

30 July 2021

Our ref: IG: C&I

Brett Bassett
Commissioner
Queensland Building and Construction Commission
GPO Box 5099
Brisbane QLD 4001

By email: commissioner@qbcc.qld.gov.au

Dear Commissioner

Accelerated Builder/Consumer Dispute Service

We write in regard to the Accelerated Builder/Consumer Dispute (ABCD) mediation service, which commenced on 1 July 2021.

QLS welcomes the introduction of the service as a temporary means to efficiently and cost-effectively resolve contract disputes in the residential building sector. QLS acknowledges the Australia-wide shortage of building materials and skilled trades caused by the combination of the COVID-19 pandemic's effects on global supply chains and the boom in construction activity. The construction industry plays a critical role in Queensland's economic recovery, and QLS supports measures designed to reach reasonable resolutions to contract disputes that take into account the genuine shortages of skilled trades and building materials due to the unprecedented changes over the last 18 months.

We consider, however, that it is important to highlight to builders and homeowners that the ABCD service ought to be entered into after careful consideration of the relevant issue/s and how to get the best from the service. We hold concerns that use of the service by uninformed parties may exacerbate the issues experienced by those parties. Our concerns include:

- In the course of the mediation, parties may get further apart and then take some preemptive action which they either may not have otherwise taken or which they are not entitled to take under the contract.
- If a party doesn't fully understand its legal obligations, it will not understand the relative weight of its position and therefore cannot properly identify a strategy in which to negotiate.
- If a compromise is reached, it will need to be appropriately documented in the framework of the contract the parties have already entered into, either in the form of a Deed of

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Variation or by some other means. This is not easily done by an unrepresented party and mediators may be unwilling or unable to draft such an amendment.

- Parties may not protect themselves legally or under their contracts in the mistaken belief that the ABCD service will overcome the issues they face and, accordingly, if negotiations fall over they will be exposed.
- In order to access the ABCD service, the QBCC Framework Policy requires the licensee to have requested an extension of time in relation to the Eligible Domestic Building Contract, which has not been agreed to by the property owner. We note that it is an offence under the *Queensland Building and Construction Commission Act 1991* section 42(2) of schedule 1B to seek to rely on an extension of time claim under the contract, unless permitted to do so by section 42. Breach of this provision carries a maximum penalty of 20 penalty units.

Many of the delays experienced widely across the industry would not entitle the contractor to an extension of time under section 42. For example, delays frequently arise in cases where the risk was reasonably foreseeable or the extension of time claim was not submitted within 10 business days of the contractor becoming aware of the cause and extent of the delay or when the contractor ought reasonably to have become aware.¹ Consequently, many industry disputes may fall outside the remit of the ABCD Service. These rights and the contractual allocations of risk must be understood before parties engage in the ABCD Service, to avoid inadvertent breaches of schedule 1B.

We note that the ABCD service, in acting as mediator, will be unable to provide parties with legal advice as to the suitability of negotiations.

Given this, we consider that it will be important that parties are advised of these points, and given the opportunity to seek legal advice before, during and after engaging in the ABCD service. At the end of mediation, an agreement should be reached on the timeline for next steps, including, for example, a reasonable time frame to engage a legal advisor to prepare an appropriate Deed of Variation.

We consider that the this information, together with information about the process itself, should be collated in the form of information sheets given to parties upon making enquiries about the service, and also to the mediators involved. The information sheets should outline the prerequisites for using the ABCD service, including the requirement to request an extension of time as permitted by section 42 of schedule 1B, and a warning that relying on an extension of time in circumstances not permitted by section 42 may carry a penalty. The mediators could then ensure that the parties had received these information sheets at the commencement of this mediation.

In addition to putting information about the requirements for using the ABCD service in the information notice, QLS recommends that QBCC consider raising awareness about the requirements under the Framework Policy more generally, to ensure that parties to Eligible Domestic Building Contracts better understand the allocation of risk in the contract, and the circumstances in which a request for an extension is permitted under section 42.

¹ *Queensland Building and Construction Commission Act 1991* sch 1B, s 42(1)(a)(i), (c).

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QLS would be pleased to consult on the development of this information and on further particulars of the service.

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



Elizabeth Shearer
President