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LIABILITY OF BUILDING SURVEYORS/ACCREDITED CERTIFIERS UNDER THE DISABILITY DISCRIMINATION ACT

Disabled access requirements for buildings

Disabled access is an essential consideration in building design.

Under the Building Code of Australia ("BCA") and Australian Standards 1428, 2890 and 1735 there are requirements for provision of mobility impaired access.

If a building does not comply with the BCA or Australian Standards a notice/order can be issued to require the building to be brought into compliance under the relevant Acts or Regulations.

In addition, the *Disability Discrimination Act 1992* requires that makes a broader requirements for the provision of disabled access.

The *Disability Discrimination Act 1992*

Section 23(1)(c) of the *Disability Discrimination Act* provides as follows:

"It is unlawful for a person to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates... in relation to the provision of means of access to... a premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not)..."

"Disability" is defined under the *Disability Discrimination Act* as follows:

"Disability, in relation to a person, means:

(a) Total or partial loss of the person's bodily or mental functions, or

(b) Total or partial loss of a part of the body, or

(c) The presence in the body of organisms causing disease or illness, or

(d) The presence in the body of organisms capable of causing disease or illness, or

(e) The malfunction, malformation or disfigurement of a part of the person's body, or

(f) A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or

(g) A disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour,

and includes a disability that:

(h) Presently exists, or

(i) Previously existed but no longer exists, or

(j) May exist in the future, or

(k) Is imputed to a person".



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In other words, “disability” does not only include mobility impairment, but can also include intellectual, psychiatric, sensory, neurological, learning, and disease related disabilities.

Buildings which the public is entitled or allowed to enter or use (whether for payment or not) may include offices, hotels and entertainment venues.

However, there is an exception under section 23(2) of the *Disability Discrimination Act*, which provides as follows:

“This section does not render it unlawful to discriminate against a person on the ground of the person’s disability in relation to the provision of access to premises if:

(a) The premises are so designed or constructed as to be inaccessible to a person with a disability, and

(b) Any alteration to the premises to provide such access would impose unjustifiable hardship on the person who would have to provide that access”.

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

If a complaint is made under the *Disability Discrimination Act* the matter goes before the Human Rights and Equal Opportunities Commission and a conciliation is held between the complainant and the owner of the land to try and resolve the matter. If the matter is not resolved at conciliation the complainant can issue proceedings in the Federal Court to determine whether the owner has breached section 23 (2) of the *Disability Discrimination Act*.

The requirement under the *Disability Discrimination Act* is complaints based, as opposed to compliance based requirements like those under the BCA and Australian Standards, so it is not necessarily a precondition to development. However, if a complaint is made and it is found to be substantiated the owner of the land may be liable to carry out works to resolve

the disability discrimination.

Liability of building surveyors/accredited certifiers

Section 122 of the *Disability Discrimination Act* provides further that a person who causes, instructs, induces, aids or permits another person to do the act which breaches section 23(1)(c) of the *Disability Discrimination Act* will also be seen to have done the act.

In the New South Wales case of *Cooper v Coffs Harbour City Council* [1999] FCA 180 it was held that a council was liable where it issued a development consent for a building which did not provide for adequate access for persons with disabilities.

We have been unable to find any case law which concern the liability of building surveyors/accredited certifiers.

However, in an explanatory note on the *Disability Discrimination Act* published by the Disability Discrimination Commissioner in 2001 the Commissioner stated that, and we quote, “*while there is currently no case law concerning the liability of... building surveyors/[accredited certifiers] under s 122 of the Disability Discrimination Act it is the Commissioner’s view that they do have liability in exercising their various building certification functions... clearly building surveyors/[accredited certifiers] need to carefully review the conditions of development approvals, understand the requirements of the Disability Discrimination Act and advise their clients of their liabilities*”.

Therefore, there may be some liability which could attach to building surveyors/accredited certifiers where they have approved a building which does not provide for adequate access for persons with disabilities.

In light of the Commissioner’s comments, there may also be some liability in contract or tort law in respect of the building surveyor’s/accredited certifier’s responsibilities to the developer if a complaint is brought against the developer.



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Proposed merger of the BCA and the *Disability Discrimination Act*

In an article published on the Australian Building Codes Board's website dated 9 October 2007 the suggestion is made that the relationship between the BCA and the *Disability Discrimination Act* needs to be reviewed.

Therefore, we might also expect that future amendments may be made to the BCA to bring it into line with the *Disability Discrimination Act*.

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