1) is imposed by written notice given to the licensee that complies with the QCAT Act, section 157(2) and:*
- (a) states that licensee may make written representations for a lifting of the suspension; and*
 - (b) briefly explains how the suspension could lapse under subsection (3).*
- (3) The suspension under subsection (1) lapses if:*
- (a) the Commission does not, within 10 days after the licensee is given notice of the suspension, give the licensee notice under section 49(1) of the Commission 's reasons for a proposed cancellation or suspension of the licence under section 48 (a section 49 notice); or*
 - (b) the Commission, within 10 days after the licensee is given notice of the suspension, gives the licensee a section 49 notice, but the licence is not suspended or cancelled*

under section 48 within 3 months, or a longer period decided under subsections (4) and (5), after the section 49 notice is given; or

(c) the Commission suspends or cancels the licence under section 48.

(4) The Commission may extend the period of 3 months mentioned in subsection (3)(b), but only if it appears to the Commission that, in the circumstances, it is in the interests of the licensee to do so.

(5) The period may be extended more than once, but whenever it is extended, it must not be extended for more than 1 month."

7.2 Clearly, a pre-requisite to the jurisdiction to suspend or cancel a licence immediately is that the Commission must have reasonable grounds for holding the opinion that there is a real likelihood of serious financial loss or other serious harm will occur.

7.3 It can be seen that immediate suspension does not allow for procedural fairness or awaiting submissions from the licensee. Therefore circumstances which justify this must be based upon identifiable evidence, from which an inference can be drawn that harm will likely be suffered.

7.4 As a matter of concept:

(a) If in truth, a licensee is solvent, and the concerns of the Commission are merely technical issues regarding compliance with FRL, then there cannot be a real likelihood that serious harm will be suffered;

(b) However, if a licensee is insolvent in the sense that it cannot pay debts as they fall due, then granting a stay does not remove insolvency. It merely allows the licensee to continue trading and incurring further debts that will not ultimately be paid.

(c) By comparison with insolvency law, a temporary lack of liquidity is different from an endemic shortage of working capital.

(d) All existing unpaid creditors of a licensee have debts already incurred. Allowing a licensee to continue to trade might result in some payment to them – though of course, it might not.

(e) All people (meaning trade suppliers, subcontractors and members of the public) who deal with an insolvent licensee after the date of the decision suffer a risk of prejudice.

7.5 Therefore in deciding whether or not there is a risk of serious financial harm to third parties, consideration needs to be given to the solvency of the licensee – and this means review of the financial statements considering, amongst other things, the Balance Sheet test and the Cashflow Test.

8 STAY CONSIDERATIONS

8.1 Upon suspension, it is common for the licensee to apply to the Tribunal for review, and, on an interim basis, seek stay of the suspension.

8.2 Whether or not a stay should be granted depends upon whether or not the granting of a stay is desirable, bearing in mind, amongst other things, whether it is arguable that the licensee will be successful in the review and the likely prejudice that would be suffered.

8.3 Therefore, consideration of a stay raises, on an interim basis, relevant issues discussed above.

8.4 As the Tribunal stands in the shoes of Commission, it has the obligation to consider review based upon the same criteria as Commission. Therefore, amongst other things, this means that the Tribunal will, in certain instances, have a positive duty to suspend or cancel, whereas on other occasions to allow the licensee to continue trading.

8.5 Most importantly though, the granting of a decision by the Tribunal of a stay does not relieve Commission from its statutory obligation to monitor the license. Therefore, provided there are

fresh issues, a stay does not prevent Commission from issuing a further suspension or cancelation – in fact, where fresh issues arise, Commission is positively required to take action.

Note: The views expressed in this article are those of the author, and do not necessarily represent those of FWBC or the Commonwealth.

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