Determination 2022/016

Whether building consent is required for a small unit prefabricated offsite

517 Rangiora Leithfield Road, Sefton

Summary

This determination considers an authority's proposed decision to require a building consent for prefabrication of a unit intended to be moved to another site. The determination discusses whether the unit is a 'building' in terms of the Building Act, the definition of 'building work' in the Act, and the exemption from the requirement to obtain building consent contained in clause 43 of Schedule 1 of the Act.

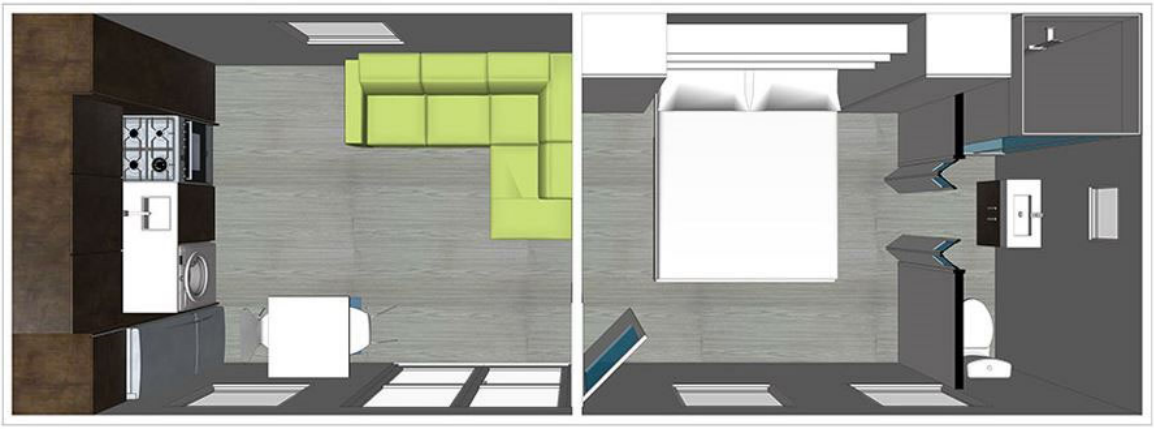

Figure 1: Illustration of the unit's interior[1]

[1] As provided by the applicant by email to the Ministry dated 12 March 2020.

In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act").

The legislation referred to in this determination (including the Act and the Building Code [Schedule 1 of the Building Regulations 1992]) is available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg acceptable solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.[2]

1.2. The parties to the determination are:

1.2.1. C Wightman, the owner of the property at 517 Rangiora Leithfield Road, who applied for this determination ("the applicant"), acting through a building consultant.

1.2.2. Waimakariri District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority, acting through a legal advisor.

1.3. I received submissions in respect of the determination from the Mobile Home Association ("MHA"). The MHA is not a party to the determination, but I have taken its submissions (where relevant) into consideration in making the determination.[3]

1.4. The determination arises from the authority's view that building consent is required for the construction of small, prefabricated units at the applicant's property (which are then relocated to another site), as this amounts to building work. In contrast, the applicant considers that this is the manufacture of a building product, as it occurs offsite to its destined final site, therefore does not involve building work (or is exempt under Schedule 1 of the Act) and does not need building consent.

1.5. Under section 177(1)(b) and (2)(a) of the Act, the matter to be determined is the authority's proposed exercise of its power of decision in requiring a building

[2] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

[3] As I am required to do by section 186(5) of the Act.

consent for the prefabrication of the Eco Cottage – Traditional[4] ("the unit") at the applicant's property.[5]

Matters outside this determination

1.6. This determination is limited to the matter described in paragraph 1.5. I have not considered any part of the unit that could be used to form a trailer or vehicle.

1.7. The applicant has requested the determination consider the following:

> 1. If **(and only if)** the prefabricated unit is considered a building "product" … ;
>
>   a. Given the manufacturing process, <u>can</u> a prefabricated building be considered a "building product" for the purposes of the building act?
>
>   b. <u>Does</u> manufacture of a building product **manufactured in New Zealand, but not on site,** need a building consent?
>
> 2. <u>Can</u> the units be built under exemption 43 as a 'building' and satisfy 43(1)(a)? (and given that all other exemption 43 conditions are satisfied no consent is required); <u>(underlining added)</u>
>
> … we want to know when these units change from being a building product to a building. We need to know when a building product needs a consent and when exemption 43 can be applied and how, not if it does. We need a consideration of "facilities" as distinct from "fixtures" and who is responsible for the conditions that relate to site.
>
> [applicant's emphasis]

1.8. The applicant asked the Ministry to clarify what product manufacture is possible by a manufacturer before it is considered building work requiring a building consent.

1.9. To the extent that the applicant's questions relate to the unit and matter the subject of this determination, they have been considered and addressed. However, it is not the function of a determination made under the Act to address how the law applies in every circumstance, other than the facts and matters in the subject case.

1.10. While not a matter for determination, the authority has indicated it intends to issue a notice to fix in relation to the unit. The applicant requests that the authority be

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[4] As per the "Standard Inclusions & Specifications" and illustration (for "EcoCottage–Traditional") provided by the applicant on 12 March 2020, and the plans with the document title "Prefabricated building 9th unit Feb 2020" provided by the applicant on 15 March 2020.

[5] I have considered whether this matter falls within the scope of 177(1)(b) and (2)(a) and am of the view that it does. However, if I am wrong in this view, I note that under section 177(1)(b) and (3)(e) I could have considered the authority's proposed decision to issue a notice to fix for an alleged contravention of section 40 (which provides that it is an offence to carry out building work except in accordance with a building consent). This would also have required me to consider the same underlying issue, being whether the prefabrication of the unit is building work.

given guidance as to the correct exercise of its power of decision to issue a notice to fix, and "what constitutes reasonable grounds for an offence". As this is not a matter to be determined, I do not discuss it further in this determination. However, I note the following:

1.10.1. It follows from my conclusion that a building consent is required for the construction of the unit in this case; if consent is not obtained, there will be a contravention of section 40. This would give the authority a basis to consider issuing a notice to fix, provided it satisfies the requirements relating to notices to fix in sections 164 and 165.

1.10.2. The requirements for a notice to fix have been considered in several court cases and previous determinations, to which the parties can refer for guidance in that respect.[6]

1.11. The applicant also sought to have the determination consider the impacts on this case of legislative amendments that are not yet in force. While those amendments do not apply to the decision that is the subject of this determination, I have made some comments about those provisions at paragraphs 4.52 and 4.75-4.77.

1.12. Finally, I note that during the determination process the applicant and the MHA raised other matters about the Ministry's role in the building regulatory system that are outside the ambit of this determination.

2. Background and the prefabrication of the unit

2.1. The applicant is the sole shareholder and director of Eco Cottages NZ Limited. The applicant advises that the company manufactures "prefabricated modules to be used as buildings … and intended to be transported to a site". The modules are prefabricated at the applicant's property. They are then relocated to the purchaser's site, where they can be placed on the ground, or connected to foundations and services, as the purchaser wishes.

2.2. The unit the subject of this determination is 3.1m wide and 8.5m long. It has:

2.2.1. a kitchen/living area, one bedroom and a bathroom (see figure 1)

2.2.2. external wall, floor and roof panels made of a galvanised steel frame with insulation and clad in galvanised steel

2.2.3. aluminium window and door frames

2.2.4. fixtures and fittings including a kitchen sink and tapware, bench and cupboards, wardrobes and other shelving, and a bathroom basin, shower, toilet and tapware

[6] See, for example, *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589; *Marlborough District Council v Bilsborough* [2020] NZDC 9962.

2.2.5. a waste pipe through to the subfloor (a 1,000 litre waste tank is available as an optional extra), sanitary piping also through to the subfloor, and optional metal guttering and downpipes

2.2.6. lights, power points, a caravan plug connector, and an optional gas water heating unit.

2.3. The applicant advises that modifications may be made to the unit to suit the purchaser's preferences, however for the purposes of this determination I have considered the design outlined above. I have not been notified of a purchaser or intended final site for the unit.

2.4. The plans for the unit note: "Foundation design is by owners design and subject to site conditions, wind zone, earthquake and local hazards if required to be considered."

2.5. While not explicitly stated by the applicant, presumably when the unit is prefabricated, or to use the applicant's term, "manufactured", the applicant's company starts from scratch and brings together the frame, insulation, electrical wiring, plumbing, windows and cladding to create the unit.

2.6. On 30 July 2019 the authority emailed the applicant, referring to previous communications between the parties, and stated:

> [The authority] believe the structures in question meet the definition of a building under the Act and consequently these buildings must be constructed under a building consent (section 40 of the Act). Carrying out building work for which consent is required and not sought is an offence under section 188 [*sic*] of the Act and [the authority] is obliged to issue a notice to fix under Section 164 of the Act.

2.7. The authority also stated in the email that its officers would visit the applicant's premises on 1 August 2019 to gather information with respect to issuing a notice to fix. The authority said notwithstanding this, its invitation to the applicant to discuss the issue further remained open.

2.8. I note the authority did not issue a notice to fix at that time, and it had still not done so at the time the application for determination was made.[7]

2.9. In response to a query from the Ministry, the authority advised on 6 March 2020 that it decided not to issue a notice to fix in 2019 because a number of similar cases were being considered by the Ministry and the courts. The authority said its intention remained to issue a notice to fix to the applicant.

2.10. The Ministry received the application for a determination on 7 February 2020. Further information was required from the parties before I could decide whether or

[7] The authority's power to do so since the application for determination has been suspended under section 183(1) until the final determination is made.

not to make the determination; such information was subsequently provided, and the parties were notified by letter dated 19 March 2020 that a determination would be made.[8]

2.11. Following the issue of the draft of this determination (see paragraph 3.5 below), the applicant sought to have the determination suspended pending:

2.11.1. an application to the High Court by the MHA for a declaration on the meaning of the words "building", "structure" and "fixed to land"; or

2.11.2. a legal opinion obtained by the Ministry considering the propositions that "all buildings are structures, all structures are realty, and all realty is either fixed to land or is land".

2.12. The applicant also wished to expand the scope of the determination and have a number of new issues considered, including a change to the particular unit (to incorporate a unit on wheels). The authority opposed these requests. Following correspondence with the parties it was agreed that the original application would proceed, with the further issues raised by the applicant addressed where relevant and appropriate in dealing with the matter to be determined.

3. Submissions

3.1. The Ministry received submissions from both parties and the MHA, which are outlined below.

Applicant

3.2. In their initial submissions, the applicant submitted (in summary):

3.2.1. Until the unit is placed on land and fixed, it is not a building, but a product that is intended to become a building. The change from 'product' to 'building' occurs when the product is placed on site or incorporated into building work and fixed to land.

3.2.2. The unit's prefabrication is not building work but "a manufacturing process of a product covered by [section] 14G[9] and a product statement is all that is required". The applicant says: "The [unit] must be considered a building product in the same way as any other product even if it is the extreme extrapolation of what a building product can be." Building Code compliance will be achieved by way of a "product technical statement"[10].

[8] In accordance with section 184.

[9] Section 14G: Responsibilities of product manufacturer or supplier (see paragraph 4.50 below).

[10] 'Product technical statement' is not defined in or referred to in the Act; it is a tool the Ministry has developed in conjunction with the building industry. It is a statement by a manufacturer or supplier of a product that summarises the key details about the product and its compliance with the Building Code, but is not required to be automatically accepted by an authority as evidence of a product's compliance.

3.2.3. The unit's prefabrication does not involve building work as the definition of building work in section 7 is not met (this definition is set out below at paragraph 4.23). Paragraph (a)(i) and (ii) of the definition are conjunctive (ie both requirements must be met), but (ii) does not apply as the unit was "not intended to be part of the allotment's compliance where it was prefabricated".

3.2.4. If a building consent was applied for and complied with on the basis that paragraph (a)(i) and (ii) of the definition were satisfied, this would mean the unit was accepted as building work pertaining to the applicant's property. However, this would create logistical problems, as consents for every prefabricated building module would be issued in relation to the land on which the building work was carried out (ie the applicant's property). The consent process is not appropriate for "manufactured building components".

3.2.5. If a building consent was required, "it would follow that the work would be Restricted Building Work and require to be undertaken/supervised by [licensed building practitioners]. LBP's are unsuited to this specialist exacting construction and the work is undertaken by coachbuilders." [11]

3.3. The applicant referred to previous determinations and case law in support of the view that building work relates to construction of a building on a particular site, and if the work is not associated with a particular site where the building will be located, then it is not building work. I consider these in the discussion section below.

Authority

3.4. In their initial submissions, the authority submitted (in summary):

3.4.1. The prefabricated unit constructed at the applicant's property, once complete, is a building. The unit is an entire dwelling that is created at the applicant's property.

3.4.2. Prefabrication of the unit at the applicant's property is building work requiring a building consent.

The Ministry's website explains this tool: https://www.building.govt.nz/building-code-compliance/product-assurance-and-certification-schemes/product-assurance/product-information-and-evidence/product-technical-statement/quick-guide-to-understanding-product-technical-statements/

[11] 'Restricted building work' (RBW) is defined in section 7 and in the Building (Definition of Restricted Building Work) Order 2011. RBW is restricted to residential design, construction or alteration work that requires building consent and relates to primary structure, weathertightness and certain fire safety design. Only licensed building practitioners (LBPs) can design, carry out or supervise this work. The matter to be determined in this case turns on whether the prefabrication of the unit is building work. It is not necessary for me to consider if the work is RBW in order to decide the matter; it does not follow that all building work is necessarily RBW.

3.4.3. Previous determinations concerning similar types of building modules have suggested that, when the final product was a building, building work must have had to occur for it to be produced.[12]

3.4.4. Interpreting paragraph (a)(i) and (ii) of the definition of 'building work' as conjunctive does not accord with the purposes and principles of the Act. It is also not how the definition has been applied in practice, as demonstrated by case law and previous determinations.

3.4.5. Case law on the interpretation of 'building work' has found there was building work on satisfaction of only paragraph (a)(i) of the definition, with no discussion of paragraph (a)(ii).[13] Previous determinations have also taken this approach.[14]

3.4.6. In *Carter Holt Harvey Ltd v Minister of Education*[15] the Court of Appeal held that the distinction between 'building work' and 'manufacture of products' was that building work was performed on a specific building, whereas manufacture of products was the marketing and supply of generic building products for subsequent use in unspecified and unknown buildings. Therefore, 'manufacture of building product' means "the manufacture of parts of building, parts that require additional parts and work to become a building."

The draft determination and submissions in response

3.5. A draft of this determination was issued to the parties for comment on 28 May 2021. The draft concluded that the prefabrication of the unit is building work, that there are no applicable exemptions under Schedule 1, and the authority is correct to consider that a building consent is required.

3.6. I note that the applicant initially submitted that the unit did not become a building as defined in section 8 until it was on the purchaser's site, but subsequently accepted that the unit is a building for the purposes of the Act when the manufacturing process is complete. This question was therefore not considered in the draft determination, which proceeded on the basis that there was no dispute that the unit was a building. However, following the issue of the draft

[12] Including Determination 2019/064 *Regarding a proposed notice to fix and whether work carried out is building work* (16 December 2019) and Determination 2019/036 *Regarding a notice to fix and whether a structure on trailers is a vehicle or a building* (25 July 2019). The decision in Determination 2019/036 was confirmed on appeal to the District Court; see *Marlborough District Council v Bilsborough* [2020] NZDC 9962.

[13] For example, *Carter Holt Harvey v Minister of Education* [2015] NZCA 321, *GPE Holding Ltd v Tile'N' Style Ltd* [2014] NZHC 802, and *Kwak v Park* [2016] NZHC 530.

[14] For example, Determination 2019/047 *Regarding the issue of a notice to fix for the relocation of two buildings* (30 September 2019) and Determination 2019/064 *Regarding a proposed notice to fix and whether work carried out is building work* (16 December 2019).

[15] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321.

determination, the applicant advised that they wished to rescind their statement that the unit was a building.

Applicant's further submissions

3.7. The applicant did not accept the draft determination and provided submissions in response to the draft. In these submissions the applicant discusses the draft and puts forward further arguments in support of their position. The applicant also provided further submissions in response to the authority's submissions in relation to the draft and in correspondence with the Ministry and the authority as to the scope of the matter for determination.

3.8. The applicant reiterated their initial submissions and made the following additional points relevant to the matter for determination (in summary):

3.8.1. The unit is a 'building product' intended to be a 'building' when fixed to its final resting place, at which time it will become a 'building' under section 8.

3.8.2. "[U]ntil the end user or purchaser of the product, 'affixes' the product to land it is nothing but a building product, like nails, or building paper or a more sophisticated assembly."

3.8.3. If the draft "stands as it is then all building products are building work that needs a building consent. If this is not the intention then a more mature understanding of what constitutes a building product is required. A prefabricated module should be recognised as a building product."

3.8.4. The unit should be considered a product until such time as its particular use is defined. The key is whether the prefabrication is specific to a particular building or a generic building product. In this case, the product is generic. The unit can be utilised as other classified uses such as commercial site offices or communal residential.[16]

3.8.5. It is not correct to say that the unit can be used as a self-contained dwelling when it leaves the applicant's property, as it lacks power, water and a wastewater connection. The unit may not be sold when complete but put in stock for sale later, so it is not a particular building designed for a specific site.

3.8.6. The exemption in clause 43 of Schedule 1 recognises that the unit is a product, and it is the later use (and the conditions) that determine it as a building. Clause 43 "recognises a building is determined by location on site and this is outside the control of the manufacturer".

[16] Clause A1 of the Building Code defines classified uses; the use of a particular building determines the application of the other clauses in the Building Code.

3.8.7. The difference between building work and building products is in respect to a specific building. The nature of a specific building cannot be determined without relationship to its intended site (including the site conditions, topography, distance from boundary and intended use). The requirements for a number of exemptions in Schedule 1 have site conditions.

Authority's further submissions

3.9. The authority accepted the draft determination. The Ministry received further submissions from the authority in response to the draft and the applicant's further submissions.

3.10. The authority reiterated its initial submissions and made the following additional points (in summary):

3.10.1. The authority agreed with the conclusion in the draft determination that the construction of the unit does not fall within any of the exempt work provided for in Schedule 1.

3.10.2. In relation to the exemption in clause 43 of Schedule 1, the criteria in subclause (1)(c)(iii) and (iv) are not satisfied (these criteria are set out below at paragraph 4.61). There has also been no evidence provided by the applicant indicating that a chartered engineer has reviewed or carried out the design of the unit.[17]

MHA's submissions

3.11. The applicant provided the MHA with a copy of the draft determination. The Ministry received submissions from the MHA in response to the draft, and further submissions in response to correspondence between the parties and the Ministry. The applicant has advised they support the submissions provided by the MHA.

3.12. The MHA make the following points that are relevant to the matter for determination:

3.12.1. "[F]or a building to be a building it must be a structure, and for a structure to be a structure, it must be fixed to land."

3.12.2. Under section 8(1)(a), building means a structure. However, structure is not defined in section 8 or any other section of the Act, so it is appropriate to consider other statutes. The Resource Management Act 1991 ("RMA") definition of 'structure' "is sufficient to establish that for something to be a structure, it must be fixed to land."

[17] This was the case at the time the authority provided its further submissions in response to the draft. However, as noted at paragraph 4.67, the applicant subsequently provided "the Engineering assessment that [the applicant] commissioned".

3.12.3. The materials for the unit are assembled on the applicant's property "into a facility made by people, but that is never fixed to land whilst on [the applicant's property]". In addition, while the unit "may have a bathroom and kitchen, those fixtures are not operational and are akin to fixtures in a kitchen and bathroom store – to be viewed, but not to be used. Do not flush before hooked to a pipe." The Act has no jurisdiction, and the authority has no authority on the applicant's property.

3.12.4. Once a building is detached "from its foundation so that it is no longer fixed to land, in law it ceases to be a building". Once fixed to a new foundation "it becomes a building once again, an appurtenance to the land, a part of the realty."

3.12.5. "All buildings are structures, all structures are realty and all realty is either land or fixed to land. All building products are components used in the manufacture, construction or assembly of buildings, but are not building products if the same product is used in chattel."

4. Discussion

4.1. The matter to be determined is the authority's proposed exercise of its power of decision in requiring a building consent for the prefabrication of the unit at the applicant's property.

4.2. The authority is of the view that the prefabrication of the unit amounts to building work and therefore requires building consent.

4.3. For the authority to require building consent for the manufacture or prefabrication of the unit, 'building work' as defined by section 7 must take place for which building consent is required.[18] For there to be 'building work' in relation to the unit, it must fall within the definition of 'building' under section 8 and not be excluded under section 9.

4.4. The applicant contends (in summary):

4.4.1. the unit is not a 'building' as defined in section 8.

4.4.2. if the unit is a building (which is not accepted), the prefabrication of the unit is not 'building work' and therefore does not require a building consent.

4.4.3. if there is building work (which is not accepted), it is exempt from the requirement to obtain building consent under clause 43 of Schedule 1 (Building work for which building consent not required).

4.5. I consider each of these issues below.

[18] Section 40(1) provides that a person must not carry out building work except in accordance with a building consent.

Issue one – whether the unit is a building

4.6. The first issue for consideration is whether the unit is a 'building' for the purposes of the Act. If the unit is not a building, the Act does not apply, and the authority cannot require a building consent in relation to it.

4.7. Section 8 defines what 'building' means and includes in the Act:

> **8 Building: what it means and includes:**
>
> (1) In this Act, unless the context otherwise requires, building–
>
> (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and
>
> (b) includes–
>
> …
>
> (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis; …

4.8. Section 9 defines what the term 'building' does not include. The unit in this case does not fall into any of the categories excluded from being a building in section 9.

4.9. There is no evidence that the unit in this case is a vehicle or motor vehicle, therefore section 8(1)(b)(iii) is not relevant.[19] As stated earlier, any part of the unit that could be used to form a trailer or vehicle is outside the scope of this determination.

4.10. The question then is whether the unit comes within the general definition of 'building' in section 8(1)(a).

4.11. The word 'structure' is not defined in the Act. In *Woodward v Astrograss Allweather Surfaces Ltd,* the High Court held that the word 'structure' in the definition of 'building' in the predecessor to the Act, the Building Act 1991, "must be taken to have its ordinary and natural meaning".[20]

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[19] That being the case, it is not necessary for me to consider the decision process set out by the Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633 when assessing whether a particular structure or unit with vehicular characteristics is a 'building' for the purposes of the Act, or a 'vehicle' which is not a building under section 8(1)(b)(iii) (and therefore not subject to the Act). This process, together with other relevant case law, is discussed in Determination 2021/022 *Regarding two notices to fix and whether work carried out is building work* (30 September 2021) and Determination 2022/001 *The authority's proposal to issue a notice to fix and whether a unit is a vehicle or a building* (1 March 2022).

[20] *Woodward v Astrograss Allweather Surfaces Ltd* HC Auckland HC112/96, 25 November 1996 at p7.

4.12. Previous determinations have also considered the meaning of 'structure' in section 8(1)(a), with reference to its ordinary meaning. Determination 2016/002 states:[21]

> 4.2.4 "Structure" is not defined in the Act and must be taken to have its usual or ordinary meaning: 'A building or other object constructed from several parts'[5], 'Something constructed or having organization – a building, an edifice'[6], and further 'Any framework or fabric of assembled material parts; a (typically large) man-made construction'.[7]
>
> 4.2.5 **For something to be a "structure" for the purposes of the Act, it must have some elements or constituent parts and/or be of some complexity**. This is consistent with the content of sections 8 and 9 of the Act. The items included in the definition of "building" in section 8 or expressly excluded from the definition of "building" in section 9 are all objects composed of different parts and/or of some complexity. [my emphasis]

4.13. In my view, the unit consists of a number of elements and is of sufficient complexity to be a 'structure' in terms of the definition of a 'building' in section 8(1)(a).

Building need not be fixed to land

4.14. The applicant submits that for the unit to be a building it must be fixed to land, and that this aligns with the definition of 'structure' in the RMA, which provides "any building, equipment, device, or other facility made by people and which is fixed to land…".

4.15. In my view, the applicant's argument ignores the words "movable or immovable" in section 8(1)(a) in relation to a "structure" and would render them meaningless. It is clear from the plain words of the section that a structure could be a building, whether immovable or otherwise.

4.16. In *Woodward v Astrograss Allweather Surfaces Ltd,* the High Court noted that while the Building Act 1991 was passed "more or less in conjunction" with the RMA, the word "structure" [in the definition of 'building'] has a meaning specific to the Building Act. The court stated:

> … the definition of "building" in s 3 of the Building Act 1991 … provides "…building means any temporary or permanent movable or immovable structure…" … Thus under the Building Act the term "building" means "structure" and under the [RMA] the term "structure" includes a building. **In the circumstances the word "structure" in the Building Act must have a meaning specific to the Building Act, and indeed the introductory words of s 3(1) make this plain. Those words are "in this Act, unless the context otherwise requires"**. [my emphasis]

[21] Determination 2016/002 *Regarding the issue of a dangerous building notice in respect of a damaged shared driveway* (20 January 2016). Footnotes 5, 6 and 7 in paragraph 4.2.4 of the determination are "n: Oxford English Dictionary. Web. 25 Oct 2015".

4.17. The argument that a building must be fixed to the ground for the purposes of the Building Act was rejected by the District Court in *Christchurch City Council v Smith Crane & Construction Ltd*.[22] In that case, the court stated:

> … it is not open to me to add words to section 8 that are not there. I would not so much be interpreting, but rather judicially amending, that section.
>
> … This approach [that structures that are not fixed to the ground are not buildings] would give rise to significant policy consequences, particularly in relation to the purpose of section 3 and the principles that are to be applied when performing functions or duties or exercising powers under the Act (section 4).

4.18. I also note that in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd*[23] the Court of Appeal found two units "sitting on concrete blocks and timber packers" were both 'buildings' within the general definition in section 8(1)(a).

4.19. For the reasons set out above, I do not accept the applicant's argument that for the unit to be a 'building' it must be fixed to land.

Building product

4.20. The applicant contends that the unit is a building product, rather than a building, and that the work to construct it is manufacture of a building product, rather than building work. I discuss this argument below from paragraph 4.39.

Conclusion on Issue one – building

4.21. I conclude that the unit is a structure, and therefore a 'building' as defined by section 8(1)(a).

Issue two – whether prefabrication of the unit is building work

4.22. The second issue for consideration is whether prefabrication of the unit is 'building work' in terms of the Act. If prefabrication of the unit is not building work, then it does not require a building consent.

4.23. I start by considering the definition of 'building work' in section 7:

[22] *Christchurch City Council v Smith Crane & Construction Ltd* DC Christchurch CRI-2009-009-12480, 19 February 2010 at [25]-[27].

[23] *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633 at [31]-[32] and [39]-[42].

> **building work**–
>
> (a) means work–
>
> (i) for, or in connection with the construction, alteration, demolition, or removal of a building; and
>
> (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
>
> (b) includes sitework; and
>
> (c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and
>
> (d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4

4.24. Paragraph (a)(i) of the definition of 'building work' refers to work in connection with the construction of a building. 'Construct' is also defined in section 7:

> **construct**, in relation to a building, includes to design, build, erect, prefabricate, and relocate the building

4.25. If work for or in connection with the construction of a building is 'building work', and construction includes prefabrication, it follows that work for or in connection with the prefabrication of a building is 'building work'. It therefore appears that the work involved in prefabricating the unit in this case, which is a building, is 'building work'.

4.26. However, the applicant advances two points in support of their view that prefabrication of the unit is not building work:

4.26.1. the requirements in paragraph (a)(i) and (ii) of the definition of 'building work' in section 7 are conjunctive.

4.26.2. the prefabrication of the unit is the manufacture of a building product because it occurs offsite to where the unit will be relocated to.

4.27. I address each of these points below. I also consider previous determinations relied on by the applicant to support their position in this determination.

Whether both (a)(i) and (ii) of the definition of 'building work' must be met

4.28. In the applicant's view, the requirements in paragraph (a)(i) and (ii) of the definition of 'building work' are conjunctive (ie must both be met) rather than disjunctive (ie providing alternatives). I will refer to these requirements in paragraph (a)(i) and (ii) as the first and second limbs respectively.

4.29. I agree that the use of "and" in legislative drafting usually has a conjunctive effect.[24] However, section 10(1) of the Legislation Act 2019 provides, "The meaning of legislation must be ascertained from its text and in the light of its purpose and its context."

4.30. If the applicant is correct that both limbs must be satisfied for there to be building work, it follows that construction of a building on a vacant site (ie without an existing building) would not be building work, and therefore not be regulated by the Act. This is because it would not be "likely to affect the extent to which an existing building on that allotment complies with the building code".

4.31. In my view, it cannot be the case that paragraph (a) of the definition of 'building work' only applies when there is an *existing* building on an allotment, the Building Code compliance of which would be affected by that work. Such an interpretation would lead to an absurd result and would not accord with the purpose of the Act, which is to provide for the regulation of building work.[25] Therefore, I consider the word "and" between the two limbs should be interpreted as "or" in this case.

4.32. It follows I do not agree with the applicant that because prefabricating the unit does not take place "on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code", it cannot be building work.

4.33. The definition of 'building work' essentially sets out a list of the work that constitutes building work for the purposes of the Act. The word "and" is at the end of each paragraph in the definition ((a), (b), (c) and (d)); however, these are clearly not to be read conjunctively. It also appears to me that paragraph (a) has been drafted as a sub-list, so the words "means work" that preface (a)(i) and (ii) apply to both limbs. Expanding (a) out in this way, 'building work' "means work for, or in connection with the construction … of a building", and *also* "means work on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code".

4.34. As the authority has noted in its submissions, the courts and previous determinations have found there was building work when the first limb had been met, with no discussion of the second limb. The applicant originally accepted that the first limb is met in this case, ie that there is "work for, or in connection with the construction … of a building".[26] The applicant subsequently advised they wished the

[24] Refer to Parliamentary Counsel Office "Principles of clear drafting" Appendix, para A3.3-A3.4, available at www.pco.govt.nz/clear-drafting/. However, I note "and" has been interpreted disjunctively – see for example *Barton v Police* [2013] NZHC 1481 at [21]-[22], where the High Court considered that interpreting "and" conjunctively in that case would lead to an absurd or unintelligible result.

[25] The purposes of the Act are set out in section 3. Section 4, which sets out the principles of the Act, is also relevant.

[26] The applicant's submission dated 26 March 2020 states: "That the prefabricated module is a building is not in question. We also accept the first part of building work definition i) is met." However, by submission dated 20 July 2021 the applicant withdrew their agreement that the unit is a building, and advised they wished the unit to be considered a building product.

unit to be considered a building product. However, I do not consider that this alters the applicant's acceptance that there is "work for, or in connection with the construction … [of the unit]".

4.35. I note that the interpretive issue with the two limbs of paragraph (a) of the definition of 'building work' is addressed in the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021 ("the 2021 Amendment"). This received royal assent on 7 June 2021 and will come into force on 7 September 2022.[27] The 2021 Amendment amends the definition of 'building work' to make it clear that the requirements in paragraph (a)(i) and (ii) are disjunctive.[28]

4.36. I agree with the parties that the first limb is satisfied in this case. Prefabrication of the unit is work for, or in connection with, the construction of a building. As the requirements in paragraph (a)(i) and (ii) are not conjunctive, satisfying the first limb is sufficient to meet the definition in section 7. Prefabrication of the unit is accordingly 'building work' in terms of the Act.

4.37. I consider that further support for my interpretation of the definition of 'building work', and my conclusion that prefabrication of the unit in this case is building work, is contained in section 17. That section provides that all building work must comply with the Building Code to the extent required by the Act. In addition, under section 14B, an owner who carries out building work, whether or not it is exempted work, is responsible for ensuring its code compliance.

4.38. If the applicant's position that the prefabrication of the unit does not constitute building work is correct, then it does not need to comply with the Building Code. Such an outcome would be contrary to, and inconsistent with, the purposes and principles of the Act as set out in sections 3 and 4, in particular the importance of:

4.38.1. ensuring people who use buildings can do so safely and without endangering their health (section 3(a)(i)).

4.38.2. the role that household units play in the lives of the people who use them, and ensuring that household units comply with the Building Code (section 4(2)(a)).

[27] Section 2 of the 2021 Amendment provides that the sections relevant to this determination come into force "on 1 or more dates set by Order in Council", or "15 months after the date of Royal assent".

[28] By replacing the word "work" in paragraph (a) with "work that is either of the following:" and deleting the word "and" at the end of paragraph (a)(i). The 2021 Amendment also includes a new paragraph in the definition of 'building work', being "the manufacture of a modular component". 'Modular component' is defined as "a building product of a prescribed kind", and 'building product' is defined in a new section 9A. I note that the applicant maintains that the unit in this case is not a modular component, nor will any future units that the applicant produces be modular components, however it is not necessary for me to consider this argument given that the matter for determination in this case involves the definition of 'building work' as it currently stands.

4.38.3. promoting the accountability of owners and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code and that the necessary building consents are obtained for proposed building work (sections 3(b) and 4(2)(q)(i)).

Whether prefabrication of the unit is manufacture of a building product

4.39. The applicant considers that prefabrication of the unit is manufacture of a building product (as opposed to building work), because it takes place at the applicant's property rather than at its "intended final site". The applicant also contends that the prefabricated unit "should be treated as the same for other building product manufactures [*sic*] who might produce a tap, window, or assembly such as a roof truss."

4.40. There is no clear distinction in the Act between manufacture of a building product and building work. However, the line between the two has been discussed by the courts and in previous determinations.

4.41. As the parties have noted, the courts have considered the distinction between building work and product manufacture. The Court of Appeal in *Carter Holt Harvey Ltd v Minister of Education* quoted approvingly from the High Court decision, where the Judge stated in relation to the phrase "relating to building work" (in section 393 limiting civil proceedings):[29]

> [143] … On one hand it cannot have been the case that the manufacture of anything that was designed to be in a building could be treated as "relating to building work". If that were so not only would nails, paint, glass and other materials that are generally on the market be included, but also, theoretically, so could certain chattels and fixtures such as internal lightbulbs and internal security systems designed for buildings.
>
> [144] It is **not possible to propose any neat phrase or cut-off line** which could apply. However**, there is a natural distinction between work, design and products intended for a particular building and generic products that are available on the general market and are not destined for a particular building**, which would include cladding and cladding systems. [my emphasis]

4.42. In that case, the Court of Appeal does not refer to the location where the prefabrication occurs as being a factor in the distinction between building work and manufacture of a building product. The key is whether the prefabrication is specific to a particular building or is a generic building product.

[29] At [156] and [163] of the Court of Appeal decision (*Carter Holt Harvey v Minister of Education* [2015] NZCA 321). The High Court decision is *Minister of Education v Carter Holt Harvey Ltd* [2014] NZHC 681. I note that the Court of Appeal decision was appealed to the Supreme Court – *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95; the appeal was dismissed.

4.43. The parties have also referred to previous determinations, including Determination 2016/040[30], which states:

> … some of the factors that might change work that is "building work" to being not "building work" include where the prefabrication takes place, the reason for prefabrication (whether it is for a particular building or as generic components for an unspecified use), and its final destination (a site in New Zealand or a site overseas).

4.44. The relevance of the reference in that determination to where the prefabrication takes place is in that case the prefabrication did not take place in New Zealand. The determination was upheld on appeal, the District Court holding that the prefabrication work carried out offshore was not 'building work' as anticipated by the definition in section 7, because the Act does not apply to work undertaken overseas.[31]

4.45. The applicant's argument in this case amounts to the distinction as to whether something is building work or not turning on *where* the work takes place. If it takes place on the intended site, then it is building work. If it takes place somewhere other than where it is intended to be sited (such as at the applicant's property), then it is not building work. In my view, this would result in a number of anomalies in terms of the application of the Act, and it is also inconsistent with the definition of 'building' in section 8, which includes moveable structures.

4.46. Putting it another way, the applicant's argument is essentially that if the work being done is on the "intended final site" then there is building work, but the same work offsite is not. It would be inconsistent if there was a different outcome achieved when exactly the same thing is being done, just in a different place. This is also inconsistent with the position that paragraph (a) of the definition of 'building work' is conjunctive, because of the requirement that the work must be "on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code".

4.47. As endorsed by the Court of Appeal in *Carter Holt Harvey Ltd*, there is no "neat phrase or cut-off line" to clarify what product manufacture is possible by a manufacturer before it is considered building work requiring a building consent. The answer will depend on the nature of the product itself and its relationship to a particular building.

4.48. Further, I consider that it is possible that work in some cases could be both manufacture of a building product and building work. However, if the work satisfies the definition of 'building work', then the provisions of the Act relating to building work apply (such as requiring consent unless exempt, and compliance with the

[30] Determination 2016/040 *Regarding the grant of a building consent for a modular house and the use of modules designed locally but prefabricated offshore* (26 August 2016), at paragraph 6.2.

[31] *Auckland Council v Liaw* [2017] NZDC 13532 at [32] and [44].

Building Code), and it is not possible to choose to only comply with the requirements relating to manufacture of building products.

4.49. The applicant contends that the unit in this case is an "extreme extrapolation" of what a building product can be, and its Building Code compliance is more appropriately suited to a "product technical statement"[32] rather than a building consent.

4.50. The applicant submits that the manufacturing process is covered by section 14G. That section sets out the responsibilities of a "product manufacturer or supplier":

> (1) In subsection (2), product manufacturer or supplier means a person who manufactures or supplies a building product and who states that the product will, if installed in accordance with the technical data, plans, specifications, and advice prescribed by the manufacturer, comply with the relevant provisions of the building code.
>
> (2) A product manufacturer or supplier is responsible for ensuring that the product will, if installed in accordance with the technical data, plans, specifications, and advice prescribed by the manufacturer, comply with the relevant provisions of the building code.

4.51. It is not clear to me how section 14G supports the applicant's view that prefabrication of the unit is manufacture of a building product and therefore not 'building work' to which the requirements of the Act apply (including the requirement for building consent). It appears that the applicant considers they (or Eco Cottages NZ Ltd) are a product manufacturer or supplier. Section 14G does not define or clarify that the prefabrication of the unit in this case is a building product, rather it states the requirements of a product manufacturer or supplier. Further, as discussed in paragraphs 4.47-4.48, section 14G does not override section 7. Even if a product has a product technical statement, if the work to prefabricate that product is building work as defined in section 7, as I have concluded in paragraph 4.36, then it is building work that requires building consent unless it is exempt work.

4.52. The applicant submits that I must consider the new section 9A introduced as part of the 2021 Amendment, which inserts a definition of 'building product'. The applicant also says I must take into account the Building (Building Product Information Requirements) Regulations 2022, which come into force on 11 December 2023, and the Building (Modular Component Manufacturers Scheme) Regulations 2022, which come into force on 7 September 2022. As section 9A and these regulations are not yet in force and cannot apply in this case at this stage, I have not discussed them further in this determination. However, I note, as mentioned below at paragraphs 4.75-4.77, that once they are in force the 2021 Amendment and associated regulations will be relevant to offsite construction of prefabricated buildings.

[32] Refer to paragraph 3.2.2 and footnote 10.

Previous determinations

4.53. The applicant has referred to previous determinations that the applicant says support their position. However, I consider many of these determinations have no application as they are not comparable with the present case. In addition, some of the determinations relied on by the applicant focused on quite a different issue, being whether structures in certain cases were a building or a vehicle, rather than whether building work had been carried out. I comment on these determinations briefly as follows:

4.53.1. The applicant states their position is consistent with Determination 2019/043[33] "that determined there was no offence under [section] 40 if there was no building work done on site". However, that determination considered a different situation to the present case, being whether the *relocation only* of two units (that had been constructed offsite) onto a property amounted to building work. Several previous determinations have considered that relocating a building, on its own, does not involve building work, and I continue to hold this view.

4.53.2. The applicant states that Determination 2014/025[34] is consistent with their view that only building work on the intended site needs consent, and not the prefabricated building. This determination considered that installation onsite of a relocated structure amounted to building work. However, this did not preclude its construction from also being considered building work; that issue was simply not considered in the determination.

4.53.3. The applicant also refers to Determination 2015/026[35], another case involving a relocated prefabricated unit and therefore of no relevance to the present case. That determination stated, in relation to the unit in that case, there was "no information as to whether the construction of the prefabricated unit was carried out under a building consent prior to its relocation …".

Conclusion on Issue two – building work

4.54. In my view, the requirements in paragraph (a)(i) and (ii) of the definition of 'building work' in section 7 are not conjunctive; only one limb is required to be satisfied. I consider prefabrication of the unit is work for, or in connection with, the construction of a building in terms of the first limb – paragraph (a)(i).

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[33] Determination 2019/043 *Regarding the issue of a notice to fix for two relocated units on a rural property* (9 September 2019). Paragraph 4.3.3 of that determination states that the second draft of the determination accepted that the offsite construction involved building work in another district.

[34] Determination 2014/025 *Regarding the proposal to issue a notice to fix in respect of a portable unit and whether the unit is a building or vehicle* (5 May 2014).

[35] Determination 2015/026 *Regarding the issue of a notice to fix and whether a prefabricated unit is a building or a vehicle* (29 May 2015), at paragraph 5.3.2.

4.55. I do not agree with the applicant that prefabrication of the unit is manufacture of a building product and not building work because the manufacture does not take place at its intended final site. While I accept there is no neat cut-off line between product manufacture and building work, the prefabrication of the unit is specific to a particular building as the unit in this case is complete and can be used as a building. Its prefabrication is clearly "work, design and products intended for a particular building" (in the words of the High Court in the *Carter Holt Harvey Ltd* case). Indeed, the unit itself is the particular building; it is not required to be incorporated into other work (although it may) to be a building.

4.56. In conclusion, I consider that prefabrication of the unit at the applicant's property is 'building work' in terms of paragraph (a)(i) of the definition of that term, for the purposes of the Act.

Issue three – whether the exemption in clause 43 applies

4.57. The third issue for consideration is whether prefabrication of the unit is exempt from the requirement to obtain a building consent.

4.58. All building work must comply with the Building Code and cannot be carried out without a building consent, except in certain cases as outlined in sections 41 and 42A.[36] These cases include the types of 'exempted building work' set out in Part 1 of Schedule 1 of the Act, which covers some low-risk building work, as well as particular tasks carried out by professionals such as registered plumbers (Part 2) and chartered professional engineers (Part 3). Regional and territorial authorities can also grant a discretionary exemption from the need to obtain a building consent (under clause 2 of Schedule 1).

4.59. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent. Sections 41 and 42A provide as follows:

> **41 Building consent not required in certain cases**
>
> (1) Despite section 40, a building consent is not required in relation to—
>
> (a) …
>
> (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A);
>
> …

[36] Refer to section 17: All building work must comply with building code, section 40: Buildings not to be constructed, altered, demolished, or removed without consent, and to section 41: Building consent not required in certain cases.

42A Building work for which building consent is not required under Schedule 1

(1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:

(a) building work described in Part 1 of Schedule 1; or

…

4.60. The purpose of Schedule 1 is to exempt low-risk building work from the need for a building consent. A summary document prepared by the Ministry as part of the Parliamentary process in relation to the exemptions brought into force in 2020, of which clause 43 was one, stated that the exemptions enable building consent authorities to focus their time and resources on reviewing the design and construction of building work that presents a higher risk to people and property.[37]

4.61. The relevant exemption in Schedule 1 that the applicant says applies in this case is clause 43, which is in Part 3 of Schedule 1. Part 3 is entitled 'Building work for which design is carried out or reviewed by chartered professional engineer'. According to the Ministry Guidance this clause "covers the construction of small detached buildings such as garden sheds, greenhouses, cabins or sleepouts" between 10 and 30 square metres.[38] It provides:

43 Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area (where kitset or prefabricated)

(1) Building work in connection with any detached building if—

(a) the building is a kitset or prefabricated building, and the product manufacturer or supplier has complied with subclause (3); and

(b) the building work is carried out in accordance with the design referred to in subclause (3); and

(c) the building—

(i) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and

(ii) exceeds 10 square metres in floor area, but does not exceed 30 square metres; and

[37] MBIE *Impact Summary: Building Consent Exemptions: Possible amendments to Schedule 1 of the Building Act 2004* (21 April 2020) at pg 5: https://treasury.govt.nz/sites/default/files/2020-06/ria-mbie-bcep-jun20.pdf. This is a 'regulatory impact statement' or 'RIS', which is prepared to support the consideration of regulatory proposals and is published at the time the relevant bill is introduced to Parliament.

[38] MBIE *Building work that does not require a building consent (*Fifth edition, August 2020) at pg 48.

(iii) does not contain sanitary facilities or facilities for the storage of potable water; and

(iv) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities; and

(v) if it includes sleeping accommodation, has smoke alarms installed.

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

(3) The product manufacturer or supplier (as defined in section 14G) must have had the design of the building carried out or reviewed by a chartered professional engineer.

4.62. In my view, there are several difficulties with the applicant's reliance on clause 43, as discussed below.

4.63. First, clause 43 came into force on 31 August 2020[39], which was some time after the authority decided building consent was required for construction of the unit. In 2019, when the parties were in discussions in relation to the unit, the applicant could not have contemplated that this exemption could apply as it was not yet available.

4.64. Secondly, my reading of clause 43 is that it relates to an exemption from a building consent for the building work associated with the *assembly* of a kitset or prefabricated building, not the building work associated with the prefabrication of the building itself. This is based on the fact that certain criteria can only be known when the building is 'on site', such as subclauses (1)(c)(iv) and (2). Further, the sense of the clause indicates it applies *post* prefabrication. Subclause (1)(a) refers to a "kitset or prefabricated building", ie it is *already* a prefabricated building and the work to prefabricate it has already occurred.[40]

4.65. Thirdly, Cabinet papers in relation to the 2020 exemptions make it clear that they were not intended to apply to buildings such as the unit in this case. In explaining additional exemptions were proposed for "larger single-storey detached buildings (eg sleepouts, garages, sheds and greenhouses)" with a floor area greater than the then current exemption of 10 square metres, the papers state:[41]

[39] By the Building (Exempt Building Work) Order 2020.

[40] This interpretation of how clause 43 was intended to apply is supported by the RIS (see footnote 37 above), which states at pg 8: "In practice, some of the proposed exemptions, such as carports, solar array panels, and single-storey detached buildings will be purchased in kit-set form or as prefabricated components where the design is a one-time sign-off by a Chartered Professional Engineer as part of the product development process before sale."

[41] Office of the Hon Jenny Salesa *Proposal to amend Schedule 1 of the Building Act 2004 to exempt specified building work from requiring a building consent* (6 May 2020) at [12],[14] and [37]. Building Act 2004:

> 14. The other [proposed exemption] is for larger buildings that could double, or more than double, the size of the current exemption where they are constructed using any materials and a Chartered Professional Engineer is involved in the design, or an LBP is involved in the design and construction to manage risk. **Note that these proposals do not include small self-contained houses** (see paragraph 37 for further discussion).
>
> …
>
> 37. In relation to the single-storey detached building exemptions, these must not contain sanitary facilities, facilities for the storage of potable water, or cooking facilities, and the building must be associated with a main dwelling. **Including these elements would significantly increase potential health and safety risks to building users or neighbouring properties. This means small self-contained houses are not covered by these proposed exemptions.**
>
> [my emphasis]

4.66. Fourthly, as the authority notes there was no evidence (and indeed the applicant had not claimed) that the design of the unit was carried out or reviewed by a chartered professional engineer. This is one of the key requirements for the exemption to apply, given its inclusion in Part 3 of Schedule 1, and one of the reasons such work is considered low risk.[42]

4.67. A short time before I issued this determination, the applicant provided "the Engineering assessment … commissioned to support [their] technical statement … to evidence [their] ability to provide a complying product statement, pursuant to s14G." The applicant asked that this assessment be considered prior to issue of the final determination, however did not provide any further information about how the assessment supports their position.

4.68. This assessment, which is dated 19 August 2021, appears to have been prepared by a chartered professional engineer. It is titled "Structural Assessment of Eco Cottages Modular Building System" and states: "Structural assessment, as described above, confirms that buildings produced by Eco Cottages are structurally adequate within the load and environment limitations as listed below." The assessment purports to relate to "all module types" of "similar construction", however, it is not clear whether that includes the unit in this case. In addition, the assessment appears to be limited to a structural assessment of the roof and wall SIP panels (Structural Insulated Panels) and "structural steel posts, beams and trimming members"; there is no indication that the modules meet the other requirements of the Building Code.

Proposed Amendments to Schedule 1 to Exempt Specified Building Work from Requiring a Building Consent (mbie.govt.nz)

[42] The RIS (see footnote 37 above) states at pg 5: "not requiring a building consent recognises that some designers, such as Chartered Professional Engineers …, are well placed to manage risks associated with certain types of work on the basis that they are trained, qualified and regulated." And at pg 8: "Some of the proposed exemption amendments above include a requirement for design to be carried out or supervised by a Chartered Professional Engineer so they have a risk profile consistent with other exemptions in Schedule 1 (i.e. low risk)."

4.69. Given these limitations, I therefore do not consider that the criteria in clause 43(1)(a) and (3) are satisfied by the assessment.

Conclusion on Issue three – exemption in clause 43

4.70. For the reasons set out above, I conclude there is no applicable exemption for the prefabrication of the unit. Clause 43 post-dated when the authority considered building consent was required, is intended to apply to the assembly on site rather than the offsite construction, and the criteria in the clause have not been met.

Additional comments on clause 43

4.71. The applicant has requested guidance as to how clause 43 can be applied and requested "consideration of 'facilities' as distinct from 'fixtures'".

4.72. It will be apparent from the discussion above that in my view the exemption in clause 43 will be available to the person assembling a prefabricated or kitset building when all the criteria in the clause are satisfied.

4.73. Because of this, it is a matter for the purchaser of a prefabricated building who wishes to avail themselves of the exemption in clause 43 to consider whether they meet all the criteria in the clause. This sits outside of the matter to be determined so I have not considered it further.

Conclusion

4.74. I have concluded that the unit is a building, and the prefabrication of the unit in this case is building work. The exemption in clause 43 of Schedule 1 does not apply, and there are no other available exemptions in Schedule 1. It is therefore my view that the authority is correct to consider that building consent is required for prefabrication of the unit. I consider this conclusion is consistent with the purposes and principles of the Act, and these purposes and principles would be frustrated if building work not taking place on site was not regulated by the Act.

4.75. However, I acknowledge the applicant's concerns regarding the challenges in applying the current building consent regime to buildings constructed or prefabricated offsite. Innovations in manufacturing technology and processes mean buildings can be constructed quite differently to traditional building work. It is my understanding that the 2021 Amendment addresses some of the issues regarding offsite construction, including clarifying the distinction between building products and building work. It includes the establishment of a voluntary manufacturer certification scheme.

4.76. This scheme provides for a "registered modular component manufacturer" to be registered and accredited for the design and/or manufacture of "modular components" (which includes the prefabrication of; frames, panels, volumetric structures and whole buildings). The 2021 Amendment amends the definition of

building work to include "the manufacture of a modular component", and amends Section 41[43] so that building consent is not required for a modular component that is designed and manufactured "by a registered [modular component manufacturer] who is certified to design and manufacture the component … with the intention that the component will be used in building work that is carried out somewhere else".

4.77. I note that when this application for determination was made, the 2021 Amendment was in the early stages of the legislative process; at that time, it was a proposal that was still under development.[44] However, significant progress has been made since then to implement the proposed new regulatory framework. A suite of regulations to support the 2021 Amendment have now been made and come into force from later this year.[45]

5. Decision

5.1 In accordance with section 188 of the Building Act 2004, I determine building consent is required for the prefabrication of the unit at the applicant's property, and confirm the authority's proposed exercise of its power of decision in requiring building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 August 2022.

Katie Gordon

National Manager, Building Resolution

[43] Section 20 of the 2021 Amendment modifies section 41 of the Act (Building consent not required in certain cases), by inserting after section 41(1)(e): "(f) the manufacture of a modular component that is designed and manufactured–

(i) by a registered MCM [modular component manufacturer] who is certified to design and manufacture the component; and

(ii) with the intention that the component will be used in building work that is carried out somewhere else."

[44] MBIE *Building system legislative reform – Discussion paper (*April 2019) at pg 32-36. The Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill was introduced in May 2020.

[45] Six sets of regulations were made on 7 June 2022 to support the modular component manufacturer scheme. These include the Building (Modular Component Manufacturer Scheme) Regulations 2022 and Building (Product Certification) Regulations 2022 (both of which come into force on 7 September 2022), and the Building (Building Product Information Requirements) Regulations 2022 (which come into force on 11 December 2023).