

25 August 2021

Our ref: [IG: C&I/P&D]

Confidential

Strategic Policy (QBCC) team
Department of Energy and Public Works
Level 7, 63 George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Strategic Policy (QBCC) team

Head contractor licensing exemption

Thank you for the opportunity to provide feedback on the head contractor licensing exemption under the *Queensland Building and Construction Commission Act 1991 (QBCC Act)*. The Queensland Law Society (QLS) appreciates being consulted on this important issue.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Executive Summary/Key Points:

- Deleting section 8 of Schedule 1A would impose licensing requirements on developers and landlords. In our view, the head contractor exemption in section 8 of Schedule 1A of the QBCC Act and the role of developers should be considered holistically as part of the review under section 115D of the QBCC Act. QLS considers that the exemption should remain in place until that review has been conducted and its findings considered.
- In the interim, there are a number of measures that can be implemented to address industry concerns, including:
 - Clarifying that unlicensed head contractors must wholly contract the building work to a single, appropriately licensed builder;
 - Amending section 42(3) of the QBCC Act so that the prohibition on recovering the contract price applies only to the work carried out unlicensed, as opposed to the whole contract; and
 - Amending the existing exclusions in Schedule 1 of the QBCC Regulation to ensure the exclusions appropriately cover 'civil work'.

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This response has been compiled with the assistance of the QLS Construction & Infrastructure Law Committee and the Property & Development Law Committee, whose members have substantial expertise in this area. In drafting this submission, we have received and considered input from legal practitioners who work with developers, builders and consumers. We have also had the benefit of reviewing a draft submission by Tracey Wood.

At the outset, we note the short consultation period in which to respond to this policy paper. Given the complex nature of exemption and its role, we consider the timeframe for consultation has not allowed for a comprehensive consideration of all the relevant issues. We have endeavoured to identify at a high level some of the key issues, but as outlined below, a full exploration of the exemption and its role, particularly in its applications to developers, is still required.

At the outset, QLS acknowledges the importance of regulation and licensing in the building industry to ensure that building work is carried out in accordance with relevant laws and regulation. We recognise the important role of licensing in providing consumers and subcontractors with safeguards and remedies.

On the one hand, we are aware of some industry concerns that the head contractor licensing exemption may be misused in a way that undermines the protections implemented by the *Building Industry Fairness (Security of Payment) Act 2017*. On the other hand, the removal of the exemption may disadvantage small and private landlords and developers and work to deter development in Queensland. As the consultation paper does not clearly articulate the concerns which are expected to be addressed by removing the exemption, it is difficult to provide a detailed response. Stakeholders need to understand the policy underpinning the removal in the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (noting the provision is yet to commence).

Ultimately, it is our view that there needs to be a review of the role of the exemption in the industry, particularly in regard to its impact on developers, before changes are made. The Minister's review of the role of developers under section 115D of the QBCC Act will be critical in identifying the viability and practical implications of a licensing scheme for those developers who currently rely on the head contractor exemption. The review should identify the circumstances in which the exemption is used by developers, the form any licensing of developers should take, and any potentially adverse impacts that a licensing scheme for developers will have on development in Queensland. We submit that until these issues are understood, Government will not be in an appropriately informed position to make a decision about repealing or substantially amending the exemption.

The issues of concern seem to relate both to ensuring the payment of subcontractors and also to ensuring consumers have recourse to rectify defective work. The review will also need to consider whether repealing the exemption would in fact address these concerns or whether a different regulatory framework is better suited to addressing these concerns.

Accordingly, QLS considers that the head contractor exemption in section 8 of Schedule 1A of the QBCC Act should remain in place until the review of developers under section 115D has been concluded and its recommendations given due consideration.

In the interim, we have suggested some amendments to the QBCC Act that may be implemented to address some industry concerns, although given the short timeframe for this

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response, further detailed consideration of the practical implications of these suggestions is required. Taking into account this position, our response to the discussion questions is as follows:

1. Can you provide examples of where the head contractor licensing exemption has been misused and what are the impacts?

QLS does not have data on the nature or prevalence of any misuse of the exemption.

Before repealing the exemption, we consider that the Department requires more information about the nature and prevalence of misuse of the exemption, if any, which might be informed by the review under section 115D.

Anecdotally, we understand that there may be opportunities for misusing the exemption where people who undertake the business of builders (for example, coordinating building works) avoid the licensing requirements by subcontracting directly with numerous licensed tradespeople.

Further, some of our members have raised concerns about circumstances where a landholder creates a corporate entity (a special purpose vehicle or 'SPV') for the duration of a project, and this entity contracts with a builder licensee for a development project. The new SPV may have limited assets, significant debt to construct the development, and be wound up soon after the end of the project. In relying on the exemption, the unlicensed SPV is not subject to the minimum financial requirements or other obligations imposed on a licensee. In these circumstances, it can be difficult for subcontractors to seek remedies where there are payment disputes.

However, we note that the use of a corporate structure with defined and limited liability is a fundamental feature of business in Australia. Any changes to how that might operate in a particular industry needs to be carefully considered.

QLS appreciates that it's important to review the role of landholders/developers and the extent to which they may contribute to defective building work by giving directions under contracts. However, in our view, whether and how landholders who are contracting with licensed builders should be regulated needs further consideration, including consideration of what type of licensing would be appropriate. Without pre-empting the findings of the review under section 115D, we have doubts about the practicality of applying the same, existing licensing regime that applies to builders to landholders.

2. How would the repeal of the head contractor licensing exemption affect existing business models, including cost impacts?

Our committee members have provided the following feedback about arrangements that might be affected by removal of the exemption:

Document type	Nature of agreement
Off the plan apartment sale contract	Land owner (seller) agrees to procure a licensed contractor to undertake construction of an apartment complex and transfer title in an apartment to a purchaser on completion

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Off the plan land sale contract	Land owner (seller) agrees to procure one or more licensed contractors to carry out civil works necessary to create individual lots and transfer title in a lot to a purchaser on completion
Development Agreement (provision of infrastructure for a community purpose or to ensure State government land is developed and utilised as intended)	<p>Party agrees to procure one or more licensed contractors to carry out a development (could include infrastructure, housing estate, apartment complex, etc) on the land owner's land.</p> <p>Ultimate intention is that, on completion; the land is transferred or leased under a long term lease to the developer (typically this model is used for the provision of infrastructure on State government land as a means of ensuring the land is developed and utilised for the intended community purpose).</p>
Development Agreement (development of land owned by private landowner)	As above but party also agrees to procure sales and retains proceeds above an agreed price for the "land component" which is paid to the land owner. Land owner signs sale contracts at the direction of the "developer" (see 2)
Fund Through Agreement	Party agrees to procure one or more licensed contractors to carry out a development on the land owner's land – construction costs paid by the land owner progressively by way of progress payments. Ultimate intention is that the land owner will retain the completed asset.
Agreement for Lease (general)	Land owner agrees to procure one or more licensed contractors to construct a commercial building or shopping centre including the leased premises and to grant a lease to the tenant on completion
Agreement for Lease (lessor constructed fitout)	Land owner agrees to procure one or more licensed contractors to undertake some or all of the fitout works for a tenant

The repeal of the head contractor licensing exemption will reintroduce uncertainty in how section 42 of the QBCC Act is to be interpreted and applied, particularly with regard to the above arrangements. Given the expansive definition of 'carry out building work' in the QBCC Act (including *directly or indirectly, cause building work to be carried out*) these types of agreements will likely be caught by the licensing requirements under the Act.

This may create uncertainty for, in particular, landlords and developers and, in turn, financiers. However, if the decision is made to remove the section 8 exemption, section 6 of Schedule 1A of the Act could be amended to make it clear how that exemption applies to these arrangements.

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Landlords

While there are large, institutional landlords who may have employees with the necessary experience and qualifications to enable the company to obtain a licence, there would be many landlords who would not be eligible for a licence.

Landlords often agree to undertake tenant fitout works because it is more expedient (including from a cost and safety perspective) for the contractor who is building the premises to do the fitout. It is also sometimes more appropriate for the landlord's contractor to do the work where alterations to the landlord's infrastructure are involved.

Developers

The level of experience and expertise of developers, and the amount of influence they have on the actual conduct of the building work, varies significantly across the industry.

In many circumstances, a developer will simply be a landowner who obtains funding and takes on project risk and engages a professional builder to undertake building work. If the exemption is removed, such a landowner will need a licence. However, a person who engages a licensed builder to carry out a relatively small residential apartment building on a one-off basis will be unlikely to qualify for a building licence. The removal of the exemption may consequently exclude small and private developers from carrying out property developments.

Those developers who rely on SPVs with limited (or no) assets other than the development site may also face difficulties meeting the criteria for a building licence, for example due to the minimum financial requirements. Licensing requirements that limit developers' capacity to rely on SPVs may deter developers from undertaking development in Queensland.

We also note that the requirement for each SPV to obtain a licence is impractical. If it is determined that property developers should be licensed, consideration should be given to developing a process whereby parent companies can obtain a licence that may be utilised by all group members.

As noted earlier, we have doubts about the practicality of applying the same regulation which applies to builders to landholders and developers.

Civil works

'Civil work' commonly refers to, for example, subdivisions, roadworks, bus shelters, footpath work, certain earth moving and excavation. A number of exclusions from the definition of 'building work' already exist for civil work in Schedule 1 of the QBCC Regulation. However, recent court decisions have highlighted the complexity of licensing for civil works, and the interpretation and application of these exclusions.¹ Some adjustments/updates to these exclusions need to be made to address the issues that

¹ See e.g. *Galaxy Developments Pty Ltd v Civil Constructors (Aust) Pty Ltd t/a CCA Winslow* [2020] QSC 51, which involved relocation of a bus shelter shed, installation of a bike rack and the removal and refixing of a small seat at a bus stop. In that case it was found that the bike rack and bus stop seat did not fall within the relevant exclusions under Schedule 1 to the QBCC Regulation. Consequently, the respondent, CCA Winslow, did not hold the appropriate licence and was barred from recovering payment for any work under the contract. At [109], the Court noted that the provisions and schedules in the QBCC Regulations produced a result which was 'absurd in reality'.

have recently come before the courts which show inconsistencies in the wording used in the QBCC Regulation. Whilst not specifically an issue created by the head contractor exemption, it is a matter that often arises in circumstances where the head contractor exemption is relied upon and should be addressed as part of this review.

Removing the head contractor exemption will have repercussions for contracts predominantly for civil works, particularly those that do not fall within the current exclusions in the QBCC Regulation.

- 3. Would it be appropriate to retain the head contractor licensing exemption for particular types of work or contracts? For example, contracts where only a certain percentage of the work:**
- a. Is building work; or**
 - b. Is to be subcontracted to other licensed tradespersons i.e. with the head contractor to carry out the remainder of the work.**

- 4. Are there types of work that should not be subject to the head contractor licensing exemption and why?**

In relation to questions 3 and 4, it is QLS' view that the head contractor licensing exemption should be retained until the review of the role of developers is examined by the Minister in the review under section 115D of the QBCC Act.

We consider that the role of developers and the operation of the exemption are issues which are indivisible and should be considered holistically. Without the findings of the review in relation to developers, it is our view that the Government does not have the information required to make an informed decision about whether the exemption should be repealed in its entirety, retained in part or retained in full.

- 5. Are there alternative measures that could address the potential misuse of the head contractor licensing exemption? For example, putting beyond doubt that an unlicensed person is liable for defective building work?**

While we consider that the exemption should be retained until the conclusion of the review of developers, interim measures can be implemented to address some current industry concerns that are related to the head contractor exemption.

Such measures include:

- Amending section 42(3) of the QBCC Act. Currently, section 42(3) prevents payment under a contract that involves unlicensed contracting, even where the unlicensed contracting may form a small proportion of the overall contract.² Section 42(3) should be amended so that the prohibition on recovering the contract price applies only to the specific work carried out unlicensed, rather than to the whole contract.
- Amending the exemption in section 8 of Schedule 1A of the QBCC Act to make it clear that the unlicensed head contractor must subcontract the whole of the project to an appropriately licensed builder. This will avoid situations where unlicensed principals are managing multiple subcontractors by ensuring that

² See e.g. the outcome in *Galaxy Developments Pty Ltd v Civil Constructors (Aust) Pty Ltd t/a CCA Winslow* [2020] QSC 51.

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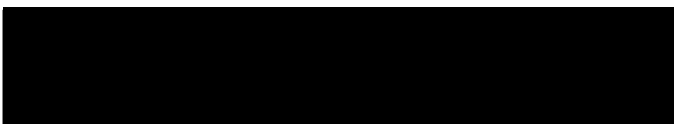
there is a single builder licensed to do all of the work under the head contract and they are responsible for managing subcontractors. However, there is some concern that taking this approach will have unintended and potentially unworkable consequences. There may be situations where it would be appropriate for a head contractor to separately contract discrete works to separate licensed builders (for example, where remediation works are required prior to commencing building work). Any amendment would need to be carefully considered to ensure that it is practical and workable.

- Amending the exemption in section 8 of Schedule 1A of the QBCC Act to make it clear that the exemption does not permit an unlicensed person to provide or carry out building work services for another person.
- Adjusting the exclusions listed in Schedule 1 of the QBCC Regulation to clarify the type of civil work that was intended to be excluded from the definition of 'building work' but where the wording used in the Regulation may not apply as intended to present day terminology. This will address disparities between similar provisions identified by recent court decisions e.g. structures on or associated with bikeways and footpaths, and structures associated with water and sewerage reticulation systems.

We note that if the head contractor exemption is amended or repealed, adequate transitional provisions should be implemented so that existing arrangements are not impacted.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

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Elizabeth Shearer
President