

Is a nominee licensee, an ‘influential person’?

We are all aware (or should be !) that if the business you are conducting contracts with customers through a company, then the existing licencing regime requires that:-

- (a) the company is the holder of a current licence of the appropriate class; and
- (b) the company has a nominee who is also currently licenced.

The class of licence for the company will be reflective of the class of licence of the nominee.

Under Section 43 of the *Queensland Building Services Authority Act 1991* (‘the QBSA Act’), a licenced contractor (and, in the case of a company, its nominee) is required to ensure that the building work carried out under that licence, is adequately supervised.

In deciding whether there was *adequate supervision*, the Authority will consider whether the work was:-

- (a) in accordance with the plans and specifications for the work set out in the Contract between the Contractor and the Consumer; and
- (b) of a standard expected of a competent holder of a Contractor’s licence of the appropriate class.

The supervision, control and direction reasonably necessary to ensure that building work complies with plans and specifications and is of an appropriate standard, will depend upon the complexity and nature of the work, as well as the experience and skills of those persons actually undertaking the work.

A breach of the ‘adequate supervision provision’ is an offence which carries a maximum penalty of \$3,000 if you are an individual, or \$6,000 if you are a company... for the first offence!

We are all familiar with circumstances where a licenced individual is employed by a company (with whom they have no other connection other than being an employee) on the basis that that individual’s licence is used by the company as its ‘nominee licence’.

Strictly speaking there is nothing wrong with that arrangement. It happens regularly and usually, the employee is ‘compensated’ for the use being made of his licence.

However, whatever the obligations of the company, that individual remains obliged to ensure that the building work carried out under his licence is adequately supervised.

BEWARE... of circumstances where your licence is being used for a number of different building sites in the circumstances where you are not able to provide that adequate

supervision in respect of all that work. On the basis that the licence is yours, the liability arising out of that building work, will also be yours.

For example, you will be called upon to rectify any of that building work that is defective. The ultimate liability will be yours, not the company employing you... although on the basis that the company is still operating, you would expect it to fix the problem. But if the company is defunct, the problem is yours and yours alone!

Another circumstance in which licencees put their licence in jeopardy... but which are illegal (but prevalent), is *licence lending*.

There can be no excuse for lending your licence to another person to enable that person to do building work. There can be no amount of compensation paid to you to justify the risk that you undertake by letting others use your licence to do building work.

I have recently given advice in relation to a third potential hazard of nominee licensing.

Part 3A of the QBSA Act provides for circumstances where individuals and companies can be excluded or classified as permitted individuals, by the Authority.

Pursuant to 56AC, an individual may be classified by the Authority as an *excluded individual* in circumstances where a company suffers an insolvency event and that individual was an *influential person* for the company.

An *influential person* is a person, other than a Director or secretary, who is in a position to control or substantially influence the conduct of the company's affairs; for example, a senior employee.

It is not too difficult to anticipate a decision by the Authority, that a nominee licencee is in a position to control or substantially influence the conduct of the company's affairs; for example, by allowing defective building work to be conducted under that person's licence, which in turn leads to compensation being payable by the company or rectification work being required to be completed, which results in the company becoming insolvent!

Once an individual is classified as 'excluded' by the Authority, they can either:-

1. accept the decision, in which case the licence will be cancelled; or
2. apply to the Authority to be classified as a *permitted individual*.

To be categorised as a *permitted individual* you need to satisfy the Authority that you '... took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event'; or

3. apply to the Commercial and Consumer Tribunal for a review of the Authorities' decision... to classify you as an excluded individual.

Great care needs to be taken if you are considering exposing your licence to any liability which you are not able to control. Ultimately it is your licence which entitles you to do building work and earn your living.

Lose it... and the consequences are dire!