

The Queensland Building Services Authority Act 1991 and The Queensland Building Tribunal - The First 12 Months

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The Queensland Building Services Authority Act 1991 ("the Act") was proclaimed on 1st July 1992¹. The ramifications of the Act were wide ranging and sweeping. In effect, it created a new system for the regulation of the building industry, repealed the Builders' Registration and Homeowners Protection Act 1979 and laid down a number of requirements with respect to domestic building contracts. In Queensland the building and construction industry has an annual turnover of more than \$5.5 billion and employs approximately 100,000 people. The housing sector represents more than half of that industry².

Where such an Act touches and concerns the livelihood of so many people, disputes regarding its interpretation and applicability are inevitable.

Already there appears to be an increasingly well trodden path to the Queensland Building Tribunal, the District Court and the Supreme Court. An examination of the decisions in those forums gives one an insight as to how such disputes may be decided.

Section 4 - "Domestic Building Dispute"

(a) Does not include the filling of land

The erection of a home is not "related" to the filling of land. The filling of land is so distinct from the building of a house as to be entirely independent. Disputes involving the filling of the land are not within the jurisdiction of the Tribunal, *I & S MacLeod v Taylor Westerveld Pty Ltd & Hepburn & Thorpe Pty Ltd*³.

(b) Limited by statute.

The definition of "domestic building dispute" does not create a new category of disputes not previously known to the law. The Act circumscribes or defines a category of disputes which previously existed and provides that the Tribunal has jurisdiction in respect of this category: *Shand Constructions v QBSA*⁴.

(c) Includes "related" supply of materials.

Both the Queensland Building Tribunal and the District Court have confirmed the wide ambit of the Tribunal's jurisdiction. In relation to this Section, the Tribunal has held:

"A claim or dispute arising between a consumer and a building contractor or between 2 or more

building contractors would be wide enough to bring within the definition of domestic building dispute, where the claim or dispute is in relation to the supply of materials. To read this section otherwise would result in an absurdity in the context of the objectives of the Act. The supply of materials, such as the tiles involved in this case, was related to the performance of domestic building work and the Tribunal thus has jurisdiction under Section 95 of the Act."⁵

(d) "Related to" given wide meaning.

The words "related to" in subclause (c) should be given a wide meaning.⁶

Section 4 - "Building Work"

The meaning of the phrase "building work" is by no means clear. This term is defined in both the repealed Act and the new Act. It is also a phrase made up of ordinary words with ordinary meanings. It seems odd that building work carried out before the commencement of the section should have a meaning which is only defined when the section came into force, see *Queensland Building Services Authority v Peter John Douglas*⁷. In that same case the Chairman of the Tribunal found that a builder had performed building work under the repealed Act but did not perform building work under the new Act.

Section 42 - Offences Under the Act by Licensed Contractors

A contravention by a licensed contractor of the terms of the Act does not necessarily disentitle that contractor from recovering payment for work carried out (see also Section 58(1)(e) of the Repealed Act). This is in stark contrast with Section 42(3) which provides that an **unlicensed** contractor is not entitled to any monetary or other consideration for doing so. This Act, like the Repealed Act, does not provide that the person for whom work is performed, which work constitutes an offence, may not obtain damages for breach by the builder; for example, for faulty workmanship, see generally the comments of the Court of Appeal in *Gaffney v Ryan*⁸.

Section 42(3) - Unlicensed Builder Not Entitled to any Monetary or Other Consideration

(a) Does the Section preclude a quantum meruit claim

Section 39 of the Building Licensing Act 1966 (South Australia) is similar to Section 42(3) and relevantly provides - "An unlicensed person who performs building work in circumstances in which a licence is required under this Act shall not be entitled to recover any fee or other consideration in respect of the building work unless the Tribunal or any Court hearing proceedings for the recovery of the fee or consideration is satisfied that the persons failure to be licensed resulted from inadvertence only."

The Supreme Court of South Australia in examining this Section said that:

"Fee or other consideration are words of contract. They mean quite simply the entitlement of the builder for his reward under his contract. It would be a strained meaning of those words to embrace restitution which is now clearly the basis for a quantum meruit claim. The section does not preclude a quantum meruit claim but merely is a statutory bar to enforcement by the builder of his entitlement to a fair consideration under his contract."

See *Tea Tree Gully Builders Co Pty Ltd v Martin & Martin 9*.

(b) Can an Unlicensed Contractor Recover the Cost of Materials and Outlays

The Supreme Court of Queensland has recently found that similar expressions such as those in this Section and in Section 53(2)(d) of the Repealed Act do not include such things as the cost of materials and other outlays. The Act could easily have said so as the Victorian legislature has done in section 19(1) of the House Contracts Guarantee Act 1987 (see, for instance, *Sevastopoulos v Spanos*)¹⁰. The section also precludes a Plaintiff who was an unregistered builder complaining of moneys owing under a construction contract or in the alternative the value of the work performed on a quantum meruit/valebat claim but did not preclude recovery for outlays incurred. See *Mostia Constructions Pty Ltd v Cox and Labivolo Pty Ltd 11*.

Section 43 - Supervision of Building Work

A person or company appointed as a builder has the duties and responsibilities of a builder, notwithstanding that he does not play an active part in the building at all times. In particular, if a person is appointed as a builder for a project involving a substantial length of time, he remains the builder for the project until his appointment is terminated or he is replaced. It does not matter that he only plays an active part at certain stages of the development. There appears to be no reason why under either the repealed Act or this Act, two or more persons cannot be the builder at the same time: *Ashmore Constructions Pty Ltd v Queensland Building Services Authority*¹².

Section 58 - Contract for Domestic Building Work to be in Writing

In circumstances where there is an oral contract between a registered builder and an owner entered into prior to the new Act, the Court of Appeal in *Pohlman v Harrison 13* has recently held that:

- (a) Such an oral contract would be unenforceable by reason of section 75 of the repealed Act;
- (b) The builder may be entitled to succeed on an alternative quantum meruit claim.

Section 64(1) - Fixtures and Fittings

This section is not retrospective: *Hamilton Nominees Pty Ltd v Queensland Building Services Authority 14*. See also *Brown v Dickson 15*.

Section 67 - References of a Domestic Building Dispute to Arbitration - Void

(a) Where arbitration already commenced.

In *Gregory Brown trading as Kleerstyle Homes v Robert & Aileen Dixon 16* Lee J. held that a reference to arbitration pursuant to clause 25 of the agreement in question, was not void pursuant to Section 67 of the Queensland Building Services Authority Act 1991. His Honour was of the view that notwithstanding there were no transitional provisions preserving arbitrations already commenced, the conclusion that an arbitration, validly instituted under the Act, is simply of no effect because of the coming into force of section 67 of the Act, is unsustainable and contrary to the ordinary presumption against retrospectivity.

(b) Power of Tribunal to proceed where dispute already referred to Arbitration

In *Makinsom and Dyer v Heran Projects Pty Ltd 17*, the then Chairman of the Tribunal rejected a contention that the Tribunal's jurisdiction did not extend to disputes which had arisen prior to its establishment; a fortiori where before that date there has already been a reference to arbitration, on the basis that the creation of the Tribunal and its jurisdictional power was entirely a procedural matter and there was nothing in the Act creating and defining its jurisdiction to show that the jurisdiction was not to be exercised from the time its powers were given. Accordingly, the Tribunal had power and jurisdiction to hear and determine the application notwithstanding the matter had previously been referred to Arbitration and thus, in those circumstances, proceedings both before the Arbitrator and before the Tribunal were competent although the Tribunal had no power to order the Arbitrator to stay proceedings beforehand.

(c) Arbitration Clause may Continue to be Effective

An arbitration clause in a contract may continue to be effective notwithstanding the provisions of Section 67 of the Act although this does not deprive the Tribunal of jurisdiction but merely provides that there is concurrent jurisdiction, *R & N. Dixon v Greg Brown trading as Kleer Style Homes*¹⁸.

Section 72 - Directions to Rectify

(a) Direction to Carry Out Rectification

"Carried out" means doing a thing oneself or causing it to be done i.e. having someone else do it for you, per Kimmins DCJ in *Ashmore Constructions Pty Ltd v Queensland Building Services Authority* 19.

Where a contractor was licensed when the building work was carried out but was no longer licensed, then the contractor must arrange to have the rectification work carried out by a licensed contractor, *Trevor Dunnnett v Queensland Building Services Authority* 20.

(b) Wording of Direction to Rectify

A direction to rectify need only express in broad terms the work that is required, *Zacharyga v Queensland Building Services Authority* 21. See also *RVMaguire & Hanlon Homes Ex parte Builders Registration Board* 22.

(c) Building Work Needs to be Unsatisfactory

It is the building work which has to be found to be unsatisfactory and building work which involves the construction of gutters that encroach upon an adjoining property is unsatisfactory building work and comes within the terms of the section, *Shand Constructions Pty Ltd v Queensland Building Services Authority* 23.

Section 89 - Legal Representation Before the Tribunal

A lawyer or "next friend" is allowed to attend the proceeding as advisor to, but not as advocate for, a party appearing in person, *Rufus Joseph Mitchell v Russell Prescott* 24. In exercising its discretion whether to allow legal representation, the essential question for the Tribunal is whether, having regard to all of the circumstances, the interests of the parties and of justice would be best served by granting or refusing leave for legal representation 25.

Section 94 - Appeals to the District Court

(a) Setting Aside Decision under Appeal

If an appeal is not by way of re-hearing, the findings made below may be set aside only if they are manifestly wrong. One must look to the judgment to see what fact findings the Tribunal has made. One then looks to see if there is evidence on which such findings could properly be made. If these steps are satisfied, the next step is to see whether or not the Tribunal has misdirected itself, per Kimmins DCJ in *Ashmore Constructions Pty Ltd v Queensland Building Services Authority* 26.

(b) Costs on Appeal

In order to discover anything concerning the costs in the appeal one looks at the Act or the rules which govern the Court which hears the appeal.

One Judge of the District Court, Queensland was of the view:

"I just cannot see what relevance the power or lack of power in the Tribunal to order costs has to do with the question of power of the District Court to order

costs on a hearing of an appeal from the Tribunal. One looks at the District Court Act and the Rules if one wishes to find out anything about the powers or practice of the District Court." 27

Section 95 - Jurisdiction of Tribunal to Hear Domestic Building Disputes

(a) Powers of Tribunal

For the purposes of the jurisdiction under this Section the Tribunal is empowered to:

- (i) make orders and give directions to resolve any dispute or matter at issue between the parties to any domestic building dispute (Section 95(1));
- (ii) join other parties (including suppliers and subcontractors) to a proceeding already commenced and similarly to make orders and give directions against such parties so joined (Section 95(3)).

Domestic building dispute is defined in section 4(1). Section 4(1)(c) provides that a domestic building dispute includes a claim or dispute in negligence, nuisance or trespass relating to the performance of domestic building work. The word "relate" is to be given a wide meaning and includes the negligent manufacture of materials used in the performance of building work such that an application may be brought by a builder against the manufacturer of those materials without bringing an application against the subcontractor or supplier of the materials 28.

(b) Existence of Jurisdiction

The Tribunal was created by Section 75 of the Act which came into force on 1st June 1992. Part 8 which includes Section 95(1) came into power on 1st July 1992. On that date the Tribunal had jurisdiction to hear and determine domestic building disputes. The Tribunal has jurisdiction in respect of domestic building disputes which existed at any time after the Tribunal was established and has that jurisdiction notwithstanding that an agreement leading to such a dispute was entered into at an earlier time, *Umbuck v Dixon Group Limited* 29.

(c) Costs before the Tribunal

In *Ashmore Constructions Pty Ltd v Queensland Building Services Authority* 30, the then Chairman held that the question of costs before the Tribunal is a separate matter and not something which follows on a substantive order under section 99(4) of the Act and an order for costs can therefore only be made if it is a consequential on the decision being the subject matter of the review and that, accordingly, the Tribunal has no power to award costs and make an order as to costs under section 99(4) of the Act.

The power to make consequential orders on the resolution of review proceedings does not allow the Tribunal to award costs, c.f. Section 32 of the Commercial Tribunal Act (NSW) 1984 and *Barry Clark v Building Services Corporation* 31.

Section 99 - Application for Review**(a) Tribunal has a Discretion**

The Building Tribunal has a discretion whether to enforce a direction of the Authority or not, *Gary Norwood Development Pty Ltd v Queensland Building Services Authority* 32.

(b) Function of Tribunal

The Tribunal's function is not to detail how any rectification work must be done, its function is to carry out the tasks set out in section 99(4) of the Act; *Trevor Dunnett v Queensland Building Services Authority* 33.

The Tribunal is in a position by virtue of section 99 of the Act to assume the shoes of the Authority and the powers of the Authority and to decide whether or not the Tribunal should exercise that discretion, *Shand Constructions Pty Ltd v Queensland Building Services Authority* 34.

Clause 2 - Schedule to the Act - Dissolution of the Builders' Registration of Queensland

The new Act and regulations made under it provide machinery for an applicant to appeal against any condition imposed on his licence, and accordingly an intention contrary to section 20 of the Acts Interpretation Act appears in the Act. Thus, in relation to any appeal instituted under the repealed Act in the Magistrates Court or District Court, upon dissolution of the Board, there is no respondent to that appeal and there is no provision in the new Act 13 transferring to the Authority any responsibility as respondent to that appeal, nor is there any provision in the new Act providing for the continuance of appeals, per Ryan J. in *Corry v Quinlan* 35. Thus, as Ryan J pointed out in that case, the effect of regulation 31(3) of the Statute Law (Miscellaneous Provisions) Act 1992 is that if an applicant's licence is continued under the new Act with the condition attached to it by the Board, the contractor may request its removal by the Authority and if the Authority refuses, the decision of the authority will be one that adversely effects the applicant and he may apply under section 99 of the Act for review of the decision, but, he can't appeal to the Magistrates Court as there will be no respondent to the appeal - the Board having been dissolved. □

Footnotes

1. See (Building Contracts 1992 CLE paper 21/10/92 and QLSJ Vol 22 No. 5, page 39)
2. See the Courier Mail 13/06/92, page 33
3. (unreported, Qld Bldg Trib 10/11/92)
4. (unreported, Qld Bldg Trib 23/3/93)
5. *Chard Roberts Construction Pty Ltd v Johnson Tiles Pty Ltd* (unreported, Qld Bldg Trib 24/2/93) upheld on appeal by Hoath DCJ in *Johnson Tiles Pty Ltd v Chard Roberts Construction Pty Ltd* (unreported, District Court Applic No. 51 of 1993).
6. *Chard Roberts Construction Pty Ltd v Johnson Tiles Pty Ltd* (Supra); see also *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council & Ors* (1983) 43 LGRA 346.
7. (unreported, Qld Bldg Trib 30/10/92)
8. (unreported, Court of Appeal 11/12/92)
9. Per Bollen J (1992) 165 LSJS 409
10. [1991] 2 VR 194
11. per White J (unreported, Supreme Court Qld 22/2/93)
12. (unreported, Qld Bldg Trib 22/10/92)
13. (unreported, Court of Appeal 3/2/93)
14. (unreported, Qld Bldg Trib 26/02/93)
15. (unreported, Sup Crt Qld 18/8/92 per Lee J)
16. (unreported, Supreme Court 18/8/92)
17. (unreported, Qld Bldg Trib 26/11/92)
18. (unreported, Qld Bldg Trib 27/11/92)
19. (unreported, Dist Crt Applic 8/1993)
20. (unreported, Qld Bldg Trib 25/2/93)
21. (unreported, Qld Bldg Trib 17/2/93)
22. [1986] 1 QdR 64
23. (unreported, Qld Bldg Trib 23/3/93)
24. (unreported, Qld Bldg Trib 10/2/93)
25. Ibid
26. (unreported, Dist Crt App 8/1993)
27. Per Kimmins DCJ in *Ashmore Constructions Pty Ltd* (supra)
28. See *Chard Roberts Constructions Pty Ltd v Johnson Tiles Pty Ltd* (unreported, Dist Crt App 51 of 1993)
29. (unreported, Qld Bldg Trib 3/11/92)
30. (unreported, Qld Bldg Trib 22/10/93)
31. (unreported, Comm Trib of NSW 26/7/91)
32. (unreported, Qld Bldg Trib 1/12/92)
33. (unreported, Qld Bldg Trib 25/2/93)
34. (unreported, Qld Bldg Trib 23/3/93)
35. (unreported, Sup Crt Applic 751/1992)