

## ***A company that only carries out building work in another State or Territory will fall within the definition of “construction company”***

**Confirmed – a company that only carries out building work in another State or Territory will fall within the definition of “construction company” under section 56AC of the QBCC Act - *Midson Construction (Qld) Pty Ltd & Ors v QBCC & Ors***

The recent Supreme Court of Queensland decision of His Honour, Crow J, in [Midson Construction \(Qld\) Pty Ltd & Ors v Queensland Building and Construction Commission & Ors \[2018\] QSC 199](#) considers, inter alia, whether a company that only carried out building work in New South Wales (and not in Queensland) was a “construction company” under section 56AC of the *Queensland Building and Construction Commission Act 1991 (Qld) (QBCC Act)*.

### **Background**

Midson Construction (NSW) Pty Ltd (**Midson NSW**) was placed into liquidation on 3 January 2018. Whilst Midson NSW had never carried out building work in Queensland, its director was also a director of a licensed Queensland company, Midson Construction (Qld) Pty Ltd (**Midson QLD**).

As a result of the liquidation of Midson NSW, the Queensland Building Construction Commission (**QBCC**) notified Midson QLD and its director that it proposed to cancel their QBCC licenses pursuant to sections 56AF and 56AG of the QBCC Act.

In April 2018, Midson QLD and its director filed an application in the Supreme Court of Queensland seeking injunctive relief and a judicial review of the QBCC decisions proposing to cancel their licenses. QBCC filed a counter application seeking to dismiss the application.

The three issues considered by the Court were<sup>1</sup>:

1. Is section 56AC of QBCC Act constitutionally valid?
2. Was Midson NSW a “construction company” as defined in section 56AC of the QBCC Act?
3. Whether the delegation of the QBCC officer was ineffective.

### **What does section 56AC of the QBCC Act say?**

Pursuant to [Section 56AC](#) of the QBCC Act, an individual may be excluded from holding a QBCC licence for 3 years if:

1. the individual takes advantage of the laws of bankruptcy or becomes bankrupt; or
2. within 2 years of a construction company being placed into receivership, administration or liquidation or wound up, the individual was a director, secretary, or influential person for that construction company.

A company may be categorised as an “excluded company” if its director, secretary or an influential person is considered to be an excluded individual<sup>2</sup>.

<sup>1</sup> *Midson Construction (Qld) Pty Ltd & Ors v Queensland Building and Construction Commission & Ors* [2018] QSC 199 at [6]

<sup>2</sup> Section 56AC(6) of the QBCC Act.

Relevantly, section 56AC(7) of the QBCC Act defines a “construction company” as:

“*construction company*” –

- (a) means a company that directly or indirectly carries out building work or building work services in this or another State; and
- (b) includes a company that, within 2 years immediately before a relevant company event for the company, directly or indirectly carries out building work or building work services in this or another State.

## Was Midson NSW a “construction company”?

Midson QLD and its director, essentially, submitted that the definition of “construction company” under section 56AC(7) is limited to a company that carries out activities in respect to building(s) constructed on land within the State of Queensland.<sup>3</sup>

The Court did not accept Midson QLD’s argument. Referring to [section 9\(1\)](#) of the *Acts Interpretation Act 1954* (Qld) and sections 8 and 51 of the Constitution of Queensland 2001 (Qld), the Court held that the QBCC Act is to be interpreted as operating to the full extent of, but not exceeding, Queensland Parliament’s legislative power.<sup>4</sup>

His Honour Crow J stated that, when interpreting the QBCC act as a whole (including section 3 “Objects of the Act” and Part 3A – Excluded Individuals and Excluded Companies):

*The legislation is remedial and is for the purposes of protection of consumers of building work and building work services. It would seem plain that in order to fulfil its purpose in protecting consumers of building work or building work services in Queensland, Parliament considered it important to protect Queensland consumers from interstate individuals who go bankrupt, and interstate companies which are placed in liquidation.*<sup>5</sup>

The Court determined that the words in section 56AC(7) “...in this or another State” must be given their plain and ordinary meaning and, therefore, Midson NSW was a “construction company” for the purposes of that section.

## Is section 56AC of the QBCC Act constitutionally valid?

Midson QLD submitted that if Midson NSW was considered to be a construction company under the QBCC Act, the question that arises is whether or not the section purports to regulate the conduct in another State, which would be constitutionally invalid.<sup>6</sup>

The Court noted that the QBCC Act does not purport to regulate the conduct of building work or anything else in any other State but, rather, seeks to protect Queensland consumers by allowing a mechanism for a building licence to be cancelled in Queensland if there is sufficient connection to financial instability of an associated entity in another State.

His Honour Crow J further noted that the QBCC requires licensees to be fit and proper persons, which may be judged, amongst other things, by reference to the financial stability of the licensee. At [43] His Honour stated:

*It cannot be said when financial stability of a licensee is an important matter in determining whether a licence ought to be granted, that a measure of financial instability by admission to bankruptcy or by a company being placed into liquidation or provisional liquidation in another State, is an insufficient or an unreal connection between the subject matter of the legislation and the State of Queensland.*

<sup>3</sup> Ibid at [8].

<sup>4</sup> Ibid at [10] to [16].

<sup>5</sup> Ibid at [33].

<sup>6</sup> Ibid at [35].

<sup>7</sup> Ibid at [36].

The Court, therefore, found that section 56AC of the QBCC Act is constitutionally valid. <sup>8</sup>

### **The delegation issue**

Lastly, Midson QLD argued that the QBCC Licence Entitlement Officer did not have the proper delegation and was not appropriately qualified to issue the Notices under sections 56AF and 56AG of the QBCC Act.

His Honour Crow J held that the delegation may be made to a range of appropriately qualified employees of the QBCC and that the delegation was explicitly set out in the QBCC delegation manual.

The Court, in consideration of the Licence Entitlement Officer's employment history and experience, determined that the Licence Entitlement Office held the relevant qualifications and was an appropriately qualified officer to issue the Notices under the QBCC Act. <sup>9</sup>

Midson QLD's application to the Supreme Court was dismissed.

If you have any concerns as to whether you or your company could be considered to be an "excluded individual" or an "excluded company" under the QBCC Act, contact Construct Law Group on (07) 3139 1874 or at [info@constructlaw.com.au](mailto:info@constructlaw.com.au).