

Q & AS – ACRA MEMBERS

DESIGN AND BUILDING PRACTITIONERS ACT 2020 (DBPA)

DESIGN AND BUILDING PRACTITIONER REGULATIONS 2021 (DBPR)

1 Body Corporate Practitioner

What is the necessity and/or benefit of being a body corporate practitioner as well as an individual practitioner (personal liabilities, insurance etc), and if an individual practitioner works for a registered body corporate, who should sign the declaration and in what form (i.e. 'so and so on behalf of' etc).

The classes of registration for body corporates are:

- Design Practitioner – Body Corporate;
- Principal Design Practitioner – Body Corporate;
- Building Practitioner – Body Corporate; and
- Building Practitioner – Body Corporate Nominee.

In all these classes, a body corporate is authorised to do anything that a registered practitioner who holds that particular class of registration can do, but only by way of an individual who:

- is an employee of the body corporate; and
- holds that class of registration.

For example, a registered body corporate that holds a "Building Practitioner – Body Corporate" class of registration is authorised to make a building compliance declaration for building work if they have a nominated individual that holds either 'General' or a 'Body Corporate Nominee' class of registration.

An individual who holds a 'General' class of registration and makes building compliance declarations for building work on behalf of the body corporate, as well as in their personal capacity.

A 'Body Corporate Nominee' can only make building compliance declarations on behalf of the body corporate.

Both the individual and the body corporate needs to be 'adequately insured' as required by the Act after 1 July 2022. Under clause 74 of the DBPR, the indemnity provided under this policy must extend to 'a person who has been a registered partner or registered employee of the body corporate regardless of whether the person ceased to be a registered partner or registered employee before the policy commenced'. Therefore, employees preparing designs for a body corporate should be covered, under normal principles, by their employer.

2 Exempt development and building elements

The legislation is somewhat vague in that the Regulation says the Act does not apply to exempt development, however the Act says that a regulated design must be prepared for a building element for building work, and that a 'building element' includes 'a component of a building that is part of the building enclosure'. Does this mean that literally any work to a building façade – including that which has traditionally been considered exempt as 'maintenance' (render repair, repainting, resealing of joints etc) – is now subject to the Act? Does this mean that such work also now requires development approval? If the answer is no and some work to building elements can still be considered maintenance, how do we determine this?



Notwithstanding that Section 5(1)(a) of the Act prescribes that a regulated design is a design that is prepared for a "building element" for "building work", if the building works are "exempt development" other than waterproofing, the Act does not apply to those building works subject to clause 13 of the DBPR.

For example, waterproofing is not subject to the Act if it is work carried out as a result of alterations to a bathroom, kitchen or toilet, is exempt development and is only being performed in a single dwelling.

Further, clause 13(2) specifies that works under clause 13(1)(c) works done under a Council Order or 13(1)(d) works done in compliance with a development control order, are only exempt if they do not relate to works 'for the purposes of repairing, rectifying or replacing the external cladding of a building'.

3 Pre-existing non-compliance

Many existing buildings have pre-existing non-compliances due to poor original construction, changing standards or simply age/wear and tear (let's face it, we really only get called to buildings when they are no longer performing, and hence some sort of non-compliance is inherent in almost all of our remedial projects). Examples include hob heights, floor to floor heights, leaks in facades. In many instances, it is simply too cost prohibitive to make the building compliant (for example, if complete façade replacement would be required to make it waterproof). How do we provide solutions to our clients that make their situation substantially better at a reasonable price, but that may not be 100% compliant. Façade leaks are a good example – we can often reduce water leaks to manageable levels, but the façade still leaks and is hence not compliant. How can this be managed?

This is a good question. We are working closely with the Building Commissioner's office to gain a better understanding of how remedial solutions in some situations can comply with the BCA when it is not possible to fit a compliant solution into an existing space and still meet the performance requirements of the BCA.

We will release further information as to this in due course but note that we have been referred to the Evidence of Suitability Handbook for guidance in the meantime:

https://www.abcb.gov.au/sites/default/files/resources/2021/HandbookEvidenceofSuitability_2021%20%282%29.pdf

4 Product certification

How do we manage the issue of product certification in reality? We rely on data provided to us by the manufacturers – how do we capture this in the case where the manufacturer is wrong or being deceptive? A current example – we have recently specified a render product on a project on the advice (including data sheets) provided by a major global materials manufacturer. They have now told us on another project that they have changed that advice and no longer recommend that previous product in that application. How can we manage such situations across the literally thousands of products that are incorporated into façade designs?

From a liability perspective, we recommend that you ensure you are protected in your dealings with product suppliers and manufacturers. Once again, the Evidence of Suitability Handbook sets out guidelines for Product Technical Statements and Documentary Evidence that should be obtained to support NCC Compliance.

There is obviously a constant changing platform across the construction industry with manufactured products which is difficult to manage when you are utilising so many products.

5 Underlying conditions

How do we manage projects on existing buildings where we cannot possibly know the condition of underlying substrates prior to demolition? The legislation requires that we lodge designs prior to construction, meaning that we must lodge designs stating 'TBC' (which we anticipate is going to have a negative reception by the commissioner) or waste our client's



money by preparing 'fake' designs that are based on guesswork and that we know are going to be subject to variation declarations later. Combustible cladding projects are the best examples – we cannot know every underlying condition on every part of the building until the cladding is removed.

Construction projects are an organic process. You can only assess what you can reasonably see, therefore the situation you have described above is difficult.

Construction contracts account for latent conditions (existing building defects). As such, where latent conditions are found during the construction process, it will be necessary to go down the variation process in accordance with the Act and Regulations and the building practitioner will need to return to the designer to obtain varied Regulated Designs.

Whilst the Regulated Designs are required to be lodged prior to commencement of building works, variations are allowed for and in this case, further design compliance declarations will be required and both the declarations and the varied designs must be lodged within 1 day of commencing the 'varied work'.

The above is not intended to be legal advice and should not be relied on as such. If you require legal advice as to your particular situation please do not hesitate to contact us.