

# Changes For Certifiers Webinar Transcript

## Cover slide

Welcome commentary.

Acknowledgement of the traditional custodians of the lands at each of the locations we are at and pay our sincerest respects to elders past, present and emerging.

Presenters:

Greg Matthews – Director, Technical Services.

Reghan Greer – webinar M.C.

## Cover slide – Speaker Greg Matthews

- Thanks Reghan and thanks everyone for ‘virtually’ coming along. I know it’s school holidays and for many there are probably plenty of places that you’d rather be right now, so I just wanted to extend mine and QBCC’s appreciation of you tuning in.
- Whenever I present to a crowd I like to break the ice with a joke to lighten the tone on what are sometimes less than thrilling subjects. This is my first effort in presenting a webinar since COVID has changed the way we do everything, so I tried to come up with a joke about social distancing - This is as close as I could get...
- As Reghan mentioned, my name is Greg Matthews and I am QBCC’s Director of Technical Services. I’ve been with the Commission as long as the Commission has been around in this iteration. I commenced with the then BSA in 2013, which was just prior to the changeover to the QBCC.
- The Technical Services division is responsible for oversight and strategic management of QBCC’s Technical Standards Unit and QBCC’s Certification Unit.
- The Technical Standards Unit monitor active building sites across QLD in relation to standards of construction. We proactively inspect sites and engage with licensees to promote good building practice. We also have the power to regulate under the provisions of the QBCC Act if and when necessary.
- As many, if not all of you would be aware, the Certification Team has powers afforded under the Building Act to monitor certifier compliance, to investigate complaints made against building certifiers, to carry out audits of building and private certifying functions, and to take disciplinary action against certifiers in relation to unsatisfactory conduct or professional misconduct if and when necessary.
- Outside of the Certification Team, QBCC also licence building certifiers and keep a register of building certifiers, including maintaining an online licensee search function which provides details of a certifier’s licence, any restrictions or conditions on their licence and any disciplinary action that may have been taken against them within the past 5 years.
- Interested parties can visit the QBCC website and be provided with a snapshot of any certifiers licence by searching by either their licence number or name.

This evening I will be presenting an overview of the BIFOLA reforms with specific reference to how these reforms will impact certifiers on the ground, in your day to day operations and interactions with your clients, local councils and building or property owners.

### Objectives [slide 2] - Speaker: Greg Matthews

By the end of the presentation you should be able to:

- Recognise new key BIFOLA terms and concepts
- Understand how the reforms impact the certification process
- Understand how the reforms impact your role as a certifier
- Feel confident you know how to comply with the new laws
- Know where to find more information.

### BIFOLA Overview [slide 3] - Speaker: Greg Matthews

- It is important for everyone to get a basic understanding around BIFOLA.
  - What is BIFOLA?
  - What legislation does the BIFOLA Act affect?
  - When do the changes commence?
  - What are the overarching objectives of BIFOLA?
- From there we will drill down further into the changes that will directly affect certifiers and the certification industry.
- What is BIFOLA? - BIFOLA is an acronym that stands for Building Industry Fairness and Other Legislation Amendment Act.
- The BIFOLA Act is an Act to amend the Architects Act, the Building Act, the Building Industry Fairness (Security of Payment) Act (known as the BIF Act), the Professional Engineers Act, the QBCC Act, the Retirement Villages Act and some miscellaneous amendments to the Fire and Emergency Services Act, the Planning Act, the Private Health Facilities Act, and the Public Health Act.
- The miscellaneous amendments generally only relate to changes for consistency with other Acts where terminology has been amended as part of the BIFOLA changes. We will get to the terminology changes later in this presentation.
- From a QBCC perspective the changes to the Building Act, the BIF Act, the QBCC Act directly affect some powers and legislative responsibilities under our remit.

There will be at least a couple of rounds of changes, with the first changes set to commence next Thursday the 1<sup>st</sup> of October. Considering that we are less than a week out from 1 October, today we will be concentrating on only the changes set to kick off in this round.

## BIFOLA Overview [slide 4] – Speaker: Greg Matthews

The main objectives of the BIFOLA reforms are threefold.

- Firstly the changes to the BIF Act serve to strengthen the Project Bank Account Framework to improve the operation of Trust Accounts, to provide additional ways to protect payments to subcontractors and by introducing new payment dispute options.
- Secondly, the reforms aim to promote industry confidence and growth by increasing QBCC's powers to effectively regulate the building industry.
- The QBCC regulates the building industry to guarantee the financial sustainability of contractors, qualifications and building safety standards to protect consumers and the community.
- This is achieved through a range of mechanisms including licensing, requiring minimum financial requirements (MFR) and reporting, monitoring for non-compliance with building industry laws and enforcing penalties and offences where applicable.
- New powers to allow QBCC to exclude persons who are not considered “fit and proper” to hold a license, and changes to MFR reporting will enhance industry confidence.
- Several changes to existing offence provisions and introduction of new penalties for non-compliance will support QBCC with taking action against misconduct in the industry.
- Thirdly, the reforms align with initiatives outlined in the Queensland Building Plan, aimed at addressing problems and improving standards in the building industry. The initiatives were government election promises.
- So hopefully that provides a high level view of the wider BIFOLA changes.
- Earlier this week, QBCC presented an in depth webinar in relation to the changes to the Security of Payment Laws.

## Building Act and Certification [slide 5] – Speaker: Greg Matthews

The main topic of this session, is to provide an overview of the main changes affecting certifiers.

- Reforms to the Building Act 1975 are aimed at improving consumer confidence and strengthening the certification and inspection process by:
  - clarifying the duty of certifiers – which is to act in the public interest
  - enhancing owners' rights – to request and receive additional non-mandatory building inspections and inspection documentation
  - introducing a demerit system – this will be introduced for certifiers in line with other building and construction industry licensees
  - improving professional standards – by requiring accreditation standards bodies to have their professional development schemes regularly reviewed
  - providing alternative licensing pathways – for building certifiers to access (commencement date still to be determined by the Queensland Government).

- The topics that we are going to cover are:
  - Some changes to the obligations on clients and certifiers to provide certain notices, including new or revised timeframes in relation to provision of those notices
  - The new provisions to allow an owner who is not the client to request certifier inspection documentation prior to the final inspection
  - The new ability for an owner who is not the client to request additional certifying functions
  - Clarification that the Primary duty of a certifier is to act in public interest above all else
  - Changes to required timeframes for certifiers keeping inspection documentation
  - The introduction of Certifier demerit points and disqualification
  - Limitations on making minor complaints about building certifiers to QBCC including powers for QBCC to dismiss certain complaints without further investigation
  - Accreditation bodies are to be prescribed by regulation rather than named within the Act
  - Updates to some terminology.

### Certifier notification requirements [slide 7] – Speaker: Greg Matthews

OK, let's get into it in a bit more detail. Don't forget to post your questions as we go and I'll attempt to answer them at the end.

s143 of the Building Act relates to the provisions around notification of engagement.

- The previous version of the Act noted that a private certifier should give notice of his engagement to the local government within 5 business days after the commencement of the engagement. The section also noted that if the owner of the building is not the client or the applicant (for example the certifier is engaged by a third party such as the builder), the certifier is to provide details of their name and their responsibilities to the owner within 5 days of their engagement.
- This was potentially problematic in cases where the client did not pass on the owners details to the certifier, and there was no means of holding the client to account under the provisions of s143.
- The changes to s143 break down the requirements based on two scenarios – either the owner is the client or the applicant, or the owner is not the client or the applicant.
- In the case where the owner is the client or the applicant, the requirement for the certifier to notify the local government of their engagement within 5 days does not change. The approved form for this notification is the Form 56 Notice to the local government that a private certifier has been engaged.
- The new s143A prescribes the case where the owner is not the client or the applicant.
- In this case, the client (the person engaging the certifier - could be the builder, architect, project manager etc) has 10 days to provide the certifier with the owners details. This holds the client to account for providing the certifier with the applicable details, and there is an offence of 20 penalty units should the client fail to comply.
- 1 penalty units is currently \$133. So 20 penalty units equates to \$2660.
- In turn, the certifier has 15 days **from the commencement of their engagement** to notify the local government of their engagement using the Form 56, and similarly has 15 days to notify the owner of their name and their responsibilities using the Form 18 Notice to the owner that a private certifier has been engaged.

- This would mean that if the client takes the full 10 days to notify the certifier of the owners details, the certifier still has 5 days (which is in line with s143) to provide the Form 56 to the local government and the Form 18 to the owner.

#### Client notification requirements [slide 8] – Speaker: Greg Matthews

- Under s143A (5), the client also has an obligation to notify the certifier of any changes to the owners name or contact details within 5 days of becoming aware of a change.
- The relevant forms and templates will soon be available at the Queensland business website shown on the bottom of the slide.

#### Obtaining certification documents [slide 9] – Speaker: Greg Matthews

- There is a new section s124A which relates to a certifiers obligation to give the owner inspection documentation for particular inspections upon request by the owner.
- At any time prior to the final stage inspection, the owner may request copies of any inspection documentation for any completed stage of the works that the certifier has inspected.
- This will serve to enhance the owner's rights by adding transparency to the process and providing peace of mind, particularly in cases where the certifier may be engaged by the builder and the owner has no oversight over the certification of their building until post completion.
- The certifier has 5 days to comply.
- The penalty is 20 penalty units, which as we mentioned previously is \$2660.
- As shown on the slide, there will soon be a suggested template on the QBCC website which can be used by owners to make a request under s124A.

#### Additional certifying functions [slide 10] – Speaker: Greg Matthews

- S143B is a new provision allowing the owner to request additional certifying functions over and above the responsibilities noted in the Form 18 under s143A.
- The certifier is entitled to charge for these additional functions, and the client would in turn pass on those charges to the owner. The Act states that the owner is liable for 'reasonable costs' of the extra function. As far as what may constitute reasonable costs, this would be a commercial decision so I am unable to comment further on that one.

#### Additional certifying functions [slide 11] – Speaker Greg Matthews

- The provisions only apply if the owner is not the client, and the owner is to make the request **to the client** within 10 business days of receiving the Form 18.
- In turn, the client is then allowed 5 days to notify the certifier of the request.
- Working through the timeframes from engagement of the certifier, this would mean that an owner request for additional certifying functions may reach the certifier 30 business days after the date of engagement.
- The building certifier, the client and the owner must then come up with an agreed day, or an agreement to determine the agreed day within 10 business days of the certifier being informed of the request for additional certifying functions.

- In relation to agreed day, it may be considered unreasonable or impossible for the parties to agree on a particular date for the extra functions. A typical reason for this might be uncertainty in the construction program.
- In these cases, an agreement to determine the agreed day could be something like, for example if the additional function was a waterproofing inspection of a particular wet area, after the completion of the waterproofing and before the commencement of tiling works.
- If the client, owner and certifier cannot agree on the agreed day, or way to determine the agreed day, it becomes the responsibility of the certifier to make this determination and notify the other parties within a further 5 days (ie 15 days after notification from the client that the additional functions are required).
- The certifier would then perform the additional function on the agreed day, and provide copies of the relevant documentation to the owner and the client within 5 days of the completion of the function.
- We are currently working on a flow chart to aid with identification of the relevant timeframes.

#### Other certifier requirements [slide 12] – Speaker: Greg Matthews

- s127 & s136 of the Building Act relate to a Building Certifier and a Private Certifier respectively to act in the public interest.
- The new additional provisions to each section add a note that the duty to act in the public interest prevails to the extent that there may be any inconsistency with any other provisions of the Act, or to another person.
- In other words, the duty to act in the public interest prevails over any duty to the client or other person or thing.
- Timeframes for keeping documentation - S150 is amended to increase the timeframes for keeping documentation from 5 years to 7 years. This timeframe aligns with the timeframes relating to the cut off day for making a complaint against a certifier. We will look at those timeframes in a few minutes.
- In relation to the Accreditation bodies, the previous s184 noted AIBS and any other entity prescribed under regulation.
- The revision to the Act removes the reference to AIBS and leaves all accreditation bodies to be prescribed by regulation.

#### Changes to terminology [slide 13] – Speaker: Greg Matthews

- There are some changes to terminology. A couple of these have been in the more recent editions of the NCC, so they are simply updating the most recent terminology.
- These include the clarification of the BCA under s12 being Volumes 1 & 2 of the NCC, and the use of the word performance solution, as opposed to an alternative solution.
- Two new ones are the change from Certificate of Classification to Certificate of Occupancy, and the change to the heading of s33 from boundary clearance and site cover provisions to design and siting provisions.
- A further change is that the definition of the Queensland Development Code, which is s13 of the Building Act, has changed to note that the QDC will be prescribed by regulation.

## Regulation of Building Certifiers [slide 14] – Speaker: Greg Matthews

- We have just covered a range of changes to the role, functions and obligations of certifiers. We will now turn to look at some of the changes introduced by BIFOLA that enhance the way QBCC regulates licenced certifiers. The key change here is the application of new demerit points to certain offences.
- Demerit points will be applied to building certifier's licences for certain building certification offences committed from 1 October 2020. Demerit points will not be allocated for offences committed prior to 1 October 2020.
- Details on which offences against the Building Act will attract demerit points, and how many, will be listed in the Building Regulation 2006. We were hoping to have a list available today, however we are yet to receive these from the department.

## Certifier demerit points [slide 15] – Speaker: Greg Matthews

How are demerit points allocated?

- When someone has a conviction for a demerit offence, the QBCC must allocate to the person the prescribed number of demerit points for the offence as soon as practicable after the points take effect.

The points will take effect upon 'conviction' which is defined under s214A of the Act.

- Conviction of a person for a demerit offence includes:
  - a court finding the person guilty or accepting the person's guilty plea for an offence (whether or not a conviction is recorded)
  - the person paying an infringement notice fine, either in full or a first instalment
  - the registration of a default certificate with the State Penalties Enforcement Registry (SPER) for an unpaid infringement notice.
- If a conviction for a demerit offence is appealed, the demerit points will not take effect until the appeal is heard and finalised.
- The number of demerit points for an offence depends on the type or severity of the offence, up to 10 demerit points for the most severe offences, however under s214G, there is a maximum of 20 demerit points per single audit or investigation.
- This will eliminate the possibility that multiple minor offences (say administrative errors) which may be uncovered during an audit could result in disqualification due to accumulating a large number of demerit points in one hit.
- S214G of the act provides further scenarios in relation to accumulation of demerit points.
- Details regarding the allocation of the demerit points will be sent to the licensee and also published on the QBCC Certifier Register.

## Certifier demerit points [slide 16] – Speaker: Greg Matthews

If a certifier is issued 30 or more demerit points within a 3 year period they may be disqualified from holding a building certifiers licence.

- Disqualification Process:
  - QBCC issues a Notice of proposed disqualification to certifier
  - Certifier has opportunity to provide submissions
  - QBCC decision to disqualify or no further action

- Certifier disqualified and licence cancelled for
  - up to 1 year (first time disqualified) OR
  - up to 3 years (if they've already been disqualified within the last 10 years).
- Disqualification information published on the Certifier Register.
- If QBCC's decision is that a certifier is a disqualified individual the decision is a reviewable decision both internally (through the QBCC internal review process) or externally (through the courts).
- Information is provided in the Certifier Disqualification Notice on how to request a review of the decision.

### Certifier demerit points [slide 17] – Speaker: Greg Matthews

What new information will be shown in the certifier's register?

- In addition to existing requirements, the certifier's register will also detail:
  - any demerit points allocated to a certifier
  - the demerit offences and the dates the points took effect
  - if the building certifier has been a disqualified individual, details of the circumstances that led to the disqualification.

**Note:** that for unsatisfactory conduct decisions, the QBCC may decide not to record the decision in the public register if QBCC is satisfied the conduct has not compromised the health and safety of a person, or had a direct detrimental impact on another person.

- The Building Certifier Register is available on the QBCC website.

### Certifier complaints [slide 18] – Speaker: Greg Matthews

- Previously, under s194 of the Act, if a complaint was properly made to QBCC, it was mandatory for QBCC to conduct an investigation in relation to unsatisfactory conduct or professional misconduct.
- Under s190, the QBCC could dismiss complaints if further particulars were required but not given, or if the further particulars were not verified by statutory declaration.
- Under the revised s190, the QBCC may also dismiss a complaint if they are satisfied the complaint is frivolous, vexatious, or lacking in substance or credibility.
- This will enable increased efficiencies and potentially save valuable time for QBCC and certifiers alike. We all know how much time preparation of submissions and the like can burn. This is a great result in my opinion.
- There are also new timeframes for complainants to make a complaint to QBCC. Previously a complaint could be made many years after the completion of the work, creating difficulty with retrieval of documentation as well as difficulty with inspecting or verifying many aspects of an investigation.
- Under the revised s190, a complaint may only be made before the 'cut off day' unless the certifiers conduct has or may have caused significant financial loss or other serious harm.
- In the Act, 'cut off day' for making a complaint about conduct of a certifier means:

- if the certifier's conduct relates to the certification of building work the subject of a building development approval: **7 years** after a certificate of occupancy or final inspection certificate is issued (or the development approval lapses)
- otherwise – if the certifier's conduct relates to building work for which a building development application has been made: **1 year** after the private certifier is engaged or the application is received by the local government
- otherwise – within **1 year** of the complainant becoming aware of the conduct.

#### What's changing [slide 20] – Speaker: Greg Matthews

- BIFOLA has made important changes to the Building Act including:
  - demerit points and disqualification of licensed building certifiers
  - the online certifier's register
  - the process of making complaints about building certifiers to QBCC
  - updated terminology
  - the duty to act in the public interest
  - the obligation to give owner certain inspection documents
  - notices required to be given by building certifiers and clients during a building project
  - the option for owners to request additional inspections.
- These new requirements apply from 1 October 2020

#### Further information [slide 21] – Speaker: Greg Matthews

- For further information on any of the changes, you can head to the QBCC website [www.qbcc.qld.gov.au](http://www.qbcc.qld.gov.au) and click on the new laws tab.
- There is a section in there on BIFOLA, and also a separate recap of the main changes for certifiers, amongst other valuable information.

- END OF TRANSCRIPT -