

*This updates the previous Practice Note-2014-63 issued April 2014*

### Purpose

The purpose of this practice note is to provide guidance (in addition to that provided in the BCA) on formulating and assessing Performance Solutions, including:

- the documentation required to be produced at the design stage to show a proposed Performance Solution achieves the Performance Requirements; and
- how the RBS (or another registered practitioner under section 238 of the Act) should record their assessment of a proposed Performance Solution.

### Definitions

**Act** means the *Building Act 1993*

**Assessment Method** means the methods set out in Part A0.5 of Volume One or Part 1.0.5 of Volume Two of the BCA that can be used for determining that a Performance Solution or DTS meets a Performance Requirement

**BAB** means the Building Appeals Board

**BCA** means Building Code of Australia and refers to Volumes 1 and 2 of the National Construction Code.

**DTS** means deemed to satisfy solution which is a solution which is deemed to satisfy the Performance Requirements of the BCA

**Performance Solution** means a method of complying with the Performance Requirements other than by satisfying the DTS solution of the BCA.

**Performance Requirements** are requirements set out in the BCA which state the level of performance which a Performance Solution must meet or which a DTS is deemed to meet.

**RBS** means a relevant building surveyor as defined in the Act and includes private and municipal building surveyors.

**Regulations** means the *Building Regulations 2018*.

### Background

The RBS must determine if the information contained in an application for a building permit adequately demonstrates that the proposed building work will comply with the Act, the Regulations and the BCA.

When assessing an application for a building permit the RBS must consider if the work will comply with the Act, the Regulations and the BCA.

Compliance with the BCA is achieved by meeting the Performance Requirements.

The Performance Requirements can only be satisfied by constructing in accordance with a:

- Performance Solution; or
- Deemed to Satisfy Solution; or
- combination of the above. (see Part AO.2 of the BCA).

Section 24 of the Act provides that the RBS must not issue a building permit unless they are satisfied that the building work and the building permit will comply with the Act and the Regulations. This requires the RBS to be satisfied that all Performance Requirements are met through a DTS or Performance Solution which is documented in the building permit application.

Regulation 24 requires that the application for building permit must include sufficient information to show that the proposed building work will comply with the Act and Regulations.

Regulation 25 goes on to expressly require an application for a building permit to include any computations and/or reports necessary to demonstrate compliance.

Where the building permit application proposes building work that includes the installation of a prescribed combustible product as part of the external wall (as specified in Minister 's Guideline MG-14), the building permit application must include a determination of the Building Appeals Board.

Where a Performance Solution is proposed in relation to a Fire Performance Requirement, regulation 121 applies.

## Design – Formulating and documenting the proposed Performance Solution

The documentation of a Performance Solution must clearly demonstrate that the proposed Performance Solution meets the applicable Performance Requirements.

The documentation must set out in writing how the Assessment Methods of the BCA can be met by the design.

The documentation may include:

- plans, specifications, technical reports, computations,
- a BAB determination,
- a Building Regulations Advisory Committee accreditation,
- expert judgment,
- testing authority reports,
- manufacturer's information,
- a certificate of compliance and/or a statement of the intended use of the building. (Refer to Part A2.2 of Volume 1 of the BCA and Clause 1.2.2 of Volume 2 of the BCA for documents which may be accepted as evidence of suitability).

Where the documentation is lacking in detail, it is not the role of the RBS to make assumptions or to supplement the application with additional material. A request for further information must be made before determining the application.

The RBS must not participate in the preparation of a Performance Solution which they might later be requested to assess and approve.

An RBS can provide general advice on the requirements of the BCA, however, they must not give specific advice on the formulation of Performance Solutions.

An RBS must not provide advice which could be perceived as compromising their independent assessment of a Performance Solution.

The independence of the RBS must be maintained at all times, even where they intend to rely on certificates from others when making their assessments.

## RBS assessing and documenting decision of assessment of the proposed Performance Solution

It is the role of the RBS to assess any proposed Performance Solution. The RBS must determine whether the Assessment Methods referred to in the design documentation have been properly applied.

Regulation 38 requires that where an RBS determines a performance solution meets a performance requirement of the BCA, the RBS must record in writing the following information:

- the performance requirement with which the Performance Solution complies; and
- details of the Assessment Method or methods used to establish compliance with the relevant Performance Requirements; and
- details of any Expert Judgement relied upon including the extent to which the judgement; was relied upon and the qualifications and experience of the expert;
- details of any tests or calculations used to determine compliance with the relevant Performance Requirements; and
- details of any Standards or other information which were relied upon.

The record should reference any computations, reports, manufacturer's information, certificates, determinations, etc. that were relied upon in assessing the Performance Solution.

The record must be lodged with the relevant council under section 30 of the Act as referred to in regulation 44(1)(j))

The building permit must list details of all Performance Solutions approved (*Refer to Form 2- Building permit form*).

### **RBS Reliance on a certificate issued pursuant to section 238 of the Act to assess and document decision of assessment**

If the RBS does not (or cannot) assess the Performance Solution themselves, the RBS may rely on a certificate under section 238 of the Act.

Where an RBS relies on a certificate issued pursuant to section 238, the RBS must satisfy themselves that the:

- assessment was carried out by a registered building practitioner in the prescribed category (regulation 122); and
- the practitioner who carried out the assessment has adequate experience relevant to the building work and Performance Solution they have assessed; and
- the certificate certifies that the design complies with the relevant Performance Requirements which are the subject of the Performance Solution (section 238(1)(a)).

The RBS should document how they have satisfied themselves about the practitioner's registration and experience.

The RBS must have regard to Ministerial Guideline 04, which provides that having regard to the complexity of a design, the RBS may require that the section 238 certificate be prepared by a person other than the person who designed and documented the Performance Solution.

The registered building practitioner issuing the section 238 certificate is required by regulation 124 to record the same information that the RBS must record under regulation 38 (as set out above).

A copy of the certifier's record under regulation 124 should be requested from the certifier by the RBS (see regulation 124(2)) as it must be lodged with the relevant council under section 30 of the Act (see regulation 44(1)(m)).

### **Relying on Expert Judgement**

Regulation 38 requires the RBS to record details of any 'expert judgement' relied upon including the extent to which the judgement; was relied upon and the qualifications and experience of the expert.

One of the Assessment Methods which may be used to assess a Performance Solution is 'Expert Judgement'.

This is defined in the BCA as the judgement of an expert who has the qualifications and experience to determine whether a Performance Solution or DTS complies with the Performance Requirements.

In making their assessment of a proposed Performance Solution, the RBS, can rely on the 'expert judgement' of a person with relevant qualifications and experience.

The 'expert' must be a registered building practitioner with expertise that is relevant to the proposed Performance Solution.

The expert should be independent from the person who designed the Performance Solution.

The RBS cannot not rely on the 'expert judgement' of the person who prepared the proposed Performance Solution.

There may be times where the RBS will have qualifications and expertise on a particular matter and can rely on his or her own expertise. However, the RBS should be cautious about relying solely on their own expert judgement.

### **Approval of Performance Solutions during the construction phase**

It is an offence to carry out building work which does not comply with the building permit, Act and Regulations (section 16).

If it becomes apparent that building work may not be able to comply with the building permit, Act or Regulations, potential amendments to the building permit should be identified by the builder or designer before the related building work is carried out and a variation to the building permit must be sought before work proceeds.

The builder or designer should liaise with the owner about proposed amendments to the building permit and seek their approval to apply for any amendment to the building permit.

Where building work proceeds and it does not meet DTS and/or the building permit, the RBS may be able to allow it to remain provided that they are able to be satisfied that the building work complies with the Performance Requirements. This may be able to be achieved through acceptance of a Performance Solution as part of a variation to the building permit.

Where the RBS becomes aware that building work does not comply with the building permit, Act or Regulations, they should immediately do one or more of the following:

- issue a building order to stop the works (Part 8 of the Act);
- issue a direction to fix (Part 4 of the Act);
- issue a building notice or building order for minor works (Part 8 of the Act).

Each of the above actions would require the building work to be brought into compliance.

As an alternative to bringing the work into compliance, the RBS may agree to accept an application seeking approval for a variation to the building permit.

Any application for a variation must document the proposed change to the approved building permit and if a Performance Solution is proposed, must include detailed documentation as set out above in relation to the application for a building permit.

On receipt of any application for a variation, the RBS must assess the documentation. If a Performance Solution is proposed, the RBS must assess and record their decision to approve the Performance Solution as set out above in relation to an application for a building permit.

## Documentation to accompany occupancy permits and certificate of final inspection

Section 73 of the Act and regulations 203 and 205 of the Regulations require that the RBS must lodge a copy of the certificate of final inspection

or occupancy permit together with prescribed documents with the relevant council.

This includes any determination of the RBS that a Performance Solution complies with a Performance Requirement of the BCA together with any computations or reports relied upon by the RBS when making the determination (regulation 203(1)(j)).

This requirement would apply to any record of a determination or documentation not already provided to the relevant council under section 30 at the time of issuing a building permit or at the time of issuing a variation to a building permit.

The occupancy permit or certificate of final inspection must list details of all Performance Solutions approved by the RBS.

## Further information

*Refer to Practice 37 – Performance Solutions*

### Want to know more?

If you have a technical enquiry, please email [technicalenquiry@vba.vic.gov.au](mailto:technicalenquiry@vba.vic.gov.au) or call 1300 815 127.

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