**Procuring agency referral report**

Ethical Supplier Mandate

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| **Cover summary** |
| **CCR reference no:** | INS-12345 |
| **Supplier:** | XYZ Plumbing Pty Ltd  |
| **Supplier ABN:** | 01 234 567 89 |
| **TPAS project identifier:** | 9999 |
| **Contract reference:** |  |
| **Project details:**  | New Hospital Project  |
| **Procuring agency:** | Queensland Health |
| **Managing Procuring agency:**  |  |
|  |
| **Date of referral:** | Click or tap to enter a date. |  |

# Purpose

This report is prepared and compiled by the Queensland Government Procurement Compliance Branch (Compliance Branch) of the Department of Energy and Public Works (EPW) from information obtained during the investigation. It is for the use of the EPW and may contain information subject to privacy legislation, right to information legislation, confidentiality, and restriction in common law. The report may contain views and opinions including findings and recommendations, which are those of the Compliance Branch.

The scope of the investigation involved the collection of compelling and admissible evidentiary material to primarily determine whether a breach of contract and/or Government policy or regulation has been committed. This report will assist the Procuring Agency to decide whether an alleged breach is either capable of being progressed to Show Cause Notice, or not capable of being progressed.

This document, along with any attachments, is confidential and should be managed appropriately as per the Information Privacy Act 2009 (Qld) and other information sharing requirements relevant to the Queensland Government.

**Requirements for this report:**

 [x]  Identification of an alleged breach of the Mandate.

 [x]  Investigation of the allegation, producing evidence of non-compliance.

 [x]  Show cause proceedings.

 [ ]  A determination by the agency the allegation is capable of being progressed.

# Subject of the Investigation

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| **Subject of Investigation:**  | XYZ Plumbing Pty Ltd |
| **ACN:** | 987 654 321 | **ABN:** | 01 234 567 89 |
| **Contact details:** | Mick Plumber | 0417 627 368 | mick@xyzplubming |
| **Postal address:**  | 1234 Smith Street, Brisbane  |
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# Contract details

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| **Contract parties:**  | XYZ Plumbing Pty Ltd and Big Building Company Pty Ltd  |
| **Date Contract signed:** | 5/05/2021 |
| **Agency contract manager** | John Smith |  | John.smith@… |
| **Postal address:**  |  |
| **Contract variation request verified by DESBT:**  | [ ]  |
| **Contract variation executed/signed:** | [ ]  Yes Click or tap to enter a date.[ ]  Not applicable |
| **Other contract variation details:**  | <insert any other relevant details that apply to contract variation OR [ ]  Not applicable> |

# Alleged non-compliance overview

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| **Alleged breach number: 1** |
| **Alleged breach details:** | XYZ Plumbing Pty Ltd (XYZ) did not pay employee 1 and employee 2 a meal allowance on 10 occasions between 30 September 2021 and 8 November 2021. The *XYZ Plumbing Pty Ltd New Hospital Project Greenfields Agreement 2020 (GA)* – Appendix 1 section 5 - Allowances, prescribes the rate at which a meal allowance is paid is $22.42, employee 1 and employee 2 were not paid this allowance when entitled to it.The underpayments occurred once per week over a 10-week period, the total combined amount back paid to employee 1 and employee 2 was $224.20.This constitutes a breach of the *Ethical Supplier Threshold*. |

# Investigation Details

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| **Background**On 1 April 2021, Big Building Company Pty Ltd (BBC) submitted a tender to Qld Health for the New Hospital Project (the project). BBC was awarded the contract and appointed Managing Contractor of the project; this was communicated by Formal Instrument of Agreement (FIA) on 1 May 2021. The contract value for the project was $160, 000, 000.00 therefore this is a *Best Practice Principles* (BPP) project. On 5 May 2021 XYZ entered into an agreement with BBC for the provision of plumbing work for the project. As part of the tender process leading to this agreement XYZ have provided to BBC an executed Deed Poll that permits the ‘Principal or it’s agents’ (Qld Health/BQAT) to access records held by XYZ in order to conduct an audit to assess compliance with XYZ’s commitments to the BPP and *Ethical Supplier Threshold* made in its tender. These tender documents were adopted as part of the subcontract between XYZ and BBC.On 5 December 2021, the Buy Queensland Audit Team (BQAT) conducted an audit to assess XYZ’s compliance to their contracted commitments to the *Ethical Supplier Threshold* and *Best Practice Principles* (BPP) for their work on the project.The audit established the industrial agreement that must be used by XYZ in remunerating their employees working on the project is the *XYZ Plumbing Pty Ltd New Hospital Project Greenfields Agreement* 2020 (the GA).**Audit**As part of the industrial relations component of the audit, BQAT audited the pay records of 2 employees of the 6 employees XYZ employed on the project. The pay records included pay slips, timesheets, superannuation contribution documents and employment contracts. .The following was undertaken by BQAT as part of the audit:* A review of the pay slips issued to employee 1 and employee 2 during the pay periods 30 September to 21 October 2021.
* This review showed both employee 1 and employee 2 had worked overtime on each Wednesday afternoon of the pay period that triggered a meal allowance payment.
* A review of the GA identified Appendix One – Section 5 prescribes the rate of meal allowances to be paid to employees as $22.42.
* On 21 January 2022, BQAT advised XYZ the non-compliance had been identified as a breach of section 50 of the *Fair Work Act 2009* – Contravening an *Enterprise Agreement*.
* BQAT required XYZ to provide evidence of corrective actions taken to rectify the issue.
* A review undertaken by XYZ established both employees worked overtime on Wednesday afternoon each week for 10 weeks (30 September 2021 – 8 November 2021). This overtime triggered a meal allowance payment.
* On 23 February 2022, BQAT received evidence that both employees were back paid $224.20 each on 5 February 2022. This evidence included a play slips from 21 October 2021 – 8 November 2021 and a payroll summary showing the meal allowance adjustment for each employee.
* Overtime was not worked after 8 November 2021 as the work necessitating the overtime was complete.
* At the conclusion of the audit this matter was referred to the Compliance Coordination and Referral Team (CCR) for further investigation.

**CCR Investigation**On review and further investigation CCR established the following:* Clause (bb) of Annexure F of the ‘Major Works Contract’ between BBC and XYZ establishes:

The subcontractor must in carrying out the Work Under Contract (WUC) and the Works, comply with: 1. the principles of the Queensland Procurement Policy and any requirements under the Subcontract or of the Client or BBC in this regard.
2. the Ethical Supplier Threshold; and
3. its tender in respect of the Best Practice Principles, including any workplace relations management plan in relation to the Best Practice Principles
* The table in Appendix One, Section 5 of the GA prescribes the meal allowance applicable for the period between 1 July 2021 to 30 June 2022 as $22.42.
* Aside from prescribing the meal allowance amount, the GA is silent on when an employee is entitled to a meal allowance.
* Clause 5.2 of the GA states; *“Where this Agreement is silent the terms of the relevant Award apply for the Employee”*.
* The relevant award for Plumbers is the *Plumbing and Sprinklers Award (*the Award)*.*
* Clause 18.1 of the Award - Allowances states; *“Employers must pay to an employee the allowances the employee is entitled to under clause*[*18*](https://awardviewer.fwo.gov.au/award/show/MA000032#P390_31666)*”.*
* Clause 18.3 of the Award – Expense Related Allowances states:

*(f) Meal allowance**An employee will be paid a meal allowance in accordance with clauses*[*15.2(d)*](https://awardviewer.fwo.gov.au/award/show/MA000032#P306_26266)*,*[*15.2(e)*](https://awardviewer.fwo.gov.au/award/show/MA000032#P308_26510)*and*[*15.2(f)*](https://awardviewer.fwo.gov.au/award/show/MA000032#P309_26702)*.** Clause 15.2 of the Award – Meal Break During Overtime state:

*(d) An employee required to work overtime for more than 1.5 hours after working ordinary hours will either be supplied meals by the employer, or be paid $16.37 for the first and subsequent meals…** A review of the pay slips issued to employee 1 and employee 2 identified each worked overtime of 3.5 hours on one day/week, which triggered the meal allowance pursuant to clause 15.2(d) of the Award.
* Although the rate of the meal allowance is $16.37 in the award, this is superseded by the meal allowance of $22.42 prescribed in the EA.
* By failing to pay employee 1 and employee 2 a meal allowance, XYZ have failed to comply with the requirement set out in the award which then constitutes a breach of s50 of the *Fair Work Act 2009* – *Contravening an Enterprise Agreement. (as per Clause 5.2 of the GA)*
* A breach of the s50 of the of the *Fair Work Act 2009* - *Contravening an Enterprise Agreement* is by definition a breach of section 2(a) of the *Ethical Supplier Threshold* - a contravention of a civil remedy provision of Chapter 2 or 3 of the *Fair Work Act 2009*, or an offence committed against the *Fair Work Act 2009*.

 **Note:** Section 50 of the *Fair Work Act 2009* is identified as a ‘civil remedy provision’ of Chapter 2.On 13 May 2022, XYZ were sent correspondence that included a series of questions in relation to this issue. On 15 June 2022 XYZ provided the following in response to these questions:* XYZ advised they became aware of the non-compliance when compiling the payroll documentation to provide to BQAT for their audit.
* XYZ advised the underpayment was rectified within 2 weeks of XYZ being made aware of the issue.
* XYZ advised the underpayment occurred due to an inexperienced payroll officer being tasked with compiling timesheets and conducting the reconciliation. This payroll officer was not aware of the meal allowance trigger included as part of overtime calculations.
* XYZ Contracting have an internal audit process whereby a senior manager cross checks payroll details that similarly did not identify the issue.
* XYZ have implemented a ‘New Project IR HR Checklist’ to prevent any similar human errors occurring in the future.
* VTS Contracting advised they have not previously been found to have underpaid meal allowances.

**Show Cause Notice**On 13 June 2022, through the show cause process, XYZ were asked to consider all evidence and documents collected as part of the investigation and then provide any further evidence that was not been considered as part of the investigation refuting or contesting the allegation. XYZ provided no additional information in the response received by CCR on 15 June 2022. |

# Investigation Findings

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| **Investigation Determination – Non-compliance 1** |
| CCR has formed the view that XYZ has clearly contravened the *Ethical Supplier Threshold* therefore this matter should be referred to Queensland Health to consider progressing the matter to the panel for their consideration.Section 2.2 of the *Ethical Supplier Mandate 2019* prescribes the application of 20 demerit points for any non-compliance to the *Ethical Supplier Threshold*. In addition to establishing a contravention of the *Ethical Supplier Threshold*, the *Ethical Supplier Mandate Standard Operating Procedure* requires the investigation evaluate if the behavior that contributed to the non-compliance was negligent, deliberate, or repeated. In considering this, CCR applies the provisions of section 9 of the *Civil Liability Act 2003 – General Principles:*1. *A person does not breach a duty to take precautions against a risk of harm unless—*

*(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and**(b) the risk was not insignificant; and**(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.*1. *In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—*

*(a) the probability that the harm would occur if care were not taken;**(b) the likely seriousness of the harm;**(c) the burden of taking precautions to avoid the risk of harm;**(d) the social utility of the activity that creates the risk of harm*.CCR has formed the view XYZ’s failure to pay the correct meal allowance to employees is clearly negligent. The following has been considered and forms the basis for this determination:* XYZ made contractual commitments relating to their work on the project to comply with the *Ethical Supplier Threshold.*
* Has failed to meet those commitments.
* XYZ is a large company providing Plumbing services to large building projects Australia Wide.
* XYZ is and has been a subcontractor on large government and commercial projects Australia wide and thus has significant experience in the management of contracts and related commitments these contracts impose on a subcontractor.
* It is reasonable to expect that XYZ was aware of its contractual commitments to the *Ethical Supplier Threshold,* and that care would be taken in ensuring they met these commitments.
* It is reasonable to expect that if care was not taken in management of its contract, a breach of its contractual commitment would occur.
* XYZ has 3 separates, approved ‘Enterprise Agreements’ listed on the Fair Work Commission website. It is reasonable to assume that XYZ has significant experience in the management and implementation of Enterprise Agreements as part of contracts they enter into and perform work under.
* A breach of this contractual obligation is potentially a contravention of the *Fair Work Act 2009,* leaving XYZ liable to penalty under this legislation.
* XYZ has provided no further explanation of how this breach may have occurred apart from it it was an ‘inexperienced payroll officer’ that was tasked with compiling timesheets and conducting weekly reconciliation.
* It is reasonable to expect that if care was not taken in management of its contract a breach of its contractual commitment would occur.
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| **Date of determination:** | 4/08/2022 noting this report is due to the QGP Compliance Branch within five (5) business days of this date | **Proposed severity:** | Major non-compliance10 Demerit Points |
| **Proposed Mandate category:** | Section 2.2 of the *Ethical Supplier Mandate 2019*, prescribes the application of 10 demerit points where a provider has achieved 50% or less compliance with the required number of apprentice and trainee hours on a project. |

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| **Additional Details:**  |
| **Have any contract management actions been taken in relation to this matter?** | [ ]  Yes [ ]  No <if yes, insert a comprehensive summary of these contract management requirements, including any deadlines provided to the supplier> |
| **Has this matter also been referred to a regulator?** | [ ]  Yes [x]  No [ ]  Not applicable | **Date of referral:** | [x]  Not applicable |
| **Is there any other information you would like to submit with this allegation?** |
| <insert any other details relevant to the non-compliant conduct, supplier, market etc., or [x]  Not applicable> |

# Penalty risk profile

**Would sanctioning this supplier present a risk to your business area? If yes, please provide further details.**

<include any exposed markets caused from a possible sanction>

# Other details

**Is there any other information you want the Tripartite Procurement Advisory Panel or decision maker to consider?**

<insert other details, or [ ]  Not applicable>

# Report attachments

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| **Attachment 1** | **Contracts and Agreements – XYZ Pty Ltd** |
| **Attachment 2** | **Evidence of Non-Compliance – XYZ Pty Ltd**  |
| **Attachment 4** | **Show Cause Notice – XYZ Pty Ltd** |
| **Attachment 5** | **Response to Show Cause Notice – XYZPty Ltd** |

# Report sign-off

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| QGP Compliance Branch has considered Intalect Pty Ltd’s response to the Show Cause Notice and the decision made in this report. QGP Compliance Branch has determined that the breach is capable of being progressed to the *Tripartite Procurement Advisory Panel*.  |
| **Details of signee QGP Compliance Branch:** | Tatjana CindricManager, Compliance Coordination and Referral, Compliance Branch |
| **Signature:**  | <insert signature> |
| **Date of signing:** | Click or tap to enter a date. |
| Queensland Health has considered <insert subject of investigation’s> response to the Show Cause Notice and the decision made in this report. QAS has determined that the breach <is/is not> capable of being progressed to the *Tripartite Procurement Advisory Panel*. |
| **Details of signee Queensland Health representative:** | <insert name of signee>, Chief Procurement Officer, <insert department name> |
| **Signature:**  | <insert signature> |
| **Date of signing:** | Click or tap to enter a date. |

# Appendix 1

TPAS – Compliance Plan for QAS Generator Upgrades – Stage 8 – 9 sites project

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| Training Type  | Total Contract Agreed Hours | Total Hours Achieved   | Achieved % of total contract agreed hours |
| New Entrants   | 287 | 287 | 100% |
| Other Workforce  | 191 | 0 | 0% |
| Total Hours | 478 | 287 |

**Table 1. Contract agreed training hours – hours recorded in TPAS at the practical completion of the project 30 June 2021.**

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| --- | --- | --- | --- |
| Training Type  | Total Contract Agreed Hours  | Total Hours Achieved   | Achieved % of total contract agreed hours |
| New Entrant   | 287 | 0 | 0% |
| Other Workforce  | 191 | 0 | 0% |
| Total Hours | 478 | 0 |

**Table 2. Contract agreed training hours - verified compliance hours as determined by BQAT audit findings as of 17 February 2022.**