

Ministerial Construction Council submission in support of S8, Schedule 1A repeal of the Head Contractor licensing exemption

Q1. A) CAN YOU PROVIDE EXAMPLES OF WHERE THE HEAD CONTRACTOR LICENSING EXEMPTION HAS BEEN MISUSED?

QBCC licensees are using this exemption taking on contracts outside their licence scope and then negotiating to be the trade contractor or sub-contractor in the on-going arrangement.

There is a recent incident of a National Disability Insurance Scheme (NDIS) provider & QBCC Builder Low Rise (BLR) licensee using the exemption to take on a project in a residential high rise building outside the BLR scope. The project had payment issues and complaints were made to QBCC.

Q1. B) WHAT ARE THE IMPACTS?

Head contractor not subject to meet the Minimum Financial Requirement legislation

The Minimum Financial Requirements (MFR) Regulation was introduced on 1 January 2019 to help ensure every licensed contractor in Queensland has a strong and financially sustainable business with an appropriate level of working capital.

Where an unlicensed head contractor relies on the schedule 1A section 8 exemption, they are not required to meet the MFR's.

Head contractor not subject to QBCC payment of undisputed debt process

The QBCC currently offers a payment of debt process that may be used by subcontractors to enforce undisputed debts owed by the head contractor. In the 2020-21 financial year, the process secured the recovery of \$3.9M in undisputed debts owed to industry participants, the majority of which were subcontractors owed monies by head contractors.

However, the success of the QBCC payment of debt process to secure undisputed debts owed by head contractors relies exclusively on the head contractor holding a QBCC contractor's licence (section 17N of the *Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018*). Unlicensed head contractors operating under the schedule 1A section 8 exemption are allowed to operate outside of the QBCC's payment of debt process leaving subcontractors in the contract train at greater risk of not being paid or being subject to delayed payment of undisputed debts.

Increased risk of poor supervision of building work and health and safety outcomes

The exemption facilitates the use of unlicensed “intermediaries” in the building process. The additional cost of such intermediaries must either be funded through increasing the total cost of the work, or in the absence of a total cost increase, reducing the financial margins of the builders and subcontractors who carry out the building work. The concern with the reducing margins is that there is a risk that some contractors may attempt to find savings through reduced supervision or less stringent quality or health and safety standards.

Detrimental impact on project trust reforms

Commencing 1 March 2021, the Queensland Government is gradually rolling out a new project trust account framework intended to give increased protection for subcontractors working on building and construction projects. Subject to some exceptions, the framework for the project trust reforms only applies to a first-tier subcontract.

Where an unlicensed head contractor relies on the schedule 1A section 8 exemption, the security of payment benefits afforded by the incoming project trust account reforms are diminished as the builder in essence becomes a single “super subcontractor” and therefore the only beneficiary of the project trust for the construction project. The result is that the builder’s subcontractors will not be afforded the improved security of payment protection outcomes intended by the project trust reforms.

Discriminatory impact on QBCC licensees (only applies to an “unlicensed person”)

The schedule 1A section 8 exemption is stated in the provision to apply only to an “unlicensed person”. Having regard to the definition of “licensee” in the QBCC Act, it seems highly arguable that the provision is not afforded to any person who is licensed under the QBCC Act, including the holders of nominee supervisor, site supervisor or occupational licences. This view is further supported by information contained on the QBCC website explaining the different scenarios where the exemption applies. Notably absent from the website is any suggestion that a QBCC licensee could take advantage of the exemption, even if they hold a licence class or type that is irrelevant to the work.

Of particular concern is that there is a common perception in some sectors of the building industry that the exemption can be used by licensees to allow them to contract work outside of their scope of work. For example, a licensed painter may believe that they can contract for work that includes painting and plastering on the proviso that the painter contracts out the plastering work to an appropriately licensed contractor. As noted above, it seems highly unlikely that the exemption can be used in this way, this may lead to the licensed painter being at risk of prosecution for carrying out unlicensed work and liable to limitations on their right to payment under section 42(3) of the QBCC Act.

Head contractor is not subject to regulatory oversight by QBCC (e.g. not subject to directions to rectify)

Based on the QBCC's governing legislation and QBCC's regulatory practises, unlicensed head contractors who rely on the exemption operate almost entirely outside the regulator's operations intended to maintain standards in the industry. For example, it is noted that the QBCC may issue a direction to rectify in specified circumstances against unlicensed principals for defective work under section 71I(L) of the QBCC Act. The QBCC Act even provides for a specific public register to be kept, which records the making of such directions. There is no record of a direction of this kind ever being given and there is no published register.

The ability of unlicensed head contractors to operate outside of the QBCC's oversight is a risk to principals and contractors throughout the contractual chain. It also creates an unfair "playing field" for competing licensed head contractors who are required to meet the stringent licensing standards required under the QBCC Act to lawfully operate their business.

Q2. HOW WOULD THE REPEAL OF THE HEAD CONTRACTOR LICENSING EXEMPTION AFFECT EXISTING BUSINESS MODELS, INCLUDING COST IMPACTS?

We understand the Property Council are concerned the repeal of this exemption would mean that every landlord who agrees, under a tenancy agreement, to have building work carried out would be carrying out building work simply by performing their obligations under a contract.

Our view is that this is not the case. The exemption in s6 of Schedule 1A of the QBCC Act covers a consumer who "engages 1 or more contractors who carry out building work for the consumer". On that basis the landlord will not be 'carrying out building work'.

The closure of the exemption will also impact QBCC licensees and their ability to take on bigger projects outside their licence scope, however, the regulator would have oversight over MFR aspects and undisputed debt.

There would be major change required for the civil construction sector - introducing a requirement to set up two contracts one for civil and one for building work.

Q3. WOULD IT BE APPROPRIATE TO RETAIN THE HEAD CONTRACTOR LICENSING EXEMPTION FOR PARTICULAR TYPES OF WORK OR CONTRACTS?

MBQ supports the repeal of the exemption. Building work should be undertaken by the appropriate QBCC licence.

Q 4. ARE THERE ANY TYPES OF WORK THAT SHOULD NOT BE SUBJECT TO THE HEAD CONTRACTOR LICENSING EXEMPTION AND WHY?

No, there are already exemptions for PPPs and prescribed government projects, tenders and offers. MBQ are satisfied they remain.

Q 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?

None that we can see. The suggestion that unlicensed persons will be held accountable for defective work is completely unrealistic. For many years we have pushed for sub-contractor accountability – to no avail.

Q 6. IF THE HEAD CONTRACTOR LICENSING EXEMPTION IS AMENDED OR REPEALED, WOULD THERE BE A NEED FOR CONSEQUENTIAL OR COMPLEMENTARY AMENDMENTS TO OTHER PROVISIONS? For example, section 9, schedule 1A of the QBCC Act which allows an unlicensed head contractor to tender to carry out particular building work.

MBQ supports maintaining Section 9, schedule 1A Tenders and Offers exemption, however, there is a need to clarify the use of “unlicensed”.

“Unlicensed” refers to a person who does not hold any QBCC licence. QBCC licence holders are not eligible to use this exemption.

“Licence” means a licence under this Act. Only people/companies who do not hold any QBCC licence are eligible to use this exemption.

Reconfirm that as part of the tender process only the appropriately licenced contractor must complete the project.