CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

The Research Director
Transport, Housing and Local Government
Committee
Parliament House
George Street
BRISBANE QLD 4000

18 September 2012

Our ref 12344/18022/80136346

Dear Sirs

This is a submission by Clayton Utz in its own capacity to the inquiry into the operation and performance of the Queensland Building Services Authority. We have written this submission as we are concerned that unless the issued referred to in this letter is addressed the legal effect of a wide range of real estate documentation entered into virtually daily is at real risk of being held to be unenforceable.

Essentially the Queensland Building Services Authority Act (Act) requires any party that carries out, or relevantly *undertakes* to carry out, building work to hold a contractor's licence of the appropriate class (Section 42). The Courts have held that in the event an unlicensed party enters into a contract to carry out building work without being licensed the contract is as against that party unenforceable.

Whilst the licensing provisions of the Act are intended to further the objects of the Act (relating to the regulation of the building industry) they have, I am sure, the unintended consequences of putting at risk the enforceability of agreements entered into by commercial parties such as an owner of land agreeing to procure the construction of a building for a tenant (agreement for lease) or a purchaser of the land (development agreement). Such agreements are entered into on a very regular basis. In those instances the party who has agreed to undertake building work will invariably engage a licensed builder to carry out the physical building work. Unfortunately the wide scope of section 42 of Act (and the definitions of the terms used in that section) is likely to have the consequence that such parties are undertaking to carry out building work. These parties generally do not hold contractor's licences under the Act.

When this issue is discussed in negotiations of real estate agreements (such as agreements for lease and development agreements) legal representatives assume that the licensing requirements of the Act would not be interpreted so widely as to apply to these parties given the underlying objects of the Act. This specific issue has not yet been subject to judicial consideration. However the recent approach of the Queensland Courts has been to adopt a strict interpretation of the Act, and on such an interpretation the undertakings given by these parties under such agreements would likely be caught by section 42 of the Act.

The Act could readily be amended without impacting on the objects of the Act by saying a party is not required to obtain a builder's licence if the party that actually performs the physical the building work is in fact appropriately licensed.

Without such an amendment the current position casts doubt on the validity of a range of agreements which commercial parties would properly consider should not be subject to such restrictions. The licensing requirement in the Act adversely impacts on parties who are committing to construct buildings for parties who are wanting to lease the building or in fact purchase the building.

We request the State consider amending the legislation to make it clear a party that agrees with another party to undertake building work will not be in breach of the Act (and therefore put the agreement with the other party at risk) if the actual building work is undertaken by an appropriately licensed builder.

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We will be happy to have a meeting with you to discuss this or other amendments to the Act at your convenience.

Yours sincerely

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