

STAYS UNDER QCAT ACT

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Litigation Lawyers

1. Consideration of a stay of a decision under review is governed by section 22 of the *Queensland Civil and Administrative Tribunal Act 2003* ("the QCAT Act") which provides:

2. Section 22 of the Act provides (only relevant parts quoted):

22 Effect of review on reviewable decision

- (1) *The start of a proceeding for the review of a reviewable decision under this Act does not affect the operation of the decision or prevent the implementation of the decision.*
- (2) *...*
- (3) *The tribunal may, on application of a party or on its own initiative, make an order staying the operation of a reviewable decision if a proceeding for the review of the decision has started under this Act.*
- (4) *The tribunal may make an order under subsection (3) only if it considers the order is desirable after having regard to the following-*
 - (a) *the interests of any person whose interests may be affected by the making of the order or the order not being made;*
 - (b) *any submission made to the tribunal by the decision-maker for the reviewable decision;*
 - (c) *the public interest.*
- (5) *Subsection (4)(a) does not require the tribunal to give a person whose interests may be affected by the making of the order, or the order not being made, an opportunity to make submissions for the tribunal's consideration if it is satisfied it is not practicable because of the urgency of the case or for another reason.*
- (6) *In making an order under subsection (3), the tribunal-*
 - (a) *may require an undertaking, including an undertaking as to costs or damages, it considers appropriate; or*
 - (b) *may provide for the lifting of the order if stated conditions are met.*

3. The Honourable Thomas AM QC observed in the Appeal Tribunal in *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254 that the criteria mentioned in section 22(4) does not exclude the application of standard principles, procedures and tests to be applied for stays. The matters to be considered under those tests include prospects of success in the review proceedings, the effect of any stay upon them, and whether irremediable harm might be suffered by the Applicant if a stay is not granted (eg *Cook's Construction v Stork Food Systems (Aust) Pty Ltd* [2008] 2 Qd R 453).

4. It was also said in *King v Qld Law Society Incorporated* [2012] QCAT 489 that the tests will also include whether a stay is desirable and appropriate to secure the effectiveness of the review hearing, having regard to the interests of any persons who may be affected by it.

5. As is clear from the terms of section 22(4) of the QCAT Act, the Tribunal is required to form a positive view that the order is "desirable".

6. "Desirable" in the context of section 22 of the QCAT Act, connotes a positive aspiration and something worthy of achievement and requires that the public interest be weighed against the personal interest of the Applicant - see the reasoning of the Administrative Appeals Tribunal in *Re Griffiths Grif-Air Helicopters Pty Ltd v Civil Aviation Authority* [1993] AATA 274 at paragraphs [45] to [47] which was relied upon in *King v QLSI* cited above.

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7. As to the requirement of this Tribunal to have regard to “*the interests of any person whose interests may be affected by the making of the order or the order not being made*”, it is appropriate in identifying such interests and such persons for the Tribunal to consider the statutory and factual context in which the decision under review was made and the nature and effect of the decision.
8. Therefore, the nature of the decision under review and the purpose of the section pursuant to which it was made are relevant.
9. As an administrative review is for QCAT to consider the decision afresh by way of hearing de novo, except in an extreme case, it is not possible on a stay application to determine the correctness or otherwise of the original decision.
10. Whether or not a stay is desirable, is based upon the Tribunal's impression of what is desirable on an interim basis based upon the evidence adduced.
11. Having said the above, a case from the CCT which provides some useful guidance in the context of a licence cancellation is *Evans v QBSA* [2007] QCCTB 124 in which the Member Mr B Butler AM SC stated:

“18 The power to order a stay under s.103 is required to be exercised subject to the provisions of the QBSA Act.

19 In my view, it follows that the public interest in ensuring the maintenance of proper standards in the building industry and in a reasonable balance being achieved between the interests of contractors and consumers must also be taken into account in the exercise of the discretion to stay a decision.”

12. After discussion of the issues in dispute, he said further:

“35. It is unnecessary for me to resolve these factual issues on the interim application but I am persuaded there is a serious question for determination.

36. The plaintiff would undoubtedly suffer substantial hardship if no stay were granted. His livelihood is dependent upon his retention of his building inspector's licence. The continued viability of the building projects he is currently supervising may also be jeopardised should he not be able to continue.

37. Against the detriment to the applicant must be balanced the public interest in protecting builders and consumers. The Authority has argued that it is important the applicant not be able to offer his services to supervise building work if that may eventuate in breaches of the Act.

38. My task in striking the balance of convenience is significantly eased by the undertakings offered by the applicant. In brief, he has undertaken not to act as supervisor for other than two companies, ..., until the matter is finally determined. He is already the director of one company and expects to soon be appointed a director of the other.

39. In the course of the hearing I was also advised that the applicant would undertake not to further advertise his services as a licensee until the matter is finally determined.

40. I consider that granting a stay, conditional upon the performance of these undertakings, will protect the public interest while allowing the applicant to continue to pursue his occupation.”

13. Many Tribunal cases in relation to stays refer to the criteria for granting an interim injunction and therefore decide the stay based upon the prospects of succeeding in the review and the balance of convenience and prejudice.

14. In addition, the QBCC Act has as its objects:

3 Objects of Act

The objects of this Act are—

(a) to regulate the building industry—

(i) to ensure the maintenance of proper standards in the industry; and

(ii) to achieve a reasonable balance between the interests of building contractors and consumers; and

- (b) to provide remedies for defective building work; and*
- (c) to provide support, education and advice for those who undertake building work and consumers.*

15. In order to attain these objectives, the QBCC Act relevantly:
- (a) establishes a system of licensing of persons who wish to carry out building work;
 - (b) establishes criteria for the granting and holding of such licences, including financial criteria;
 - (c) established the respondent as the relevant body to administer the system of licensing, including conducting audits and investigations;
 - (d) gave the respondent power relevantly to suspend licences for non-compliance with an investigation or audit process.
16. Therefore the objects of the Act in relation to licensing clearly require a weighing up of the interest of the licensee, the various owners/developers with whom the licensee is dealing, the sub-contractors and trade suppliers as well as public generally.
17. As an administrative review by way of hearing de novo for QCAT to consider the decision afresh, except in an extreme case, it is not possible on a stay application to determine the correctness or otherwise of the original decision.
18. Whether or not a stay is desirable, is based upon the Tribunal's impression of what is desirable on an interim basis based upon the evidence adduced.
19. For example, in respect of a licensing decision, as a matter of concept, if the licensee is solvent, paying creditors and complying with his obligations under the financial requirements for licensing, then it is desirable on an interim basis that he continue to trade and a stay be granted.
20. However, if a licensee was insolvent, not paying creditors or trade suppliers, and not complying with his obligations under the financial requirements for licensing, then it would be desirable for their license to be suspended so as to protect sub-contractors, suppliers and the public.
21. In summary, it can be seen that the criteria for granting of a stay under the QCAT Act is slightly different from the criteria under the CCT Act. This should be borne in mind when applying for, or opposing, a stay.

Malcolm Robinson