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**MASTER BUILDERS ASSOCIATION SEMINAR –
THE COLA ACT; AN UPDATE**

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The **Construction Occupations Licensing Act 2004** (“the COLA Act”) has been around since 1 September 2004. An update to the COLA Act came into force on 1 July 2006.

The Act provides for the licensing, disciplining and general regulation of construction occupations.

Section 7: what is a construction occupation?

Each of the following is a construction occupation: builder, building surveyor, drainer,

electrician, gasfitter, plumber and plumbing plan certifier.

Also, ‘asbestos assessor’ and ‘asbestos removalist’ have been added to the list. These occupations are defined in sections 7A and 7B.

A “builder” is defined as an entity that provides, has provided or proposes to provide a building service.

A “building surveyor” is defined as an entity that provides, has provided or proposes to provide a

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building certification service. Further, “building certification work” means anything a building certifier may or must do under the *Building Act 2004*.

Given the greater emphasis on asbestos management in the amended Act, building certifiers will need to approve asbestos management control plans.

A “plumbing plan certifier” is an entity that provides a plumbing plan certification service (s 14, and refer to the *Water and Sewerage Act 2000*).

Section 16: what is an operational act? Each of the following: *Building Act 2004, Electricity Safety Act 1971, Gas Safety Act 2000, Utilities Act 2000, Water and Sewerage Act 2000*. Also, the *Dangerous Substances Act 2004* has now been added.

Section 17: License Applications. An individual, corporation or partnership may apply to the registrar to be licensed in a construction occupation or, for a construction occupation that is divided into classes, in an occupation class.

Section 19: Decision on licence application. If an entity applies for a license for a construction occupation or occupation class, the registrar must issue, or refuse to issue the licence. The registrar is the *construction occupations registrar*, a public servant appointed by the Chief Executive, who has relevant experience or a

qualification in building or some other construction occupation.

The registrar can issue a licence other than the licence applied for in certain circumstances, and need not decide an application if the person is currently subject to disciplinary action.

Section 28 Nominees of corporations and partnerships. A corporation or partnership is eligible to be licensed only if it has a single nominee appointed to supervise its construction services. Or it has 2 or more nominees appointed by it, with each responsible for the supervision of different construction services carried out by the entity.

A corporation or partnership may revoke a nominee's appointment only with the registrar's approval (section 30). The entity will have to have arranged another nominee to take over the nominee's functions.

A nominee commits an offence if the nominee fails to (a) adequately supervise the relevant construction services or (b) ensure that the relevant construction services comply with the COLA Act and the operational Acts (s31(2)). The licensed corporation is also liable.

Rectification Orders

Section 34: Intention to make rectification order. This section applies if the registrar believes on reasonable grounds that a licensee or former licensee has provided a construction service otherwise than in accordance with this Act or an operational Act. (2) The registrar

may give the entity and the land owner a written notice giving details of the rectification order that may be made and (b) explains why the registrar intends to make the order. The notice must invite submissions in response.

Section 35: When rectification order may be made. If the registrar has given an entity (other than the land owner) notice under section 34, and after considering any submissions made within the time mentioned in the notice, the registrar may issue a rectification order if satisfied that the entity is contravening or has contravened this Act or an operational Act AND it is appropriate to make a rectification order.

Section 36 details considerations for deciding whether a rectification order is appropriate, eg. any injury, loss or damage caused or that could have been caused, and how the proposed order may affect people affected by the contravention.

Section 38 rectification orders. The stated period for compliance with the order must be not less than 1 month after it is given to the entity, unless it is an emergency rectification order (s39 – which does not require notice of intention, and has a completion period of not less than 24 hours). Examples of actions that can be ordered are:

- to take stated rectification action
- to demolish a building or part of a building and then provide the construction service
- to start or finish stated work

If the entity does not comply, the registrar can arrange for another licensee to enter onto the property and charge the costs as a debt against the entity that failed to comply. The owner of the land must be given at least 24 hours notice of such entry and the ordered entity must be given a copy of the notice (s 41).

The registrar must not make a s38 order if a submission satisfies the registrar that the contravening act happened or ended more than 10 years before the day the registrar proposes to make the order.

Section 40: A person commits an offence if the person intentionally fails to comply with a rectification order given to the person (max: 200 penalty units).

Insurance

Before providing a construction service, a licensee must give the client evidence of what insurance the licensee holds (s 47). Such evidence can be provided by way of advertising that includes reference to the insurance. The licensee may ask the client to sign an acknowledgement that the client has been told about the licensee's insurance.

Under the COLA Regulation as amended, there is a new definition of 'eligibility' to be a building surveyor. Refer to clause 17 of the Regulation (attached). A building surveyor will need to be adequately insured, including:

- a minimum limit of indemnity of \$1,000,000 for any one claim; and

- a minimum limit of indemnity for the costs of defending or settling a claim of 20% of the limit of indemnity for the claim.

In practice, this mandatory (20% for costs) requirement is leading to a reluctance by insurers to enter the market.

Disciplinary Proceedings

If a licensee is suspected of a contravention, usually as a result of a complaint, the construction occupations registrar will issue a written notice of the allegation(s) to the licensee (*section 55 of the Act*).

The notice (called a disciplinary notice) should provide sufficient detail about the allegation(s) so that the licensee knows the case against them. After receiving the notice, the licensee has 12 business days to provide written submissions in response (s 56).

A disciplinary notice can be given whenever a disciplinary ground is found to exist, which include (s 54):

- the licensee, or a nominee or employee of the licensee contravening the COLA Act or an operational Act;
- the licensee giving false or misleading information in relation to a construction service;
- the licensee's license has been automatically suspended (see below);
- criminal offences involving fraud, dishonesty or violence;
- the licensee, being a corporation, enters into receivership or administration;

- if the licensee, being a corporation or partnership, has or had no nominee.

Sections 48 to 53 of the Act relate to **automatic suspensions** of licenses. For example, if an individual licensee becomes bankrupt, or if a corporation licensee enters into a winding up, or if a building surveyor ceases being insured in accordance with the regulations. The registrar may revoke the suspension if satisfied that the cause of the suspension no longer exists.

Interim Suspension

If the registrar has given or proposes to give a disciplinary notice to a licensee, the registrar may suspend the licensee:

- (i) for a period of 2 weeks or shorter, but may be extended once for 1 week; and
- (ii) if the registrar has considered the circumstances and the grounds leading to the decision to serve the disciplinary notice; and
- (iii) if the registrar believes on reasonable grounds that it is in the public interest to suspend the license before making a decision under section 60.

Commonly, the allegation that a building practitioner will be defending will be a claim that they have breached a provision of, or a requirement made under the Building Act, the COLA Act, or some other "operational" law.

Also on 1 September 2004, the Building Act 2004 came into force, and note the following sections:

Section 49: Complying with the Building Code

“(1) A person must carry out building work only in a way that will, or is likely to, result in a building that complies with the building code.

(2) An offence against subsection (1) is a strict liability offence.”

However, *subsection 49(4)* reads:

“It is a defence to a prosecution for an offence against subsection (1) if the person proves that-

- (a) the building work was carried out in accordance with approved plans; and
- (b) if the approved plans had been followed at the time of approval the resulting building would have complied with the building code.”

Misconduct complaints are arguably “quasi – criminal”

As the complaint procedure is ‘quasi-criminal’ in nature, case law suggests an early admission of an offence (a “guilty plea”), should be taken into account in deciding the severity of a penalty. (Note that the Criminal Code applies to all offences under the Act).

Cf the High Court case of *Cameron v The Queen [2002] HCA 6 (14 February 2002)*.

Should a building practitioner receive a disciplinary notice, setting out allegations, the practitioner

should promptly obtain legal advice as to the strategy in responding.

Pursuant to an intended change to the Act, the licensee will be able to request an *inquiry hearing* be held at the time they provide their written response. If the registrar then decides not to hold an inquiry hearing in regard to a disciplinary ground, the registrar will not be able to take disciplinary action against the licensee in regard to that ground.

After the written response is sent, the registrar may make a decision, or instead may decide that an *inquiry hearing* should be held. At the inquiry hearing (if it is held) the licensee should appear personally whether or not they also have a lawyer (*sections 60, 66-69*).

Possible Outcomes

The registrar may take disciplinary action if satisfied on reasonable grounds that a disciplinary ground is established in regard to the licensee or former licensee. In so doing, the registrar must take into account any response given to the registrar in accordance with the disciplinary notice, and those considerations in *section 62*.

If the registrar **decides** to hold an inquiry, the registrar must give the licensee at least 2 weeks written notice (s 66). This will include notice of where and when the hearing will be held.

As a result of an inquiry hearing, if the allegations are established or proven, the registrar may deal with the matter in one or more of the following ways:

- reprimand the licensee;
- require the licensee to complete a stated course of training;

- order the licensee to pay a financial penalty of not more than \$1,000;
- suspend the licence of the licensee for a stated period;
- cancel a licence;
- cancel the licence and disqualify the licensee from applying for another licence for a certain time or until a stated thing occurs;
- disqualify the former licensee from applying for another licence for a stated period, until they have completed a stated course of training, or until a stated thing occurs.

The possible penalties are listed in the COLA Act (*at section 61*).

Again, before deciding what penalty to impose, the registrar must consider the factors set out at section 62 of the COLA Act, including:

- the degree of responsibility of the licensee for any act or omission;
- any injury, loss or damage caused or that could have been caused;
- the number of people detrimentally affected by any act or omission;
- the extent to which it is necessary to discourage the person and others from doing something that made up the disciplinary ground;
- whether, and the extent to which, it is necessary to protect the public from the person.

However, section 62(2) also says that the registrar may consider anything else that is relevant.

If a builder's license is affected by some form of disciplinary action,

the registrar must notify each building certifier, in writing, about the disciplinary action taken on the license (s 63).

Compliance Auditors

Such auditors may be appointed by the registrar to audit the forms and other paperwork required to be provided by licensees. Pursuant to s 80 of the Act, they can enter onto a licensee's premises to inspect and take copies of documents. They will need to produce their identity card, and then the occupier of the premises must give assistance to the auditor so they can discharge their functions.

Offences

Sections 81 to 88 set out a range of offences, some of which are "strict liability".

The offences include as follows:

- pretending to be licensed when not licensed;
- a corporation has no nominee;
- the licensee's advertising does not have the required details;
- unlicensed people carry out construction services when not supervised by a licensee;
- a licensee contravenes a condition of a license or contravenes a code of practice.

Demerit Points

Sections 89 to 96 set out a demerit point system whereby demerit points are recorded against a licensee in a demerit points register. Such points are accumulated if a demerit disciplinary ground exists. Such grounds are set out in section 60 but do not include contraventions

for which an infringement notice may be issued.

If a licensee incurs 15 or more demerit points for a construction occupation within 3 years, the registrar may suspend the licensee's licence, disqualify the licensee, or take some other disciplinary action against the licensee which the registrar considers appropriate.

The registrar may serve a notice of licence suspension or licence disqualification without giving the licensee the chance to make representations (s100).

However, the registrar must give the licensee a 'warning' notice if a licensee incurs a demerit point AND in the past 3 years the licensee has incurred at least 10 other demerit points (s94). This notice must advise how many points exist and the effect of the relevant part of the Act.

Advisory Boards

The registrar must establish an advisory board for each construction occupation (s 114), to advise the registrar about qualifications for the construction occupation, and to help with investigations and disciplinary hearings if requested.

REVIEWS

Once a registrar's decision is made, that decision may be subject to a review by the licensee if they are dissatisfied. Application should be made to the Administrative Appeals Tribunal for such a review.

Section 124 states that application may be made to the AAT for review of a 'reviewable decision'. The

regulations may prescribe which decisions are 'reviewable decisions'.

For example, it is an offence for a licensee not to comply with a rectification order (*section 40*), however a licensee ordered to rectify can apply for a review under the *Administrative Appeals Tribunal Act 1989*. Another authorised licensee cannot enter onto the land to carry out the rectification work until the review has been disposed of or the review period has ended.

Further Concern – Commencement Notices

Commencement Notices are issued for building work to be done by licensed builders (s 37 of the Building Act). This occurs once a building approval has been issued for the work.

Pursuant to s 41 of the Building Act, 2 or more building commencement notices for the same work may be in force at the same time.

Further, such a notice continues to operate even if the building work being done is only part of the building work for which the notice was issued.

This can lead to a scenario where different parts of the works have been done by different builders.

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