

# REVIEW OF REFUSALS OF PERMITTED INDIVIDUAL APPLICATIONS

[based on a paper presented at the 2011 BSA conference]



## INTRODUCTION

1. Under the builders licencing system pursuant to the *Queensland Building and Construction Commission Authority Act*, previously the *Queensland Building Services Authority Act* ("QBCC Act") if a "Relevant Event" occurs to a licensee, then the licensee is classified as an Excluded Individual for a period of five (5) years after the Relevant Event occurred.
2. A Relevant Event might occur where the licensee became bankrupt or took advantage of the laws of bankruptcy, or was a director, secretary or influential person of a company that suffered an insolvency event. [s. 56AC]
3. Where a licensee is an Excluded Individual, their licence must be cancelled unless they apply to be categorised as a Permitted Individual. [56AF]
4. The purpose of this paper is to discuss the criteria for categorising a person as a Permitted Individual and to discuss some tactical considerations in relation to the matter.

## THE TEST TO BE CATEGORISED AS A PERMITTED INDIVIDUAL

5. Section 56AD of the QBCC Act provides relevantly:
  - (1) An individual may apply to the Authority, in the form approved by the Board, to be categorised as a Permitted Individual for a Relevant Event if the individual has been advised by the Authority, or has otherwise been made aware, that the Authority considers the individual to be an Excluded Individual for the Relevant Event.
  - (8) The Authority may categorise the individual as a Permitted Individual for the Relevant Event only if the Authority 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.
  - (8A) In deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a Relevant Event, the Authority must have regard to action taken by the individual in relation to the following:
    - (a) keeping proper books of account and financial records;
    - (b) seeking appropriate financial or legal advice before entering into financial or business arrangements or conducting business;
    - (c) reporting fraud or theft to the police;
    - (d) ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees;
    - (e) putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts;
    - (f) making appropriate provision for Commonwealth and State taxation debts.
  - (8B) Nothing in subsection (8A) prevents the Authority from having regard to other matters for deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a Relevant Event.

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6. The issues for consideration in an application pursuant to s.56AD(1) were confirmed in *Younan v QBSA* [2010] QDC 158, per His Honour Judge McGill at paragraph [26] as follows:
- (a) Identification of the “Relevant Event”;
  - (b) Identification of the circumstances that resulted in the happening of the Relevant Event;
  - (c) Whether the Applicant took all reasonable steps to avoid the coming into existence of those circumstances; and
  - (d) If the threshold issue is satisfied, should discretion be exercised to classify the Applicant as a Permitted Individual.

### **CONSIDERATIONS IN RELATION TO THE “REASONABLE STEPS TEST” (I.E. THE FIRST 3 CONSIDERATIONS)**

7. The “Relevant Event” referred to in s.56AD(8) is the Relevant Event identified in s.56AC.
8. A number of points follow by virtue of the wording of s.56AD(8):
- (a) A person may only be categorised as a Permitted Individual if they took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the Relevant Event – see *Cats v QBSA* [2008] QCCTB 22 at [13].
  - (b) As a matter of logic, such steps could only have been taken before the Relevant Event.
  - (c) It is presumed that there has been a Relevant Event, by virtue of the application seeking categorisation as a Permitted Individual. Therefore, it is not open for consideration that there was a Relevant Event, and there cannot be a finding that there was not a Relevant Event.
  - (d) It is not a question of whether the Applicant did everything possible to prevent the circumstances from arising, or whether they would have arisen if he had acted differently - see *Younan v QBSA* [2010] QDC 158 at [26].
  - (e) Hence *Younan* confirms CCT cases which state that *all reasonable steps* does not mean *all possible steps*, only reasonable steps – e.g. see *Hyde v QBSA* [2003] QBT 30 at [53].
  - (f) What were reasonable steps depended on what was reasonable for the individual concerned in the circumstances in which he found himself, with such information as he then had – see *Younan v QBSA* at [26].
  - (g) This confirms CCT cases which stated that what steps are reasonable are to be considered from the position of a reasonable builder in the shoes of the Applicant, e.g.:
    - *Hyde* at [58] to [60];
    - *Darvill v QBSA* [2008] QCCTB 35 at [42];
    - *Nation v QBSA* [2006] QCCTB 114 at [55];
    - *Delonga v QBSA* [2004] QCCTB 26 at [33].
  - (h) The reasonable steps are those to avoid the coming into existence of the circumstances that resulted in the Relevant Event, not the Relevant Event itself, e.g. see *Dellaway v QBSA* [2007] QCCTB 181 at [7].
  - (i) Further, for a step to be relevant to the avoidance of the coming into existence of the Relevant Event, it must have been a causative factor of the circumstances. Hence causation is relevant.
  - (j) As to what amounts to reasonable, many of the cases quote from *Rich v State of Queensland & Ors; Samin v State of Queensland & Ors* [2001] QCA 259 where, McPherson JA said:

*"What amounts to reasonable steps necessarily involves investigation of the nature of the harm, the foreseeability and degree of risk of its happening, and the measures reasonably available for preventing or averting it."*

This point was considered in *Younan* by McGill DCJ at [26]:

*"The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight"*

9. Section 56AD(8A) lists a number of matters the Authority must consider. It is important to note that this focussed attention on specific matters, but it does not change the test. Hence, whilst the Authority must have regard to the specific matters listed, those matters are only relevant to the extent that they are relevant to the causation of the coming into existence of "the circumstances".

#### **FACTORS RELEVANT TO EXERCISE OF DISCRETION (I.E. THE 4<sup>TH</sup> CONSIDERATION)**

10. If the "reasonable steps" test under s.56AD(8) has been satisfied, there is a need to consider exercise of discretion - e.g. see *Younan* cited above at [26]; *Vadasz v QBSA* [2013] QCAT 84 at [75].
11. As to the criteria relevant to discretion, it is submitted that the purpose of the statute should be considered. In this regard it is submitted that the comments in the District Court decision in *Younan v QBSA* [2010] QDC 158 at paragraphs [32] to [35] regarding reliance upon the explanatory note are in respect of the "reasonable steps" test under s.56AD(8) and are not stated in respect of consideration of the exercise of discretion. Therefore, it is submitted that it is not inconsistent with that case for consideration of the purpose of the statute when identify factors relevant to the exercise of discretion.
12. On that basis, if it becomes necessary to consider the exercise of discretion, it is submitted that, bearing in mind the purpose of the sections, a number of factors would necessarily be relevant, such as:
  - (a) Any phoenix activity;
  - (b) Any previous Relevant Events, whether or not the Applicant has been Permitted for such events (though of course, if the Applicant was permitted for such event, that would be relevant);
  - (c) Whether at present there are unrelated employees, subcontractors, trade suppliers or members of the public who would be affected adversely by the Applicant losing his licence, i.e. "innocent third parties";
  - (d) Payments by the Applicant of creditors after the Relevant Event, or conversely, failure to make payments committed pursuant to a Deed of Company Arrangement.
  - (e) Convictions for matters relevant to the holding of a licence. Perhaps this might include fraud, but not driving in excess of the speed limit.
13. As matters relevant to the "reasonable steps" test should be considered under that test, and those matters do not require further and separate consideration under the exercise of discretion. Therefore events inherent in the facts relevant to the reasonable steps test should not be a separate matter for consideration.
14. The application of the exercise of discretion is not subject to the "onus of proof" required by s.56AD(8). It is just a decision based upon the evidence available.
15. Presumably, where there has been a previous Tribunal hearing for a previous Relevant Event, there would be an issue estoppel created by the decision. That is, QCAT would not need to go behind that decision and it should stand on its face for what it says.

16. I raise for consideration the situation where there is a fresh business which is being conducted, is the financial prosperity of that business relevant? That is, if there is a fresh business which is being run badly, should that be taken into account in exercise of discretion? What if the business is being managed very well and the Applicant has learned his lesson? We should be wary of being forced to investigate the financial status of the current business as that clearly would fall outside the exercise of discretion.

### **ONUS OF PROOF – REVIEW HEARINGS GENERALLY**

17. In the context of the Tribunal's jurisdiction, it is not appropriate to speak in terms of onus of proof. This has been held in relation to the comparable jurisdiction for merits-based reviews given to the Commonwealth Administrative Appeals Tribunal and adopted in QCAT:
- (a) *Szbel v. Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 C.L.R. 152, the High Court at [40] per Gleeson C.J., Kirby, Hayne, Callinan and Heydon JJ in reference to the Refugee Review Tribunal);
  - (b) *Bushell v. Repatriation Commission* (1992) 175 C.L.R. 408, 424-425 per Brennan J.; and
  - (c) *Laidlaw v QBSA* [2010] QCAT 70 at [21];
18. Therefore, in the absence of any legislative direction to the contrary, onus of proof has no place in merits reviews and the jurisdiction remained inquisitorial, and not adversarial.

### **OBLIGATION TO ADDUCE EVIDENCE IN PERMITTED INDIVIDUAL MATTER**

19. The wording of s.56AD(8) requires there to be sufficient material to be put before it that the Applicant should be categorised as a Permitted Individual. On a review therefore, there must be the sufficient material put before it that satisfies it that the test in s.51AD(8) has been satisfied.
20. This has been confirmed in a number of CCT and QCAT cases, including for example:
- (a) *Fogg v QBSA* [2010] QCAT 203 at [32]
  - (b) *Vuu v QBSA* [2010] QCAT 335 at [15].
21. This obligation does not apply to the exercise of discretion and there is no obligation upon the Applicant to adduce evidence on this point.
22. As a practical matter, if the Applicant adduces evidence as to what steps are reasonable, then in effect the Applicant's evidence sets the standard as to what is reasonable. If the Authority does not adduce evidence on this point, then the only evidence as to the level of what is reasonable will be the evidence of the Applicant.

### **POINTS ARISING FROM SOME RECENT MATTERS**

23. Firstly, as stated in Younan at [24]:

[24] It is immediately apparent that these are all concerned with the prudent management of a company as an ongoing business, or even, ...something which is to be done before one conducts business or enters into financial or business arrangements.[8] In other words, the focus of this subsection is on prevention rather than dealing with problems after they have arisen, .....as I have said earlier I do not consider that the provision by a related company of additional funds to prop up the company was necessarily a prerequisite for a conclusion that reasonable steps were taken.

24. The correct identification of the circumstances that resulted in the happening of the Relevant Event is commonly difficult. In many, if not most cases, there are multiple circumstances and certainly the Applicant will throw up for consideration many. The important criteria is whether any circumstance was causative of the Relevant Event.

25. Further, consideration of “reasonable steps” must of necessity be driven by the circumstances identified. A step taken can hardly be a reasonable step to avoid the coming into existence of the Relevant Event if it has no causal relevant to the circumstances that resulted in the happening of the Relevant Event.
26. The obligation to pay tax is important and on any view of the matter, the ATO is a creditor. It is not good enough to pay trade creditors and ignore the ATO. This is a specific matter that the Authority must consider by virtue of s.56AD(8A).
27. In recent hearings, all accountants who have given evidence appear to accept that:
- (a) A building company should watch its cash flow and capitalisation.
  - (b) Cash flow involves an analysis of the anticipated expenditure compared to the reasonably anticipated cash inflows. Significantly, it is an analysis of future cash flow that is important.
  - (c) The capitalisation of a business refers to the amount of capital required to trade. The amount of capital required to trade depends upon the cash flow, hence the consideration of the capital requirements of the business require analysis of the anticipated future cash flows of the business.
  - (d) The director of a building company has a personal responsibility to review the records. Whilst he can contract with accountants and employee bookkeepers, he needs to take responsibility and understand and deal with the financial aspect of the business himself. This is consistent with the approach in tax law.
  - (e) Good business management requires analysis of cash flow and capitalisation for the purposes of running the business, and not nearly as minimalist compliance for reporting for tax and QBCC requirements.
  - (f) It is good business practice for a director to review the cash flow and capital position of the business on a monthly basis (or more depending upon the size of the business).
  - (g) It is good business practice for a director to review the cash flow and capital position with the accountant half yearly (or more depending upon the size of the business).
  - (h) When making a substantial deduction from the business, whether by discretionary expenditure to acquire property, or the withdrawal for dividend, the director should review the cash flow and capital position of the company at that time. Depending on the size and nature of the transaction, it may be good business practice to involve the accountant at that time.
28. From involvement in recent hearings there are a number of points that I consider should be accepted as good business practice [hence these are merely my thoughts and not established points of law]:
- (a) The number of contracts that a building company undertakes at any one time affects the cash flow position. Therefore, a review of the financial position of the company should also include a review of the number and value of contracts that the business can undertake at one time. This is a consideration of good business practice and is separate and apart from minimalist compliance with the FRL in relation to turnover.
  - (b) The FRL requires compliance with a current ratio (i.e. a pinpointed position at a current time) and an NTA (i.e. a pinpointed asset position at a current time). It does not consider future cash flows. Therefore, compliance with the FRL does not provide an indication of good business practice.
  - (c) A director should be aware of the FRL and the affect of transactions upon compliance with it. The withdrawal of cash (i.e. a current asset) to acquire property (i.e. a non-current asset) will destabilise the current ratio. That is not merely a problem in relation to

FRL compliance, but also in respect of good business practice. The whole point about current asset and liabilities is the ability to be able to pay. Surely, you cannot possibly be reviewing the cash flow properly if you fail to consider the current assets versus liabilities.

- (d) Each company has its own dealings with the public, subcontractors and trade creditors. For that reason, if a builder decides to have different companies within a group, each company has its separate responsibilities to those members of the public and those creditors etc. Therefore, it does not seem sufficient for a director to concentrate on one company in a group to the detriment of another. If the director uses multiple companies to trade with the public and creditors then he should condescend to monitor each company.
- (e) The reasonable steps test relates to steps to avoid the circumstances that result in the Relevant Event. That means that the test is viewed from the perspective of that company, not merely from a group perspective. Financial information needs to be given for the relevant company, not merely the group.
- (f) As to what is reasonable, as the test is to be considered from the perspective of the applicant as director of the company, then what is reasonable surely must consider the interests of that company, rather than merely using the failed company as a pawn in group dealings.
- (g) If a company is going to enter into an agreement that will be significant to its operations into the future, such as entering a franchise, then there needs to be due diligence undertaken to assess the appropriateness of entering the agreement. The due diligence would include accountancy assessment, as well as legal review.
- (h) If a company is going to enter an arrangement with the predominant purpose of obtaining tax benefit, then it is possible to obtain a private tax ruling. If the arrangement is contentious, then it would seem a reasonable thing to do. If one is not obtained and accountancy advice is relied upon, any exclusions or warnings from the accountant (as there always will be) are important as to reasonableness.

## **PRODEDURAL ISSUES**

- 29. The five (5) year licence exclusion starts from the date of the Relevant Event. The date does not get postponed or varied by virtue of the duration of the review in QCAT. Therefore, if the decision process (including QCAT review) takes a number of years, that will mean that the licence is not cancelled until the QCAT matter is decided.
- 30. As a matter of principle therefore, to conform with the intention of the legislature, the Permitted Individual application needs to be resolved without delay. Undue delay has the prospect of frustrating the intention of the legislature.
- 31. In a Permitted Individual case, the decision maker has no evidence of any primary fact to give, only evidence of a consequential opinion which formed the decision made (which perhaps should not be evidence anyway). As a result, there is no reason for the decision maker to be excluded from the hearing room during hearing. In fact, the decision maker should be present during the hearing to see if any new evidence changes the decision.
- 32. As there is quite some lead time from start to Directions Hearings, it seems feasible for the Authority to file the Statement of Reasons and Statement of Evidence from the decision maker prior to the Directions Hearing. There seems no reason why an Applicant cannot also prepare and file their evidence prior to Directions Hearing, rather than do nothing and await direction to be given in 6 weeks time.
- 33. Is a Compulsory Conference useful in a Permitted Individual matter? I have come to the conclusion, against my initial inclination, that Compulsory Conference can be beneficial. In saying that, where the Applicant is represented by lawyers, commonly it is beneficial for the Applicant himself to talk. It is his affairs that are under scrutiny and he will be the best person to explain the detailed workings of the business.

34. At Compulsory Conferences, for any result to be made in favour of an Applicant adjusting the existing decision, there would need to be on record a good basis for the change. It relates to licencing and therefore needs to be capable of proper scrutiny. As a conference is on a without prejudice “closed door” basis, any Applicant should agree to sign written answers to questions (or to re-format their answers into a further statement). To facilitate this, a number of pertinent questions might be given to the Applicant at or prior to the Conference.
35. At Compulsory Conferences, it is not appropriate for the Authority to be required to attend “open for consideration” of the Applicant’s position and to be mindful of the possibility of changing the decision if the Applicant flatly turns up with the sole view that either the Application is accepted or it must proceed to hearing. That is, if the Authority must be open to consideration of the Applicant’s views, conversely, the Applicant should be open to the possibility of withdrawing the Application. Basically, both sides should approach the conference in an open manner.
36. Is a second conference likely to be useful in a Permitted Individual review? I respectfully submit it is not. If there is a difference of opinion as to what circumstances resulted in the Relevant Event, then further discussion might not assist. If the Applicant has further evidence to give, then that can be considered. It however does not assist such review to have a further conference about it.

## **SUMMARY**

37. The reasonable steps test is definitely a difficult test to satisfy. It requires assessment of the conduct of the business most commonly from a prudential management perspective.
38. There is only one District Court case on these sections. Therefore, there are a number of aspects that are not fixed by binding precedent.
39. Also, from the above it can be seen that there are a number of points that have arisen in recent cases where the answer to issues is contentious.
40. The best method of approaching the matter is by dealing with each of the 4 criteria in order. Once the matter is approach in that way, you have the best start in preparing a successful case for categorisation as a Permitted Individual.

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