

Guidance for architects and Building Surveyors

ARBV specific guidance for architects and building surveyors regarding building permits in which the architect is named as the builder.

In some cases, the Building Act 1993 (**BA**) permits building permits to be issued naming an architect as the builder, rather than a registered building practitioner. This guidance assists relevant building surveyors (**RBSs**) and architects to understand the limited circumstances in which an architect may be named as the builder on a building permit. It also sets out other obligations and relevant matters that apply when an architect is named as builder on a building permit.

Who is an 'architect' for the purpose of the BA?

Under the Architects Act 1991 (Vic) (**AA**) only persons who have been registered by the Architects Registration Board of Victoria (**ARBV**) under the AA can use the title of 'architect' in Victoria. Persons who have a degree or other qualifications in architecture or design, but who are not registered with ARBV are not architects and cannot use that title or have it applied to them. Likewise, people carrying out drafting or design work but who aren't registered with ARBV are not architects.

Can a company be an architect?

Under the AA, only individual persons can be architects. Companies and other corporate entities cannot be architects. The AA provides a process for approval of certain companies to operate architectural businesses, subject to meeting certain requirements, including that at least one director of the company must be a registered architect. These companies are described in the AA as 'approved companies'. However, approved companies are not 'architects' under the AA.

When can an architect be named as the builder on a building permit?

An architect may be named as the builder on a building permit only in limited circumstances. The table below sets out who can be named as a builder on a building permit for building work, depending on the type of work being carried out and the value of that work:

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VALUE OF BUILDING WORK	TYPE OF BUILDING WORK	WHO CAN BE NAMED AS BUILDER	APPLICABLE BUILDING ACT SECTION
\$10,000 or less	Any	Building practitioner; or Owner of the land; or An architect registered under the AA; or Endorsed building engineer	24B(2)
More than \$10,000	Building work that is not Domestic Building Work	Building practitioner; or Owner of the land; or An architect registered under the AA; or Endorsed building engineer	24B(3)
Any value	Domestic Building Work that is being carried out under a Major Domestic Building Contract	A building practitioner who: 1. Is registered in the class Domestic Builder–Unlimited or one of the limited classes of domestic builder which authorises the carrying out of this type of work; and 2. entered into the contract.	24B(4)
More than \$10,000 but less than \$16,000	Domestic Building Work that is not being carried out under a Major Domestic Building Contract	Owner of the building or land	24B(5)
Over \$16,000	Domestic Building Work that is not being carried out under a Major Domestic Building Contract	Owner of the land, but only where the owner: <ul style="list-style-type: none"> has been issued with a certificate of consent for the work; or is a building practitioner registered in the category for Domestic Building Work; or is an architect registered under the AA; or is Homes Victoria; or is carrying out the work under an emergency order, a building notice or a building order 	24B(6) 25B

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The requirements in sections 24B and 25B make clear that the circumstances in which an architect can be named as the builder are limited. This is particularly so for Domestic Building Work.

What is 'Domestic Building Work'?

The definition of Domestic Building Work in the BA follows the definition in the Domestic Building Contracts Act 1985 (Vic) (**DBCA**). The DBCA definition covers the construction, alteration, extension, repair or demolition of 'homes'. 'Homes' are defined to include any residential premises.

This includes:

- standard residential dwellings;
- apartment buildings;
- specialist disability accommodation¹; and
- other types of homes.

RBSs should take care to assess whether the proposed building work is Domestic Building Work, having regard to:

1. the definition of Domestic Building Work in sections 3 and 5 of the DBCA;
2. the exclusions to the definition of 'home' in section 3(1) of the DBCA; and
3. the exclusions in section 6 of the DBCA and regulation 8 of the Domestic Building Contract Regulations 2017.

¹ As defined in the National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020

There are strict requirements that apply in the BA to Domestic Building Work, in order to protect consumers who may purchase a home that has recently been constructed.

Where the building work in question is Domestic Building Work over \$16,000, an architect can only be named as builder where all of the following criteria are met:

1. the Domestic Building Work is not being carried out under a Major Domestic Building Contract; and
2. the architect is an individual who is registered under the AA; and
3. the architect is the owner of the land.

An RBS must be able to satisfy themselves that each of those criteria are met before they can issue a building permit on that basis.

Identifying whether the work is being carried out under a Major Domestic Building Contract

The definition of a Major Domestic Building Contract in the BA follows the definition in the DBCA. The DBCA provides that a Major Domestic Building Contract is any contract for the carrying out of Domestic Building Work where the amount the builder will receive for carrying out the work is more than \$10,000. This includes where the work is split between more than one contract but the total paid to the builder for the work exceeds \$10,000.

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Identifying the owner of land

To identify the owner of the land, the RBS should have a current title search which shows the owner of the land. The RBS' ability to name an architect as a builder pursuant to either of section 24B(3) or sections 24B(6) and 25B (read together), is limited to where the individual architect is named on the title.

A permit cannot be issued to an architect where:

1. the land is owned by a company of which the architect is a director, shareholder or which the architect has a beneficial interest in, or the power to control; or
2. the land is owned by a company which is an 'approved company' under the AA.

A permit can only be issued naming the architect as builder where the architect's own name is on the title to the land.

Identifying whether the person is registered as an architect under the AA

An RBS must also satisfy themselves that the person in question is an architect registered under the AA, prior to naming them on a building permit.

This can easily be done by checking the online register of architects maintained by ARBV on its website: <https://www.arbv.vic.gov.au/find-architect>

Architects who are registered under the AA include architects who become registered in Victoria under mutual recognition or who are taken to be registered in Victoria under automatic mutual recognition, pursuant to the Mutual Recognition Act 1992 (Vic.). Architects taken to be registered under automatic mutual recognition are also able to be identified using the above website link.

Additional requirements for architects to be aware of

Architects should be aware that there are additional requirements that apply to them, should they be named as the builder on a building permit for Domestic Building Work not being carried out under a Major Domestic Building Contract.

Under section 137C of the BA, should an architect sell any home or apartment constructed by them under a permit issued in their name, there are warranties that apply to the building work, in relation to workmanship, the quality and suitability of materials used and the compliance of the building work with applicable laws. Those warranties mirror those that exist in the Domestic Building Contracts Act 1995 (Vic.) for Domestic Building Work carried out by a builder under a Major Domestic Building Contract.

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Under section 137E of the BA, architects who are named as builder on a permit for Domestic Building Work are prohibited from entering into 'off the plan' sales of any homes constructed. Homes and apartments can only be sold off the plan if they are constructed under a Major Domestic Building Contract or if the contract of sale is itself a Major Domestic Building Contract.

Insurance requirements when an architect is named as a builder on a permit

The architect is not required to obtain domestic building warranty insurance when named as a builder on a permit. The requirement to obtain domestic building warranty insurance that applies under Part 9 of the BA to builders carrying out Domestic Building Work only applies where that work is carried out under a Major Domestic Building Contract. An architect can only be named as the builder for Domestic Building Work where the work is not being carried out under a Major Domestic Building Contract, so the requirement for insurance does not apply to them.

However, under section 137B of the BA, those architects cannot sell any building that they have constructed unless each of the following criteria apply:

1. they have obtained a defects inspection report on the building from a registered building practitioner not more than 6 months before the sale and provided a copy to the purchaser; and
2. they are covered by the required insurance, which provides coverage for the purchaser for 2 years from the date of completion of the building work for non-structural defects and 6 years for structural defects.

Will professional indemnity insurance cover work by an architect where they are named on a building permit?

All architects must maintain professional indemnity insurance (PII) as a requirement of their ongoing registration as an architect. However, architects should not assume that their PII will cover them if they are named on a building permit as builder for a project. PII will usually cover liability arising from professional services performed by an architect for others.

If the project in question is Domestic Building Work on land owned by the architect and is not carried out under a Major Domestic Building Contract, then liabilities that may arise to others by the architect may fall outside the scope of the architect's PII.

This may be different, if the project in question is not Domestic Building Work and the architect is named as builder under section 24B(3) in circumstances where the architect is named as builder in the course of providing services to another, then this may be covered by the architect's PII, depending on the terms of the policy.

Architects should:

1. Make enquiries with their PI insurer before proceeding with an arrangement in which they are named as builder on the building permit to confirm whether they are covered by PII in respect of potential liabilities; and
2. Consider whether they should obtain any other insurance, such as contract works insurance, protection works insurance or the like in relation to the project.

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Potential consequences for architects and RBSs where the BA and the AA are not complied with in relation to the naming of an architect on a permit

The provisions of the BA which permit an architect to be named as builder are designed to ensure that this only occurs in appropriate circumstances and that there are consumer protections which operate where required.

There may be significant consequences for both RBSs and architects where an architect is named as builder on a building permit when they should not have been.

The potential consequences may include:

1. Disciplinary proceedings for either or both of the RBS and the architect;
2. Prosecution where an offence provision of the BA has been breached (such as section 137E of the BA);
3. Individual civil liability for loss and damage arising from any defects in the building work or for other disputes arising from the project; and
4. Lack of insurance coverage for loss or liability arising out of the project, as an insurer may deny coverage where the building permit was not correctly issued and relevant laws were not complied with.

RBSs should, before issuing a building permit naming an architect as the builder, ensure that:

- One of the scenarios set out in the table above applies to permit the architect to be named as builder;

- They have all of the relevant evidence that they need to demonstrate that the architect is eligible to be named on the permit, including a title search and an ARBV registration search.

Where in doubt, the RBS should seek advice from the VBA or other professional organisation.

Architects should, before applying or agreeing to be named as the builder in a building permit:

1. Carefully consider the structure of any project in which they are named as builder and obtain legal advice as to the project structure;
2. Make enquiries with their PI insurer before proceeding with an arrangement in which they are named as builder on the building permit to confirm whether they are covered by PII in respect of potential liabilities; and
3. Provide thorough instructions to the RBS, so that they understand the proposed project structure and the context in which it is proposed that the architect be named as builder.

More Information

arbv.vic.gov.au

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