

CONTRACTUAL OBLIGATIONS, DEMERIT POINTS AND BANS



COMMERCIAL HEAD CONTRACTS AND SUBCONTRACTS

This section is about the law regarding contracts between building contractors and subcontractors or between contractors and principals or Owner Builder Permit holders.

The information does not relate to contracts between homeowners and contractors for domestic building work.

Do contracts have to be in writing?

Yes. *The Queensland Building and Construction Commission Act 1991* ('the QBCC Act') requires that contracts for building work, whether domestic or commercial, must be in writing.

This includes head contracts, subcontracts and sub-subcontracts.

Subcontracts for domestic building work and all contracts for commercial building work between developers, builders and subcontractors must be in writing.

The requirements also apply to contracts for building work between a contractor and an Owner Builder Permit holder.

Note: Different requirements apply when you contract directly with homeowners for domestic building work (see the next section).

You must ensure that all contract documentation, including related plans and specifications, are kept for seven years from the date the documents were put into writing.

Generally, work priced at less than \$3,300 is not classed as building work under the QBCC Act and therefore does not require a written contract. However, commercial or subcontracted work of any value involving plumbing, drainage, gasfitting, design drafting, completed building inspections, site classification, fire protection, electrical work and pest control must be recorded in a written contract.

Does the contract have to be in writing before commencing work?

Commercial contracts for building work priced at over \$10,000 must be in writing before work starts. If the building work is priced at \$10,000 or less, the contract must be in writing before the work is completed.

The contracts must contain the following:

- the scope of the work covered by the contract
- when the work is to be completed
- the amount to be paid for the work (or how the amount is to be calculated)
- details of any agreement between the parties about retentions and securities
- the address of the site where the work is being carried out
- the name and licence number of the building contractor who is to perform the contracted work.

Your contract should also contain the following:

- the name and contact details of the parties involved
- any plans and specifications relevant to the scope of the work (these should be dated and referred to in the description of the contracted work)
- when the work is to commence
- the amount and timing of any progress payments for the contracted work
- a procedure for dispute resolution.

What if I don't comply?

If you do not put a contract in writing, or you enter into a contract that does not contain the requirements stated in the QBCC Act, you commit an offence. The QBCC may prosecute or take disciplinary action against a contractor for this offence. Demerit points may also be accrued. Failure to use a written contract, or using a defective contract, also significantly reduces your ability to enforce payment and increases your risk of becoming involved in a costly dispute.

What if my contract contains a "pay-when-paid" clause?

Do not be fooled by clauses of this nature.

A "pay-when-paid" provision is one that makes one person's payment dependent on another person's payment, or dependent on the operation of another contract. Such clauses, if included in contracts, are void (i.e. of no legal effect). This means that the person engaging you cannot make you wait until they themselves are paid, but must pay you according to the terms of your contract.

When should I be paid?

Builders

Generally your right to be paid depends on the contract. Read the contract carefully before signing and discuss any concerns with your solicitor. If a commercial contract states a progress payment can be made more than 15 days after a payment claim is submitted, that provision is void.

If the parties have not included in their contract the intervals for making progress claims, times for making payment and how such payments are to be valued, a default provision exists in the *Building Industry Fairness (Security of Payment) Act 2017* ('the BIF Act'). If there is no contractual provision, payment claims must be made on the last calendar day of the month, with payment becoming due 10 business days after the payment claim is made.

Subcontractors

Generally, you are entitled to be paid according to the terms of the contract. Read the contract carefully before signing and discuss any concerns with your solicitor.

If a construction management trade contract or subcontract states a progress payment can be made more than 25 days after a payment claim is submitted, that provision is void.

Adjudication through the BIF Act is also available for the interim resolution of payment disputes involving construction work contracts. Adjudication is a dispute resolution process that may result in an enforceable decision. It is a quicker and more cost effective alternative to going to court.

Contact the QBCC on 3613 3450 or 3613 3451 or visit the website at qbcc.qld.gov.au to find out more about the adjudication process. Adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute from a court or tribunal.

What if I start work without a written contract and when I get the contract, it contains 60 or 90 day or other extended payment terms, or fails to specify a period?

Builders and subcontractors

As outlined above, construction management trade contracts and subcontracts cannot provide payment terms of more than 25 business days. Commercial building contracts cannot provide for payment terms of more than 15 business days.

A contract that makes no provision for payment terms, or whose payment terms exceed the allowed maximum will automatically be subject to payment terms of 10 business days after the claim is made under the BIF Act.

The QBCC strongly recommends that you do not commence work until payment arrangements have been agreed to in writing. However, if you start work without a written contract and you are later given a contract that has less favourable payment terms than those in the legislation or those that you agreed to, you should consult your solicitor or industry representatives before you sign the contract.

What can I do if I am not paid on time?

You have the right to suspend work if you are not paid on time and your right to payment is not in dispute. You may also suspend work if you are not paid all money ordered to be paid to you by a court or tribunal.

You can suspend work by issuing a notice to the party who owes you money. You should consult your solicitor or industry association prior to taking this action. In addition to suspending work, you have the right to claim interest on any amount that is not paid on time, regardless of what the contract says.

You should also report the failure to make payment to the QBCC by lodging a Monies Owed Complaint online at qbcc.qld.gov.au.

The QBCC will then investigate your complaint of monies owed as under the Minimum Financial Requirements, a licensee must at all times pay all undisputed debts.

Failure to pay a legitimately owed debt that is not subject to genuine dispute may result in loss of licence.

It is also important to note that whilst the QBCC's investigation may result in the debt being paid, the QBCC is not responsible for collection of the debt. The QBCC recommends that you also seek independent legal advice or consult your industry association about options available to obtain payment.

I am a subcontractor and my contract says I have to provide securities and retentions. What percentage is reasonable?

At any time before practical completion the total of retentions and securities for subcontracts cannot exceed 5 per cent of the total contract price. This applies regardless of your contract and you cannot, by law, be required to provide more. This limit does not apply to security taken by the builder for amounts paid for something not yet installed.

The amount retained from progress payments cannot exceed 10 per cent of the progress payment amount. The total of retentions and securities held after practical completion cannot exceed 2.5 per cent of the total contract price unless the retentions and securities relate to something other than the correction of defects in the contracted work identified during the defects liability period.

I am a builder and my contract says I have to provide securities and retentions. What percentage is reasonable?

At any time before practical completion the total of retentions and securities cannot exceed 5 per cent of the total contract price unless the contract specifically states that it is not subject to this 5 per cent limit and the relevant clause is initialed by both the builder and the principal. This limit does not apply to security taken by the principal for amounts paid for something not yet installed.

The maximum amounts that can be retained from progress payments (10 per cent of the progress payment amount) and after practical completion (2.5 per cent of the total contract price) are the same as for subcontractors (see above).

I am a subcontractor and I want to replace cash held by the builder (as a retention or security) with a bank guarantee. Can I do it?

Yes. Regardless of the contract, you have a legal right to substitute a valuable instrument (usually a bank guarantee) for a cash security or retention held by the builder. The builder has no right to refuse such a request.

What if I am directed to perform a variation?

If you are directed to perform a variation under a contract, you can refuse to comply with the variation until it is given in writing. If you decide to comply with a direction given verbally, the direction must be confirmed in writing within three business days of it being given.

If you do not receive the written confirmation within three days, the party ordering the variation commits an offence.

Where do I go if the other party breaches the contract?

You should seek legal advice from your solicitor. It is particularly important that you do not attempt to end any building contract, for any reason, without assistance from a solicitor as incorrect termination of the contract may leave you exposed to legal and financial risk.

If the contract is for residential work, you can lodge an application in the **Queensland Civil and Administrative Tribunal (QCAT)**. Call **1300 753 228** or visit their website qcat.qld.gov.au.

If the contract is for commercial work you should consult the terms of your contract governing dispute resolution.

Commercial disputes under \$50,000 may be resolved through the QCAT. Where both parties agree, disputes over \$50,000 may also be dealt with by the Tribunal.

Note: Parties are required to participate in a dispute resolution process (e.g. mediation) prior to lodging a building dispute with QCAT.

Where do I get more information about these laws?

- your industry association
- your solicitor
- obtain copies of the most recent reprints of the *Queensland Building and Construction Commission Act 1991*, and the *Building Industry Fairness (Security of Payment) Act 2017*, or view the texts on the Office of Queensland Parliamentary Counsel website at legislation.qld.gov.au
- the QBCC website qbcc.qld.gov.au

DOMESTIC BUILDING CONTRACTS - SCHEDULE 1B OF THE QBCC ACT

On 1 July 2015 the legislation which previously governed domestic building contracts in Queensland, the *Domestic Building Contracts Act 2000* ('the DBC Act'), was repealed and replaced by Schedule 1B of the QBCC Act. All contractors engaged in domestic building work need to know about their obligations concerning domestic building contracts under Schedule 1B. Failure to comply with these requirements may result in costly disputes and leave you exposed to QBCC Compliance action, contract termination or the inability to enforce payment for the work you have performed. The following are some of the key provisions of Schedule 1B.

Written contracts

All projects involving domestic building work where the contract price (including labour, materials and GST) is more than \$3,300 must be covered by a written, dated contract signed by both parties. The contract documentation and procedures must comply with the requirements set out in Schedule 1B.

It is unlawful for a domestic building contract to attempt to exclude or change the operation of a requirement specified under Schedule 1B, including for example a clause that seeks to reduce or remove a homeowner's rights or a clause that attempts to treat a direction to rectify work issued by the QBCC to a building contractor as being given to someone else. Such clauses will be void (i.e. of no legal effect; unenforceable) to the extent of the inconsistency with what the legislation requires.

You should carefully check your contract documentation and, if necessary, seek legal advice to ensure it complies with the domestic building contract requirements of Schedule 1B.

NOTE: If the contracts you are using were developed interstate or before 1 July 2015 they will almost certainly be non-compliant with Queensland legislation and therefore dangerous for you to use.

Where can I obtain compliant contracts?

Your industry association or the QBCC can assist you.

The QBCC produces a range of domestic building contracts that fully comply with the new legislation and cover all types and sizes of domestic building projects.

The relevant QBCC contracts include:

- the **QBCC New Home Construction Contract** - recommended for the construction of a single detached dwelling or duplex
- the **QBCC Level 1 Renovation, Extension and Repair Contract** - recommended for domestic building work on an existing home (including a house, townhouse or unit), or associated building work, including minor renovations, extensions, improvements and routine repairs where the contract price is \$3,301 to \$19,999;
- the **QBCC Level 2 Renovation, Extension and Repair Contract** - recommended for more major domestic building work on an existing home (including a house, townhouse or unit), or associated building work, including renovations, extensions, improvements and routine repairs where the contract price is \$20,000 or more;

- the **QBCC Natural Disaster Repairs Contract** - recommended for repairs of any value resulting from the effects of a natural disaster; and
- the **QBCC Small Building Projects Contract** - this very brief document is recommended for minor renovation and repair work priced at up to \$3,300. Although no written contract is required under Schedule 1B for domestic building work priced at up to \$3,300, a brief written record of your agreement is strongly encouraged to reduce the risk of a dispute.

These QBCC domestic building contracts include all necessary forms, schedules and (where relevant) the **Consumer Building Guide** and **are available for free download** from the **QBCC website**. Go to qbcc.qld.gov.au and search for 'contracts'.

Consumer Building Guide

Where the contract price is \$20,000 or more (i.e. all Level 2 contracts) Schedule 1B requires you to provide your clients with a copy of the QBCC Consumer Building Guide **before they sign the contract** and a signed copy of the full contract, including any plans and specifications, within five business days after you sign the contract. **Only the QBCC-developed Consumer Building Guide is acceptable under the legislation** - you cannot change the document in any way or develop your own version. Hard copies of the Guide are available for free from any QBCC office or may be downloaded for free from the QBCC website.

Queensland Home Warranty Scheme

Under the QBCC Act, all builders and trade contractors who perform insurable residential construction work over \$3,300 (including GST) directly for a homeowner must collect the Queensland Home Warranty Scheme insurance premium from the homeowner and pay it to the QBCC within 10 business days after the date the contract was entered into or before the contracted work is started (whichever is earlier). An exception is where the owner holds an Owner Builder Permit. You should always check the Permit before deciding not to pay insurance.

Insurable work includes the construction of an entire home, renovations and extensions. Sub-contractors working for a principal contractor are not required to pay this insurance.

Deposit and progress payments

Schedule 1B sets out maximum deposit percentages that must not be exceeded, even if the homeowner agrees. **Generally, if the contract is for domestic building work priced at \$20,000 or more (including labour, materials and GST), the maximum deposit allowed is 5 per cent of the total contract price. If the contract price is more than \$3,300 but less than \$20,000 the maximum deposit is 10 per cent.**

Schedule 1B does, however, provide an exception to these deposit restrictions under certain limited circumstances. **If the value of the 'off-site work'** [defined as contracted services performed at a place other than where the work is to be finally installed or constructed] **is more than 50% of the contract price you are entitled take a deposit of up to 20%** irrespective of the contract price.

This new concession was introduced primarily for the benefit of contractors who perform or subcontract customised building work off-site for subsequent installation or erection on site, including the manufacture of made-to-order kitchen modules, domestic sheds, window glass, house cladding, etc.

Note: Although the legislation does not set maximum deposits for smaller building projects priced at up to \$3,300, the QBCC recommends no more than 20 per cent.

Variations

Failure to properly document contract variations is one of the major causes of building disputes and financial loss by contractors. Under Schedule 1B you must record all variations, whether sought by you or the homeowner, in a written variation document which must be agreed in writing by the homeowner before you start to carry out the variation work. A copy of the variation document must be given to the homeowner within five business days after the variation has been agreed to.

The only exception is if the variation work is required to be carried out urgently and it is not reasonably practicable in the circumstances to produce a copy of the variation document before carrying out the work.

If a variation requested by you involves additional work, the homeowner is only liable to pay for that work if you could not reasonably have foreseen the extra work at the time you signed the contract. Failure to include something in the contract, or to properly price it, would not normally be a legitimate basis for a variation to increase the contract price.

You cannot seek payment for any increase in the contract price as a result of a variation before the variation work has been started.

The 'cooling-off' period

Homeowners may generally withdraw from the contract during the 'cooling-off' period, which is within five business days after the day on which the homeowner receives a signed copy of the entire contract (including any plans and specifications) and, where the contract price is \$20,000 or more, a copy of the QBCC Consumer Building Guide. It is very important that you provide these documents promptly to your clients.

If a homeowner wants to withdraw from the contract under the cooling-off provisions, before the expiry of the cooling-off period they must give you a written notice stating their intention to withdraw under s35 of Schedule 1B and pay certain costs (usually \$100 plus any 'out-of-pocket' expenses reasonably incurred by you before the homeowner withdrew from the contract).

Note: A delay in providing the homeowner with copies of the entire contract and the QBCC Consumer Building Guide may lead to compliance action by the QBCC and extends the period in which you are exposed to the risk of the homeowner withdrawing from the contract under the cooling-off provisions.

WARNING:

Under Commonwealth Government legislation, the Australian Consumer Law, **very strict legal provisions (and penalties for non-compliance) apply to 'unsolicited consumer agreements' (i.e. when the agreement results from an uninvited phone call or a door-to-door approach)**. In these cases if you do not follow the procedures and documentation requirements set out in the legislation the cooling-off period may be as long as 6 months.

For a summary of the requirements for these sorts of agreements, search for the ACCC fact sheet titled 'Telemarketing and door-to-door sales' at its website: accc.gov.au

Foundations data and certificates of inspection

Where the building project involves the construction or alteration of footings or a concrete slab, or may adversely affect the footings of a building or a concrete slab forming part of a building, Schedule 1B requires you to obtain appropriate 'foundations data' (e.g. soil tests, contour surveys, etc.) unless this data already exists (e.g. the homeowner has recently obtained the data) and it is reasonable for you to rely on it. You must get this data before entering the contract and give a copy to the homeowner as soon as they have paid for the costs involved in obtaining it.

If your building project requires certification and you are responsible for engaging the building certifier, you must give the homeowner copies of each certificate of inspection as soon as practicable after you receive the certificates from the certifier.

Extension of time (EOT) claims and allowances for likely delays

Under Schedule 1B, for an extension of time claim to be valid the delay must be not reasonably foreseeable by you and beyond your reasonable control, or caused by the homeowner, or the result of an approved variation. **The claim must be presented to the homeowner in writing within 10 business days** of when you become aware of the cause and extent of the delay or when you reasonably ought to have become aware of the cause and extent of the delay. Finally, the extension of time claim must be approved in writing by the homeowner and a copy given to the homeowner within 5 business days of when they approve it.

The effect of these requirements for EOT claims is that when calculating the completion date, or the time required to carry out the contracted work, you must make reasonable allowance for factors such as inclement weather (i.e. wet weather and its effects) and non-working days (i.e. Saturdays, Sundays, public holidays and other days on which you do not intend to work on site) which are likely to affect the time required to complete the whole project.

It is suggested that to minimise uncertainty and the risk of disputes regarding the date for Practical Completion you may wish to consider stating in your contract schedule the number of days you have allowed for each likely delay.

Implied warranties

Schedule 1B sets out certain implied warranties which are deemed to be part of every regulated domestic building contract. These warranties must be stated in all Level 2 contracts (i.e. all domestic building contracts priced at \$20,000 or more). These statutory warranties require that the contracted work will be carried out:

- in accordance with all relevant laws and legal requirements
- in an appropriate and skilful way
- in accordance with the plans and specifications (where they form part of the contract)
- using materials that are good and suitable for the purpose for which they are used, and new, unless otherwise stated in the contract
- in such a way that, where relevant to the contract, the home will be suitable for occupation on completion of the contracted work, and
- that any allowances for prime cost items or provisional sums which are included in the contract price have been calculated with reasonable care and skill.

Contract termination

In certain circumstances, usually where there has been a substantial breach by the other party, the contractor or homeowner may be entitled to terminate the contract. **If you are considering terminating the contract for any reason, the QBCC strongly recommends that you seek legal advice** and ensure that the steps and documentation required for termination stated in the contract are carefully and fully observed. **Failure to correctly terminate the contract may compromise your legal rights and ability to receive full payment for your work under the contract.**

For further information on domestic building contracts

For more general information on domestic building contracts and the associated Queensland legislation, **the QBCC strongly recommends you read the booklet on the QBCC website titled - 'Domestic Building Contracts - General Information for Owners and Contractors'.**

LICENCE DISQUALIFICATION - DEMERIT POINT SYSTEM

How does the demerit point system work?

The demerit point system is designed to encourage change. Contractors will incur demerit points if they commit demerit point offences. Those who repeatedly offend are likely to be disqualified from holding a QBCC licence. Demerit points are recorded on the public register to serve as a warning to homeowners, subcontractors and suppliers.

A person who accumulates 30 demerit points within a three-year period will face disqualification from holding a QBCC licence for three years.

If they again, within 10 years of the first ban, accumulate 30 demerit points over a three-year period, they will be disqualified from holding a QBCC licence for life.

Demerit point offences

Demerit point offences are specific offences under the QBCC Act (and previously the *Domestic Building Contracts Act 2000*). Demerit points are not allocated for all offences under those Acts. Relevant demerit point offence provisions are listed below.

Demerit point offences and value of demerit points on or after 1 July 2015

SECTION	DESCRIPTION OF OFFENCE	DEMERIT POINTS APPLICABLE
s.42B(1)	No nominee	10
s.42C	Unlawful carrying out of fire protection work	10
s.42D	Unauthorised fire protection work	10
s.43(1)	Company not ensuring personal supervision	8
s.43(2)	Individual not ensuring personal supervision	8
s.43A(1)	Company not ensuring adequate supervision	8
s.43A(2)	Individual not ensuring adequate supervision	8
s.43B(2)	Construction Manager Company not ensuring personal supervision	8
s.43B(3)	Construction Manager Individual not ensuring personal supervision	8
s.43C(2)	Construction Manager Company not ensuring adequate supervision	8
s.43C(3)	Construction Manager Individual not ensuring adequate supervision	8
s.50C(4)	Failing to comply with audit	4
s.51A(1)	Licensed contractor helping unlicensed contractor commit offence against s.42	10
s.51A(2)	Licensed contractor using other's name, number or PIN	10
s.51B(2)	Licensed contractor contracting with unlicensed person	8
s.53B(1)	Providing false misleading documents regarding financial requirements	4
s.56(2)(b)	Partnership with unlicensed person in contravention of s.56(1)(d)	8
s.67AW(2)(b)	Judgment debt	10
s.67G(1)	No written contract (not domestic less than \$10,000)	4
s.67G(2)	No written contract (not domestic more than \$10,000)	4
s.67G(3)	Contract does not comply with formal requirements (not domestic)	4
s.67I(4)	Direction not in writing	4
s.67V(1)	No warning re construction management contract	4
s.68B(2)	Licensed contractor failed to pay appropriate insurance premium (offences occurring on or after 28 October 2016)	4

Demerit point offences and value of demerit points on or after 1 July 2015 continued

SECTION	DESCRIPTION OF OFFENCE	DEMERIT POINTS APPLICABLE
s.68B(3)	Licensed contractor failed to pay appropriate insurance premium for speculative work (offences occurring on or after 28 October 2016)	4
s.68C(2)	Construction manager failed to pay appropriate insurance premium (offences occurring on or after 28 October 2016)	4
s.72AA(1)	Delay rectification work	4
s.72AA(2)	Obstruct rectification work	4
s.73	Failure to comply with direction to rectify or remedy (up to 10 demerit points)	10
s.105R(1)	Failure to produce document	8
s.108A(2)	Failure to keep documents for 7 years	4
s.108B(1)	Providing false misleading statement	4
s.108C(1)	Providing false misleading document	4
s.108C(3)	Making false misleading entry in document	4

Demerit point offences and value of demerit points (Schedule 1B – domestic contracts)

SECTION	DESCRIPTION OF OFFENCE	DEMERIT POINTS APPLICABLE
Schedule 1B s.15	Copy of contract for building owner	4
Schedule 1B s.16(2)	Copy of commencement notice	2
Schedule 1B s.17(2)	Copies of certificate of inspection	2
Schedule 1B s.18(2)	Copies of Consumer Building Guide	2
Schedule 1B s.30	Work must not start before contract complies	10
Schedule 1B s.31(2)	Foundations data before entering a contract	4
Schedule 1B s.31(5)	Copy of foundations data to building owner	2
Schedule 1B s.33(1)	Excess deposits	4
Schedule 1B s.34(1)	Progress payments directly related to work	2
Schedule 1B s.40(2)	Copy of variations document in writing within 5 business days of agreement	2
Schedule 1B s.40(5)	Variations in writing before work starts	2
Schedule 1B s.41(1)	Variation document complies with formal requirements	2
Schedule 1B s.42(2)	Extension of time complies	2
Schedule 1B s.42(3)	Signed copy of a claim for an extension of time, within 5 business days	2
Schedule 1B s.43(2)	Caveat lodged on resident owner	4

Points will be allocated for each conviction for a demerit point offence and these points will be removed three years from the date they take effect. Details of the relevant provisions may be accessed at legislation.qld.gov.au or enquiries can be made at any QBCC office.

Unsatisfied judgment debts

For demerit points, a judgment debt is the amount entered in a Court as being owed by a contractor for a building contract, goods or services supplied for building work, or money owed to the QBCC under the Queensland Home Warranty Scheme.

Ten demerit points will be allocated for each unsatisfied judgment debt, however these will be removed if the contractor can demonstrate to the QBCC that the judgment debt has been paid in full.

Demerit points are recorded on the public register to serve as a warning to homeowners, subcontractors and suppliers. A person who accumulates 30 demerit points within a three-year period will face disqualification from holding a QBCC licence for three years.

In addition, under the Minimum Financial Requirements Regulation commencing 2 April 2019, a licensee who has an unpaid debt owing to a subcontractor, or for goods or services supplied for building or construction work, including adjudication decisions and judgement debts, may also face licence suspension or cancellation action, and reprimands imposed on the licence.

It is also an offence for a contractor to not inform the QBCC within 14 calendar days of not paying a judgment debt in full within the required time-frame. The required time-frame is either 28 calendar days after judgment is entered or a longer period only if that longer period has been allowed by the court for payment.

Audits

The QBCC Inspectors can audit licensees to determine if they have been complying with their obligations about:

- payment of insurance premiums
- the requirements of the Schedule 1B of the QBCC Act
- the requirements of Part 4A of the QBCC Act - commercial head contracts and all subcontracts.

In an audit, the QBCC may request copies of, or access to, records and documents concerning a licensee's compliance with these matters. The QBCC will issue a notice to the licensee. The licensee must comply with the written notice within 21 calendar days unless they have a reasonable excuse. Possible self-incrimination is not a reasonable excuse.

A maximum of twenty (20) demerit points may be allocated in relation to offences discovered under a single audit.

Procedure before disqualification

If the QBCC considers an individual has accumulated 30 demerit points in three years, the QBCC will notify them and provide them with details. The person will be invited to make a written submission within 28 calendar days to satisfy the QBCC that they did not accumulate 30 demerit points in three years.

If the QBCC considers a company has accumulated 30 demerit points, the QBCC will notify an individual who was a director, secretary, nominee or influential person within the company at the time the 30 demerit points were accumulated, providing the details. The individual will be invited to make a written submission within 28 calendar days to satisfy the QBCC that:

- a. the company has not accumulated 30 demerit points, or
- b. the individual exercised reasonable diligence to ensure that some or all of the matters that resulted in demerit points did not occur, or
- c. that they were not in a position to influence the conduct of the company's affairs in relation to at least some of the demerit points accumulated.

If, after considering a submission, the QBCC still considers an individual was responsible for accumulating 30 demerit points, either for themselves or for a company, they will be disqualified from holding a licence or being an influential person for a licensed company for three years. If 30 demerit points are again accumulated in a three year period, the disqualification will be for life.

The QBCC's decision to disqualify a person may be reviewed in the QCAT, but the tribunal may not overturn the decision to impose the ban if it has been correctly imposed under the QBCC Act.

LICENCE BANS - TIER 1 DEFECTIVE WORK

The effects on a homeowner when a building contractor performs grossly defective building work can be devastating. Contractors who perform grossly defective work face bans from the industry.

What is Tier 1 defective work?

Tier 1 defective work is building work of the most grossly defective nature. The formal definition of Tier 1 defective work is grossly defective building work that:

- a. falls below the standard reasonably expected of a licensed contractor for the type of building work, and
- b. either:
 - iv. adversely affects the structural performance of a building to the extent that a person could not reasonably be expected to use the building for the purpose for which it was, or is being, erected or constructed, or
 - v. is likely to cause the death of, or grievous bodily harm to, a person.

An example of Tier 1 defective work would be substandard work that requires all or a significant part of a building to be demolished or substantially reconstructed.

Bans for Tier 1 defective work

If you carry out Tier 1 defective work, in addition to rectification costs, you will face a licence ban for three years. If you again carry out Tier 1 work within 10 years of the first ban, whether or not you have served the three-year ban, you will be banned for life.

The process leading to a ban

If the QBCC considers that you have carried out Tier 1 defective work, you will be issued a notice informing you of the details of the work and the effect of becoming a banned individual. You will be given the opportunity to make a written submission to the QBCC within 28 calendar days should you believe that:

- a. you did not carry out the work stated in the notice, or
- b. the work was not Tier 1 defective work, or
- c. you exercised reasonable diligence to ensure the work carried out was not defective.

The QBCC will carefully consider this submission prior to making a decision about imposing a ban.

Example: After considering a submission, the QBCC may be satisfied that you exercised reasonable diligence because you reasonably relied on plans drawn by an engineer and it was the reliance on the plans that caused the Tier 1 defective work. In that case, a ban would not be imposed.

If the QBCC considers that a company has carried out Tier 1 defective work, the QBCC may issue a similar notice to an individual who is a director, secretary, influential person or nominee for the company at the time the work was carried out.

The person concerned will be given the opportunity to make a written submission to the QBCC should they believe that:

- a. the company did not carry out the work stated
- b. the work carried out by the company was not Tier 1 defective work, or
- c. that they exercised reasonable diligence to ensure that the work carried out was not defective, or
- d. that they were not in a position to influence the conduct of the company's affairs in relation to the defective work.

After considering this submission, if the QBCC is still satisfied that the individual is responsible for carrying out the Tier 1 defective work, they will be banned.

Decision may be reviewed

The QBCC's decision may be reviewed in the QCAT but if the tribunal supports the decision, it may not alter the term of the ban.

If the tribunal reverses or annuls the QBCC's decision, it must decide at the same proceeding whether proper grounds exist for disciplinary action with respect to negligence or incompetence.

EXCLUDED INDIVIDUALS AND COMPANIES

To ensure public confidence in the QBCC's licensing system, and to promote security of payment in the building and construction industry, the *Queensland Building and Construction Commission Act 1991* contains anti-phoenix provisions which prevent those responsible for poor financial management from running a business in the building industry.

These provisions are to prevent individuals who:

- become bankrupt or enter into an agreement under Part IX or Part X of the bankruptcy act; or,
- are a director, secretary or influential person of a construction company within the two years before the company experiences a company failure,

from holding a QBCC contractor licence, nominee supervisor or site supervisor licence or be a director, secretary or influential person for a company holding a contractor licence.

The period of exclusion is 5 years from the date of the insolvency event for events that occur before 1 July 2015.

The period of exclusion is 3 years from the date of the insolvency event for events that occur from 1 July 2015.

A person involved in 2 separate insolvency events faces life exclusion.

Under what circumstances will a person become an excluded individual?

A person becomes an excluded individual if the individual is a director, secretary or influential person for a company at any time up to 2 years before the company has a provisional liquidator, liquidator, administrator or controller appointed, or is wound up or ordered to be wound up for the benefit of the creditor.

An influential person for a company means an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the company's conduct.

A person also becomes an excluded individual if they become bankrupt or take advantage of the laws of bankruptcy by entering into a Part IX or Part X agreement.

For insolvency events that occur from 1 July 2015, a failed company will only lead to exclusion if the company was a construction company. This means that it directly or indirectly carries out building work or building work services within 2 years of the insolvency event.

A person who becomes an excluded individual for a second insolvency event will become a "permanently excluded individual" and be banned for life.

Under what circumstances will a person not BE an excluded individual?

A person will not be an excluded individual if the individual can satisfy the Commissioner that at the time the individual ceased to be an influential person, director or secretary for the construction company, the company was solvent, evidenced by an independent solvency report of the company at the time of the individual's cessation.

An excluded individual does not also become an excluded individual for another relevant event if the Commission is satisfied that both events are consequences flowing from what is, in substance, the one set of circumstances.

What is the effect of someone being an excluded individual?

The excluded individual's QBCC contractor or nominee supervisor licence will be cancelled and they will be unable to reapply for another licence until their exclusion period ends. They are also prevented from being a director, secretary or influential person for a QBCC-licensed company during this time.

Under what circumstances will a company become an excluded company?

A company becomes an excluded company if an excluded individual is a director, secretary or influential person for the company.

What is the effect of a company being an excluded company?

The excluded company's QBCC licence will be cancelled and they will be unable to reapply for another licence until the exclusion period ends unless the excluded individual stops being a director, secretary or influential person.

For more information

Visit qbcc.qld.gov.au or call us on 139 333.

