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COMPLIANCE WITH BCA DOES NOT MEAN COMPLIANCE WITH THE DDA

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Laws covering buildings

Two types of legislation govern buildings and their accessibility. They are the *Building Code of Australia* (BCA) and the *Disability Discrimination Act* 1992 (DDA). There is an ill considered assumption that compliance with the BCA equals compliance with the DDA.

The BCA is a far better known regulatory instrument compared to DDA which is a little more obscure. The lack of uniformity between the two Acts is problematic as it creates uncertainty and confusion in the building industry. Harmonisation changes have been mooted for a long time for consistency but at this time the status of their proclamation could only best be described as "matter pending".

The current inconsistency between the BCA and the DDA can have potential dire effects on individuals and businesses, who design, build, own, manage, lease, operate or regulate the use of public buildings whereby they can be exposed to lawsuits and/or required to incur expensive modifications to their properties in order to comply.

BCA

The BCA contains comprehensive guidelines on the technical requirements applicable to designing and constructing buildings. It is a national code, administered at State and Territory level.

DDA

DDA regulations deem it unlawful to discriminate against a person on the ground of their disability in providing access to or use of a building that the public can enter or use. Although it is not explicitly about buildings it refers to the design and construction of buildings in that it must provide access for people with a disability otherwise it is deemed to be discriminating against people on the basis of their disability. People with a disability can enforce their rights by bringing a complaint under the DDA.

The jurisdiction of the DDA applies to existing buildings as well as buildings built since its enactment. However, there would be a stronger case for existing building owners to win an appeal based on unjustifiable hardship because the owners/builders of such premises would not have been aware of the requirements at the time of design/construction.

DDA and BCA

Prior to recent cases there were some members within the building

industry who, when complying with the BCA, were not aware that they were also required to comply with the DDA or more essentially what they had to do to comply with the DDA. It is noteworthy that the DDA does not provide construction standards to building owners or developers.

The term 'access to buildings' in the DDA applies only to buildings that are available for the general public to enter and use. These include buildings requiring access for employees, entertainment, clubs, accommodation.

Complaints of discrimination

If a business operates out of a public building that does not provide equitable access for people with a disability they may be subject to a complaint of discrimination, even if their building adheres to BCA.

The Human Rights Equal Opportunity Commission (HREOC) is responsible for attempting to conciliate an agreement between the parties where a member of the public considers that they have been discriminated against due to their disability. If it is not possible to reach an agreement the complainant can take their complaint to the Federal Magistrates Court.

Defences of unjustifiable hardship

The primary defence a business or individual can raise when faced with an allegation of non-compliance with the DDA is to convince the court that providing access would cause them an 'unjustifiable hardship'.

When deciding whether the particular circumstances amount to unjustifiable hardship the court will take into account the cost, technical difficulties, use of the building and the effect the proposed changes may have on specific heritage features.

The court is only obliged to consider the question of whether or not a defence of unjustifiable hardship exists.

Notable decisions

Cooper v Human Rights and Equal Opportunity Commission [1999] FCA 180 concerned a complaint that was lodged against two parties, Holiday Coast Cinema Centres Pty Ltd and the Coffs Harbour City Council.

The basis of the complaint was that the construction of the cinema failed to ensure access for people in wheelchairs.

The council's defence to the allegation was that it honestly believed the circumstances were such that the operator would suffer "unjustifiable hardship" if required to make the premises accessible to people with a disability.

The Court decided that lack of wheelchair access to the new cinema amounted to unlawful discrimination by the cinema operator under DDA. Furthermore, the Court deemed that the council committed unlawful discrimination in that it had sanctioned the development without requiring compliance with the access requirements of the DDA.

This case is significant in that the HREOC decided that councils are

compelled to consider DDA provisions in relation to access to premises when approving development applications.

Another seminal case is *Cocks v Queensland State Government (1994) EOC 92-612*. This case concerned a very large government-owned convention and exhibition centre under construction in Brisbane. The complainant had a mobility impairment and brought a complaint against the centre on the basis that the front entrance of the complex was not accessible because it was designed with steps alone.

The Tribunal considered the question of "unjustifiable hardship" and found that the provision of non-discriminatory access could not be said to cause unjustifiable hardship to the State of Queensland. The cost of installing a lift was small within the context of a multi-million dollar project and the Government should be able to meet the cost thus a finding a discrimination was found.

Opinion re: Jane and Leroy Hutton [1999] QADT 19 involved the Huttons who planned to build a small guesthouse and were experiencing problems with the local government because of non-compliance with the disabled access and facilities requirement of the building code.

The Anti-Discrimination Commissioner sought an opinion on whether the Huttons could rely on the unjustifiable hardship provisions of the ADA.

The Tribunal considered the financial and other circumstances and found that it would be sufficient to provide wheelchair accessibility to the entry, living, dining and one bedroom and bathroom rather than to the whole premises.

Changes

Apparently there are changes before the BCA. These changes are listed on the Australian Building Codes Board website to include the 'premises standard', which will help clarify the accessibility requirements under the DDA. The premises standard will set out specific accessibility requirements for the building industry. The contents of the premises standard will replace the general 'non discrimination' provisions of the DDA in relation to access to premises.

This change will mean that the technical details of both legislations, the BCA and the DDA, will mirror each other. If these changes are enacted, we will enjoy a situation whereby compliance with BCA will mean compliance with the DDA.

The standard has been drafted to form an achievable standard that will increase accessibility of buildings without imposing an undue burdens on the building industry.

Conclusion

Mere compliance with the BCA is not an acceptable defence when faced with an allegation of discrimination under the DDA. The DDA is a Federal instrument that will override state legislations such as the BCA whenever there is an

inconsistency. The BCA is currently undergoing changes in order to comply with the DDA and these changes will attempt to meet the objective of the DDA "*to ensure buildings are as accessible as possible without imposing an unjustifiable hardship on building owners and occupiers.*"

If indeed the BCA is amended along the proposed lines, it will mean that in the future when developers and designers construct buildings that comply with the BCA they will also comply with the DDA. The advantages to the building industry and people with a disability are obvious: clarity, consistency and improved access throughout Australia.

In the interim, individuals and businesses, who design, build, own, manage, lease, operate or regulate the use of public buildings should consider seeking legal advice to ensure that they are complying with the DDA as well as the BCA. There may be instances where the owners of existing buildings can be granted an exemption from complying with the DDA.

Another relevant article on this issue is Paula Gerber's article in the Law Institute Journal, 'Construction Law and Human Rights Law: Building a Bridge Between Two Disciplines (2006) 80(8) *Law Institute Journal* 48

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Lovegrove & Lord practice construction law in a number of jurisdictions in Australia. Kim Lovegrove and Lauren Crowe can provide assistance in construction law advice and litigation. Subsequent to the acquisition Andrew Lord, as partner we can look after your commercial needs.

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