

LICENSED BUILDING PRACTITIONER SCHEME

GUIDE PREPARED FOR VERO LIABILITY

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Introduction to the Licensed Building Practitioner scheme

1. The Licensed Building Practitioner (**LBP**) scheme was introduced in 2007 by the Building Act 2004 (the **Act**) and associated rules and regulations. From 1 March 2012 "*restricted building work*" must be carried out or supervised by an LBP: s 84. Restricted building work is work that is critical to the integrity of a building and which is specified in regulations made under the Act to be work required to be carried out by an LBP. It does not include work for which a building consent is not required.
2. The scheme creates seven license classes: designers, carpenters, external plasterers, bricklayers and blocklayers, foundation specialists, roofers and site supervision. License applicants must either hold a recognised qualification in the area or demonstrate that they can achieve minimum standards of competence in the relevant license class.

Restricted building work

3. The Building (Definition of Restricted Building Work) Order 2011 (**RBW Order**), due to come into force on 1 March 2012, specifies that the following work must be carried out or supervised by an LBP:
 - a. carpentry, external plastering, bricklaying or blocklaying, foundation work, and roofing in connection with the construction or alteration of the primary structure or the external moisture-management system of a house or small-to-medium apartment building (being residential buildings of less than 10 metres in height): cl 5.2;
 - b. design work in connection with any of the work described above: cl 6; or
 - c. design work in connection with a fire-safety system attached to a small-to-medium apartment building: cl 7.
4. Work pursuant to a building consent applied for before 1 March 2012 is not included: cl 4.

5. Restricted building work must be carried out or supervised by an LBP. The requirement to 'supervise' is an onerous one: an LBP must provide sufficient control or direction and oversight of the building work to ensure that it is performed competently and complies with the relevant building consent.

Civil liability

Section 88

6. Section 88 of the Act provides that an LBP who carries out or supervises restricted building work must, on completion of the work, provide a memorandum to the owner and the territorial authority stating what work the LBP carried out or supervised.
7. If the restricted building work relates to a "specified system" (e.g. sprinkler system, lift, air conditioning system), the LBP must also provide a certificate to the owner and the territorial authority stating that the work is capable of performing to the performance standards set out in the building consent. The certificate may be qualified if the LBP has only worked on part of the system.
8. Section 88(4) provides that a memorandum or certificate does not, of itself, "create any liability in relation to any matter to which the memorandum or certificate relates"; or "give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner was not required to provide the memorandum or certificate".
9. Section 88(5) provides that s 88(4) does not limit s 397(c). That subsection, which cannot be contracted out of, creates an implied warranty in all building contracts that the building work will be carried out in accordance with all applicable legal requirements.
10. The effect of s 88(4) is that the mere act of providing a memorandum does not give rise to liability. This section does not, however, limit or affect an LBP's liability for negligence. It does not affect the ordinary duty owed by a tradesperson to an owner, or others who he or she can reasonably foresee will be affected by his or her actions, to use reasonable care and skill in carrying out or supervising work.

Section 89

11. Section 89 of the Act provides that an LBP must, if of the view that any building work carried under a building consent does not comply with that consent, notify the relevant territorial authority and the owner as soon as practicable.

12. The duty imposed by s 89 is a narrow one. The LBP is only required to report in circumstances where he or she has formed a view that building work does not comply. The Court is unlikely to superimpose a wider common law duty requiring the LBP to investigate and correctly assess whether building work complies with the consent.¹ Of course the LBP will already owe the owner a common law duty to carry out or supervise building work in accordance with the consent.
13. A failure to comply with s 89 is not an offence and is not a ground for disciplinary action against the LBP (discussed below).
14. In summary, s 89 adds to the duties owed by an LBP to the owner, and creates a duty to the territorial authority, but only where the LBP can be shown to have formed a view which it fails to report.

Offences and penalties

15. Sections 85 and 86 make it an offence, punishable by a maximum fine of \$20,000:
 - a. for an unlicensed person to carry out restricted building work without being supervised by an LBP licensed to supervise the relevant work;
 - b. for an LBP to carry out or supervise restricted building work he or she is not licensed to carry out or supervise; or
 - c. to knowingly engage a person to carry out or supervise restricted building work, knowing that the person is not licensed to do so.
16. It is also an offence, subject to the same punishment, for a person to hold him or herself out as being licensed to carry out or supervise particular building work when he or she is not: s 314.
17. Offences against the Act are punishable on summary conviction: s 376. Charges may be brought by the Chief Executive of the Department of Building and Housing and the relevant territorial and regional authorities: s 377.

Discipline

18. The LBP scheme establishes procedures for complaints against LBPs, investigation of those complaints, and disciplinary action: ss 315 to 320; Building Practitioners Complaints and the Disciplinary Procedures Regulations 2008 (**Disciplinary Regulations**).

¹ See *Deloitte Haskins and Sells v National Mutual Life Nominees Ltd* [1993] 3 NZLR 1 (PC) dealing with a similar statutory reporting duty imposed on auditors.

19. Anyone can complain to the Building Practitioners Board (the **Board**) about the conduct of an LBP: r 5. The Board is an independent statutory board whose members are appointed by the Governor-General on the recommendation of the Minister for Building and Construction.
20. When the Board receives a complaint, it must either: (a) refer the complaint to the body responsible for dealing with complaints about the LBP (e.g. if the complaint is made about a registered architect, the New Zealand Institute of Architects); or (b) ask the Registrar of Licensed Building Practitioners to prepare a report: r 6.
21. In the course of preparing his or her report the Registrar must provide a copy of the complaint to the LBP and ask the LBP to provide his or her response, any relevant information, and any evidence he or she wishes to provide: r 7.
22. Once the Board receives the Registrar's report it must decide whether or not to proceed with the complaint. If it does, it must hold a hearing: r 10.
23. The Board may only take disciplinary action against an LBP if it is satisfied that one of the grounds set out in s 317 of Act applies. These include:
 - a. carrying out or supervising building work:
 - i. in a negligent or incompetent manner;
 - ii. of a type that he or she is not licensed to carry out or supervise; or
 - iii. that does not comply with a building consent;
 - b. failing, without good reason, to provide a memorandum about any plans and specifications required to accompany the building consent application or to provide the owner or territorial authority with a memorandum in accordance with s 88; and
 - c. holding himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise.
24. If it determines that one these grounds has been made out, the Board may:
 - a. order the LBP to pay the costs and expenses of the Board's inquiry: s 318(4); and
 - b. impose a range of other penalties, including cancelling or suspending the LBP's license, or ordering the LBP to pay a maximum fine of \$10,000: s 318(1).

25. Either party may appeal the Board's decision to the District Court: s 330(2). Further appeal to the High Court against a determination of law is possible: s 340(1). The Act provides for the court hearing the appeal to order a party to pay some or all of the other party's costs incurred in respect of the appeal: s 338.

Building Amendment Bill (No 3)

26. The Building Amendment Bill (No 3) (**Bill No 3**) has reported back from Select Committee and is awaiting its second reading.
27. Bill No 3 introduces four types of building consent: standard building consent, low-risk building consent, simple residential building consent and commercial building consent. These terms are yet to be defined.
28. The responsibilities of building consent authorities (**BCA**) will differ depending on the type of building consent applied for. Significantly, in processing an application for a low-risk building consent, a BCA will not be required to consider whether the building work in the plans and specifications will comply with the building code, nor will it be required to inspect the building work. In processing an application for a simple residential building consent a BCA will only have to consider prescribed aspects of the plans and specifications and make prescribed inspections. Accordingly, a BCA's potential exposure for negligently issuing a building consent or conducting inspections will be reduced.
29. Bill No 3 also proposes amendments to the Act in relation to the types of work which must be carried out or supervised by an LBP:
- a. the general requirement in s 84 that restricted building work be carried out or supervised by an LBP now contains an "*owner-builder exemption*": s 18; and
 - b. "[s]*imple residential building work*" (yet to be defined) must be carried out or supervised by an LBP: s 18. A similar provision in relation to low-risk building work was deleted by the Select Committee. It seems likely that such work will not be required to be carried out or supervised by an LBP.
30. Bill No 3 dispenses with the distinction in s 88 between a certificate and memorandum and provides that an LBP who carries out or supervises restricted building work must provide a "*record of work*" on completion of the work, stating what restricted building work the LBP carried out or supervised.
31. Bill No 3 also introduces a code of ethics for LBPs, to be introduced by Order in Council. Failure to comply with the code of ethics can result in disciplinary action under s 318 of the Act: s 58.

Building Amendment Bill (No 4)

32. The Building Amendment Bill (No 4) was introduced to Parliament on 6 September 2011. Significantly, it inserts a new Part 4A into the Act, titled: *“Consumer rights and remedies in relation to residential building work”*.
33. This Part only applies to *“residential building contracts”*, being building contracts in relation to a household unit. It relevantly provides:
 - a. a building contractor must not enter into a contract with a client without first providing to the client *“the prescribed information”* and *“a prescribed checklist”* (both of which are yet to be defined): s 362D;
 - b. if the price for the building work is not less than the *“prescribed minimum price calculated in accordance with the prescribed methodology”* the building contract must be in writing and contain *“as a minimum the prescribed information, content, terms, and conditions”* (both of which are again yet to be defined): s 362E;
 - c. the warranties currently implied into some building contracts by s 397 of the Act will now also apply to contracts to on-sell. Currently, these warranties are only implied into building contracts and contracts to sell houses by or on behalf of a property developer: s 396. A subsequent purchaser of a building will be able to sue for breach of these warranties despite not having been a party to the contract. Remedies for breach of warranty are provided for in ss 362K to 362O; and
 - d. if a client notifies a building contractor of a defect within one year of completion of the building work, the building contractor must remedy the defect within a reasonable time and pay damages for the client’s loss (other than reduction in value). If notification is made, it is assumed that the building work is defective and can be remedied, unless the building contractor is able to provide otherwise: s 362P.

Potential liability

34. The potential liabilities to which an LPB is exposed under the LBP scheme, or the general law, include:
 - a. liability in negligence to clients, or others who the LBP can reasonably foresee will be affected by his or her work, in respect of work carried out by the LBP;
 - b. liability in negligence arising from a failure to supervise competently work carried out by another person;

- c. liability for breach of statutory duty arising from a failure to notify an owner or the territorial authority that building work did not comply with a building consent in circumstances where the LBP had formed such a view;
 - d. liability for fines (which would not generally be covered by insurance) and defence costs associated with a prosecution under the Act;
 - e. liability for fines and costs orders imposed under the disciplinary scheme established by the Act (which again would not usually be insured) and representation costs associated with the disciplinary process and appeals;
 - f. liability for breach of the implied warranties under the Act and for breach of the prescribed terms of the mandatory contracts proposed by Bill No 4; and
 - g. liability to remedy defects and pay damages in respect of defects notified within 1 year of completion of the building work under the scheme proposed by Bill No 4.
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