



## The expanded definition of Influential Person – will it have unintended consequences?

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The Queensland construction industry saw increased regulation in 2017. With the industry focused on the “big ticket” items, being non-conforming building products, the changes to BCIPA and project bank accounts, the expansion of the definition of “influential person” under the *Queensland Building and Construction Commission Act 1991* (Qld) (“**QBCC Act**”) has mostly escaped attention. But it is an equally important change.

### WHAT DOES IT MEAN AND WHY DOES IT MATTER?

The Queensland Building and Construction Commission (“**QBCC**”) has multiple functions, but its primary function is to oversee a licencing regime for builders. The regime attempts to ensure that Queensland licensees are only those persons:

1. With the qualifications and experience to perform building work in a good and “tradesmanlike” manner; and
2. With the financial resources to complete the projects they commit themselves to.

The QBCC seeks to achieve the latter by imposing financial requirements upon applicants and licensees in an attempt to promote viable businesses within the industry and avoid licensees suffering financial collapse.

In order to preserve the integrity of the licensing regime, the QBCC Act provides that persons will be “excluded”

from holding a builders’ licence in certain circumstances, including if an individual holds a position of influence with a corporate licensee which collapses. While builders collapse for various reasons, including intentional and unintentional financial mismanagement, the government takes the view that no matter what the cause of a licensee’s failure, the individuals who held a position of influence within a collapsed licensee should not be allowed to hold a similar position within another licensee.

The aim is to prevent rogue and inexperienced operators from moving from business to business, given more financial difficulty may follow them. The QBCC Act provides that all individuals intimately involved with a collapsed builder (being directors, secretaries, significant shareholders and persons holding a position of influence) are, for a period of 3 years, excluded from personally holding a builder’s licence or being a director or secretary of, or holding a position of influence with, another builder (“**Excluded Individuals**”).

### INFLUENTIAL PERSONS

The excluded person regime extends to “influential persons” to ensure that builders operating through corporate entities cannot intentionally structure themselves in such a way that Excluded Individuals are in effective control of a business even though they are not a director or secretary. An example is where a person’s spouse would be the director and/or secretary, but the excluded person is, for all intents and purposes, running the business.

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An “influential person” was previously defined as “an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company’s affairs, including, for example, a shareholder with a significant shareholding, a financier or a senior employee.”

That definition has now been expanded and gives specific examples of who may be considered “influential persons”. The most concerning for employees of corporate building contractors is that, “a person may be an influential person for a company if the person [...] gives instructions to an officer of the company and the officer generally acts on those instructions; or makes, or participates in making, decisions that affect the whole or a substantial part of the company’s business or financial standing; or engages in conduct or makes representations that would cause someone else to reasonably believe the person controls, or substantially influences, the company’s business.”

The purpose of the change was explained by the Minister for Housing and Public Works as follows:

*“Anyone who receives a ban under these new laws will face major penalties if they try to run another building company, either in their own name or by, once again, giving secret directions from behind the scenes. The new regime will allow someone to be declared an ‘influential person’ even if they have no obvious paid role in a company or even if they are given a job title which is a disguise designed to provide false reassurance that the person is not actually in charge. As I said in the House this morning, people should not be running a dud business under their nanna’s name or under anyone else’s name. They should not get away with running under the radar. Lumping others with their debts, deliberately sinking their old company and then slinking away to a new business is disgraceful, base behaviour and it is a low act.”*

While there are sound policy objectives for ensuring creation of a legislative framework that closes any potential “loop holes”, the net can be cast too wide.

Large builders (which tend to operate through corporate entities) employ a number of people who will potentially be “influential persons” under the expanded definition, but who are usually only employees and who do not stand to gain from the profit of the business. For example, the expanded definition may well apply to senior project managers and financial officers who regularly “give instructions” which are acted upon or “participate in making decisions”, which affect a substantial part of the company’s business or its financial standing. Decisions which are made about specific projects, whether financial or operational, can have a significant affect on the

company as a whole, particularly if those decisions are in hindsight proved to have been unwise. There is a risk that, depending on how broadly the QBCC applies the expanded definition, certain employees of a collapsed builder may be classified as an “influential person” by the QBCC. As a result, they will be unable to obtain alternative gainful employment within their regular profession or trade for 3 years.

While the change has been implemented because of legitimate concerns, it has failed to take into account the adverse effects it may have on those employed in the industry. It remains to be seen how the QBCC will apply the newly expanded definition. Watch this space.

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