

Guideline

Protection of adjoining property

Section 93 insurance requirements

This guideline has been prepared by the ARBV pursuant to regulation 7 of the Architects Regulations 2015. Guidelines provide architects guidance on professional conduct and practice. If the ARBV reasonably believes an architect has not complied with the guidelines, it may give written advice to an architect about compliance, pursuant to regulation 8 of the Regulations. Guidelines also help consumers understand what the ARBV expects of architects. Guidelines are reviewed regularly.

This guideline focuses on section 93 of the *Building Act 1993* (Vic.) which sets out the insurance requirements applicable when protection work is required to be carried out. “Protection Work” is defined in the Building Act as work that is carried out to shore up, underpin or protect an adjoining property when building work is being carried out.

Section 93 requires that, before any protection work is commenced in respect of an adjoining property, an owner must ensure that a contract of insurance is in force, in accordance with the Building Act against:

- (a) damage by the proposed protection work to the adjoining property; and
- (b) any liabilities likely to be incurred to adjoining occupiers and members of the public during the carrying out of the building work and for a period of 12 months after that building work is completed.

This guidance sets out the insurance requirements and the steps that must be taken by owners or others acting on their behalf.

Where architects are engaged to assist their clients with construction phase requirements such as protection work notices and insurance, they need to ensure that they understand what is required under section 93 in order to comply with their professional obligations to their client.

ARBV guidance

1. What is a contract of insurance under s93?

A ‘contract of insurance’ under section 93 includes the policy, any schedules and the certificate of currency or certificate of insurance.

Without considering the full and complete contract of insurance, it is not possible to know with certainty the extent and amount of cover, excesses (or deductibles) and any clauses or conditions that might have the effect of limiting the cover.

2. Features of compliant insurance contracts

Section 93(1) of the Building Act, in effect, requires two types of insurance to be provided:

- section 93(1)(a) relates to insurance for the adjoining owner against damage by the proposed protection work to the adjoining property – which is referred to as ‘first party insurance’; and
- section 93(1)(b) relates to insurance for the owner against any liabilities that are likely to be incurred to the adjoining occupiers and members of the public during the carrying out of the building work and for a period of 12 months after that building work is completed – which is referred to as ‘third party insurance’.

The contract(s) of insurance must provide both types of insurance.

Further, the contract must operate so that, in relation to material damage, the adjoining owner is an insured party and able to claim directly on the insurance.

The liability insurance must extend for not less than 12 months after the completion of building work, but can be extended as necessary, as provided for under section 93(4). The owner must lodge a copy of evidence of the extension with the adjoining owner as soon as possible as required under section 93(5).

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3. What amount of insurance is required?

The Building Act does not prescribe what the required amount of insurance must be. Section 93(2) requires that the contract of insurance must be for an amount that is agreed to by the adjoining owner. The appropriate amount will vary, depending on the size and nature of the building work and of the adjoining owner's building. Consideration should be given to what a 'worst case scenario' would need to cover.

4. Who bears the obligation of providing compliant insurance?

When first enacted, the legislation required the owner to secure and provide the insurance. This proved problematic and the Building Act was amended to make the owner responsible for ensuring there is a contract of insurance, satisfying section 93 of the Building Act, in place prior to commencement.

Many owners will rely on their contractor providing compliant insurance to satisfy this requirement.

General contractor insurance does not typically provide the level of cover required under section 93 and contractors often seek an extension of their insurance as an endorsement to provide the required cover.

Suitable endorsements must be to the contract of insurance and not just to the certificate of currency. This is because the certificate of currency seeks to reflect the terms of the contract of insurance, rather than actually imposing the terms of the contract of insurance.

Where the owner is relying on their contractor to satisfy the insurance requirements on their behalf, they should have arrangements in place to ensure the contractor continues to renew the insurance as required after they have completed the work so that the insurance extends for not less than 12 months.

The owner must also consider the implications for their insurance (and on-going cover) if there is a change of contractor during the course of the work where the initial contractor had provided the insurance.

Whilst the principal contractor, or contractors, may be providing insurance on behalf of the owner, the owner remains responsible under the Building Act and liable for any breaches under this part.

5. What penalties apply for breaches?

It is a criminal offence to breach the requirements of section 93. The penalties for a breach are significant – the penalties for failing to have compliant insurance or to renew it when necessary equate to a maximum of almost \$100,000 for individuals and \$500,000 for corporations.

The penalties for not lodging a copy of the contract of insurance with the adjoining owner prior to commencing or for not lodging a document providing evidence of renewal equate to a maximum of almost \$10,000 for individuals and \$50,000 for corporations.

6. Who can claim on the insurance?

As noted in section 2 above, there are two distinctive types of insurance required, being insurance against:

- damage to the adjoining property from protection work (which may include the failure of that work or non-provision of the required measures); and
- the liabilities likely to be incurred from the building work.

The adjoining owner must be able to claim directly in relation to the first type. The second type requires that the owner who has incurred the liability to the damaged party can claim on the policy.

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7. Common protection work insurance issues

It is not uncommon for the insurance requirements and an owner's responsibilities to be misunderstood and for the process to progress in breach of the Building Act. Typical examples include:

- the adjoining owner is only given a copy of the Certificate of Insurance/Certificate of Currency without the associated documents (policy and schedules);
- work commences prior to insurance being agreed to by the adjoining owner;
- owner relies on the Contractor's General Building Insurance without it addressing the requirements of section 93 of the Building Act;
- demolition work only is proposed and the Demolisher awarded the contract cannot secure compliant insurance;
- the insurance policy has exemptions in conflict with the requirements of section 93;
- insurance does not nominate or recognise the adjoining owner as an 'Insured party' in relation to cover for damage from protection work;
- there is a change in contractor and insurance is not renewed and/or fails to continue for not less than 12 months after completion of building work;
- the insurance has a section 93 'saving clause' that fails to be worded sufficiently to take precedence over policy clauses in conflict with the requirements of section 93; and
- the owner/agent assumes that where an adjoining owner has not questioned the insurance it is considered to be accepted rather than obtaining confirmation of agreement or, where agreement cannot be reached, referring the matter to the Building Appeals Board.

8. How can 'saving clauses' assist?

Many standard insurance products in the construction industry have clauses that allow the insurer to deny a claim if the work is not completed in accordance with the building permit, to the required standards or is otherwise in breach of the legislation.

It is in these circumstances where an adjoining owner is most likely to be at risk of suffering damage from protection work or other liabilities are likely to arise in connection with the carrying out of building work.

Effective endorsements to extend cover to comply with section 93 of the Building Act can include the 'saving clause' that states that, notwithstanding any wording to the contrary, the contract of insurance shall respond to section 93 of the Building Act and where in conflict shall be read such that the conflict does not exist in favour of the requirements of the Building Act.

The specific wording will depend on the circumstances and parties should discuss the requirements with experienced insurance brokers, legal practitioners or insurance experts.

9. Must adjoining owners/property be named?

The courts have determined that the adjoining owner and/or the adjoining property do not have to be specifically named in the schedule, so long as:

- the adjoining owner falls within the definition of an 'insured party' in relation to damage; and
- the insurance is to provide cover in relation to adjoining property required to be protected.

Therefore, a contract of insurance will not necessarily be non-compliant only because the adjoining property(s) and adjoining owner(s) are not individually identified or explicitly named in the schedule.

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Role of the Building Appeals Board

The Building Appeals Board has the power to hear disputes regarding protection works insurance, including as to whether the insurance is compliant and whether the amount is sufficient. Either the owner or the adjoining owner can apply to the Board for a determination where agreement cannot be reached on whether the insurance is compliant and/or the amount is sufficient.

Other protection work requirements

In addition to the requirement for insurance, Part 7 of the Building Act contains strict requirements for how the design of the protection work is to be agreed upon or otherwise determined and how access to the adjoining property is managed.

The VBA has published Practice Note PW02 and an Approved Statement which provide additional information.

Conclusion

Architects who are acting for or advising clients about protection work should make themselves familiar with all of the requirements of Part 7 of the Building Act. When applicable, they should inform their client, in writing, of the client's obligations under section 93 of the Building Act.

Relevant Legislation

Building Act 1993
Building Regulations 2018
Insurance Contracts Act 1984

Relevant Resources

Victorian Building Authority (VBA)
www.vba.vic.gov.au

VBA Practice Note
Practice Note PW-02 Approved Statement for
Protection Work

Building Appeals Board
www.buildingappeals.vic.gov.au

Victorian Court of Appeal in Colonial Range Pty Ltd v
CES Queen (Vic) Pty Ltd [2016] VSCA 328



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