QBCC Exclusions

When is a company a "construction company"?

Background

The Queensland Building and Construction Commission (**QBCC**) must not grant a licence if a person is an excluded individual for a relevant event. An individual becomes excluded if they are a director, secretary or influential person for a construction company, within one year immediately before a 'relevant company event'.

In 2014 and 2015 the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) was amended to, *inter alia*:

- reduce the exclusion period from 5 years to 3 years;
- remove the ability of an 'excluded individual' to apply to be categorised as a 'permitted individual';
- limit the application of section 56AC to a 'construction company'; and
- deem a series of relevant (insolvency) events to be one relevant event if they all flowed from the one set of circumstances.

Under the amended section 56AC of the QBCC Act, a 'construction company' is a 'company that directly or indirectly carries out building work or building work services'. This definition does not provide the time frame in which a company must have concluded operating as a 'construction company' prior to the insolvency event.

The amendment to alter the definition from 'company' to 'construction company' was made to prevent a person from becoming excluded if the insolvency event occurred in a company unrelated to the construction industry, such as being a director of a hairdressing business.[1]

Olin v QBCC

A recent QCAT decision has, for the first time, considered the definition of a 'construction company' as defined in section 56AC of the QBCC Act. The proceeding involved a review of a decision of the QBCC to categorise a licensee, Mr Peter Olin, as an excluded individual.

Mr Olin was a director, secretary, or 'influential person' of the company Brisbane Joint Sealing Pty Ltd (BJS) at the time liquidators were appointed in December 2016. The last work that could be characterised as 'building work' was performed by BJS on 8 April 2016, some eight months before liquidation. Between April 2016 and November 2016, when Mr Olin cancelled the company's licence, the only other work BJS carried out was the sale of assets and payment of administrative expenses.[2] Mr Olin submitted that the use of the term 'carries out building work' in defining a 'construction company' under section 56AC of the QBCC Act required the company to be actively engaged in building work at the time of the relevant event for it to be considered to be a 'construction company'.[3]

QCAT found that, with reference to the object of the QBCC Act to regulate the building industry,[4] a wider interpretation of the term 'carries out' to extend to the past tense of 'carried out' would better promote the purpose of the QBCC Act and be more consistent with the overall objective.[5]

QCAT also found that as section 56AC of the QBCC Act is a provision formed with the purpose to protect the interests

[1] Queensland Building and Construction Commission and Other Legislation Amendment Act 2014 (QLD), 9.
[2] Olin v Queensland Building and Construction Commission [2017] QCAT 319, [7].
[12].
[15].
[16].

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of consumers, suppliers, and the integrity of the industry, it is reasonable to assume the terms of section 56AC should be given the widest possible scope.[6] Further, as the provision falls within Part 3A which was designed to prevent a resurgence of insolvent companies through a 'phoenix' company, the amendment to replace the term 'company' with 'construction company' suggests the emphasis is on the nature of the company's activities.[7]

As BJS were only ever engaged in construction activities and continued to hold its licence until one month before the liquidator was appointed,[8] QCAT was satisfied that due to the substantial character and focus of its activities[9], BJS remained a construction company and confirmed the decision of the QBCC to exclude Mr Olin. This was despite the conclusion of the company's construction and building related works several months before liquidation.

Lessons to take from *Olin*

If this case is to be followed, it may be difficult to determine at what point a company ceases being a construction company, having far-reaching implications for directors, secretaries or other influential people of construction companies who are wanting to avoid exclusion by the QBCC.

However, the above case is limited to its specific facts and background. Depending on other activities the company may be engaged in (and any other relevant facts such as your previous involvement with other companies and financial positions), it may be possible to avoid being characterised as an 'excluded individual'.

Building Industry Fairness (Security of Payment) 2017

The introduction of the new Building Industry Fairness (Security of Payment) Act 2017 has amended section 56AC of the QBCC Act. The amended section now states that:

- A person will now be considered an 'excluded individual' if they were, within <u>two years</u> immediately before a relevant event, a director, secretary, or influential person in a construction company. The previous time frame was one year.
- The definition of a construction company will be extended to include a company that directly or indirectly carries out building work or building work services Australia wide instead of only within Queensland.

While this amendment now operates in Queenland and has clarified some of the uncertainty in the previous version of section, it is important to note that these changes do not operate retrospectively. As such, Olin will remain a decision that continues to have some relevance in determining whether the company is or was a 'construction company'.

If you have any concerns about a potential exclusion and your company's activities, please contact Kirsty Stewart of our office to discuss how we may assist you.

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