

10 March 2023

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Ms Angela Masson
A/CEO and Commissioner
Queensland Building & Construction Commission
299 Montague Road
West End Qld 4101

VIA EMAIL: angela.masson@qbcc.qld.gov.au

Dear Angela,

USE OF QBCC LICENSING POWERS

As discussed at our meeting of 27 February 2023, we are concerned that the QBCC may be improperly imposing conditions on licences by relying on an incorrect head of power in the QBCC Act.

In 2022 the Queensland Parliament amended section 74B (*Proper grounds for taking disciplinary action against a licensee and former licensees*) of the QBCC Act. One of the effects of the amendment was to give QBCC an express legislative pathway to investigate and take disciplinary action against a licensee who contravenes an offence provision under the QBCC Act. Disciplinary actions available under the amendment included imposing conditions on a licence.

Master Builders is aware that, since January 2023, 115 of our members have had conditions imposed on their licences for allegedly contravening offence provisions under the QBCC Act, namely provisions in the QBCC (MFR) Regulation. These conditions operated, amongst other things, to prevent the member from taking on new work (which is particularly damaging to a contractor's business).

These conditions were imposed pursuant to section 36 of the QBCC Act, which provides a condition may be imposed on a licence subsequent to issue if:

- The QBCC has reason to believe that a licensee may have insufficient financial resources to meet possible liabilities in relation to building work; or
- There is some other proper ground for imposing a condition on the licence.

To impose a condition the QBCC must also be satisfied the condition is appropriate.

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In relation to the first possible ground, Master Builders has two main concerns:

- (a) it is inappropriate in our view to impose a condition of no new work based on an assumption of guilt for an offence which has not been proven by any investigative or procedural steps provided for in the legislation; and
- (b) it is questionable whether failure of a licensee (particularly small businesses) to lodge annual reporting by the due date, alone, is sufficient to enable the QBCC to reasonably believe the licensee may have insufficient financial resources to meet possible liabilities in relation to building work.

In relation to the second option of ‘some other proper ground’, this is a general condition-making power. We question whether it is ‘proper’ to impose a licence condition, based on what is essentially an ‘administrative deeming of guilt’ for an offence, based on failure to respond to a notice rather than proof of the offence.

We believe if the QBCC wishes to impose licence conditions of this nature, the disciplinary process provided for in section 74B, that is designed and intended for this purpose, should be used (noting section 74B was amended in 2022 to include contraventions of offence provisions in the QBCC Act).

The approach taken by the QBCC to impose the licence conditions under section 36 has denied licensees the investigative and procedural safeguards that would ordinarily be available to them if the conditions had been imposed through a disciplinary action as envisaged by the recent amendments to the QBCC Act.

There is well-established case law supporting the view QBCC should be using its express disciplinary action powers to impose a condition on a licence for a contravention of an offence, rather than its general condition-making power in section 36.

For example, in *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672; [1979] HCA 26, Mason J said:

“It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power.”

Similarly, in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, Gavan Duffy CJ and Dixon J said:

“When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.”

We are recommending that the QBCC review its procedures and use the disciplinary action provisions available to them to pursue conditions, rather than imposing conditions on licences. If the QBCC does not believe our concerns are legitimate, we are keen to hear why.

Yours sincerely,

A handwritten signature in black ink that reads "Paul Bidwell". The script is cursive and fluid, with the first name "Paul" and last name "Bidwell" clearly distinguishable.

Paul Bidwell
CEO