

## Article Information

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## Civil Contractors and Developers: Get Ready for more QBCC Licensing Changes

### Harsh consequences follow when an unlicensed builder carries out building work in Queensland.

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Those consequences will impact a wider class from **24 July 2022** upon termination of an exemption that sometimes (potentially misleadingly) referred to as the **Head Contractor Exemption**. The Head Contractor Exemption is currently available if an unlicensed entity engages a licensed contractor to carry out particular 'building work'.<sup>[1]</sup>

Before the Head Contractor Exemption terminates, civil contractors, contractors licensed only for a specific class of work and property developers should revisit their licence status, and test whether they are correctly licensed with regard to the type of work they are carrying out ... or have merely agreed to carry out.

#### The Head Contractor Exemption

Section 42 of the *Queensland Building and Construction Act 1991* (Qld) ('**QBCC Act**') prohibits carrying out and /or agreeing to carry out building work in Queensland without the appropriate building licence. However, throughout the QBCC Act and its regulations, certain types of construction work are carved out of the definition of 'building work'. The QBCC Act also includes a shopping list of exemptions<sup>[2]</sup> from the requirement to hold a contractor's licence: the Head Contractor Exemption being one.

The Head Contractor Exemption applies to unlicensed superior contractors (including civil contractors, and property developers) **provided** they engage appropriately licensed contractors to carry out the relevant building work.

For example, the Head Contractor Exemption was relied upon by a civil contractor, Carruthers Contracting ('**Carruthers**'), when it constructed water and sewerage services (which do not require a QBCC licence) along with retaining walls and acoustic fences (for which a QBCC licence was required). Although Carruthers did not possess a QBCC licence of any kind, as Mr Carruthers expressed a specific intention to hire a licensed contractor to perform the retaining wall works and expressed a general intention to hire a licensed contract to perform the acoustic wall works, Carruthers was entitled to rely on the Head Contractor Exemption.<sup>[3]</sup>

This will not be the case after **24 July 2022**.

#### Who will be Impacted?

Removal of the Head Contractor Exemption will impact anyone who is not correctly licensed who constructs or agrees to construct 'building work'<sup>[4]</sup> in Queensland: including property developers and civil contractors who have been able to rely on the Head Contractor Exemption since it was introduced in 2013 (almost a decade ago).

Removal of the Head Contractor Exemption will impact contractors and subcontractors at all levels of the contractual chain.

For example, in a recent District Court decision<sup>[5]</sup>, a subcontractor who was not licensed to carry out fire rated sealant works engaged an appropriately licensed sub-subcontractor to carry out the work. The subcontractor was able to rely upon the Head Contractor Exemption when the head contractor sought to rely upon the licensing discrepancy to avoid paying the subcontractor.

The outcome will be very different for subcontractors in similar situations after the Head Contractor Exemption terminates.

### **What are those consequences?**

The consequences for building contractors who are not licensed or who do not hold the correct class of licence are severe. These same consequences apply to unlicensed civil contractors, property developers and others who (even if inadvertently) agree to carry out 'building work' for which a QBCC licence is required.

**Penalties exceeding \$200,000** may be imposed<sup>[6]</sup>. Also section 42(4) of QBCC Act limits the amount an unlicensed contractor can be paid for 'building work' to (essentially) recovery of reasonable costs for materials and labour supplied. In particular, an unlicensed contractor will not be entitled to any payment for:

- the supply of its own labour;
- profit; or
- unreasonably incurred costs relating to either materials or labour.

Further, an unlicensed (or wrongly licensed) contractor will be unable to successfully pursue an adjudication under the *Building Industry Fairness Act* in respect of any disputed payment claims<sup>[7]</sup>.

### **When will I need a building licence?**

This can be a complex question to answer. Civil contractors, in particular, have inadvertently fallen foul of the QBCC's licensing regime many times. One of many examples of the challenges faced is found in a 2020 decision of the Supreme Court of Queensland<sup>[8]</sup>. There, Civil Contractors (Aust) Pty Ltd T/A CCA Winslow ('**Winslow**') held a Structural Landscaping Licence and was engaged by Galaxy Developments Pty Ltd ('**Galaxy**') to carry out civil works associated with a land subdivision in Coomera, Queensland. The civil works included construction of a road and bus stop and installation of a bus shelter seat and bike rack.

Payment disputes arose between Winslow and Galaxy, and Winslow obtained an adjudication decision in its favour for about \$1.3M. Ultimately, Winslow could not enforce the adjudication decision because the adjudicator delivered it late.

However, at first instance Dalton J found that Winslow also was not entitled to enforce the adjudication decision because Winslow's Structural Landscaping Licence did not permit it to install bus shelter seats or bike racks.

While the Queensland Court of Appeal<sup>[9]</sup> ultimately found that the particular bus shelter and bike rack were inherent parts of the 'road' that Winslow had constructed, and therefore not 'building work' for which a licence was required, this case illustrates:

- the complexity around decisions as to whether any building licence is required;
- the complexity around decisions as to which class of licence might be required; and
- the potentially harsh consequences if an incorrect licensing decision is made.

### **What should Developers, Civil Contractors and Building Contractors do?**

Review your contracts, especially the scope of works you have agreed to carry out.

Have you agreed to carry out any 'building work' for which you are not correctly licenced?

If so, will that work be completed before 24 July 2022?

If you hold a QBCC Licence, review it. Is it for the correct class of building work?

Do you need to apply for a QBCC licence, or a different licence? If so, can you satisfy the QBCC's requirements, including the QBCC's 'Minimum Financial Requirements'?

Piper Alderman's Project & Construction Team has recognised expertise liaising with QBCC to support clients through both QBCC licence applications and QBCC licence reviews.

*This article has been written for general educational purposes only, and is not to be taken as legal advice.*

[1] See s8 of Schedule 1A to the *QBCC Act* and s125A of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (Qld).

[2] see schedule 1A to the *QBCC Act*

[3] *The Trustee For Hardev Property (Dev 10) Unit Trust v Palmgrove Holdings Pty Ltd (T/as Carruthers Contracting) & others* [2019] QSC 208, [45-6].

[4] As defined by the *QBCC Act*

[5] *Panel Concepts Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2021] QDC 322.

[6] The penalty for a corporation is up to \$172,312.50 for its first offence \$206,775.00 for its second offence and, \$241,237.50 for its third offence (see *Penalties and Sentences Regulation 3*, s181B of *Penalties and Sentences Act 1992* and s42(1) of *QBCC Act*)

[7] See, by way of example, see *Cant Contracting Pty Ltd v Cassella* [2006] QCA 538

[8] *Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow* [2020] QSC 51

[9] *Civil Contractors (Aust) Pty Ltd t/a CCA Winslow v Galaxy Developments Pty Ltd* [2021] QCA 010, [60], [94] citing Item 15 of Schedule 1 of the *Queensland Building and Construction Commission Regulation 2018* (Qld).