

Access to Buildings for People with a Disability

ACCESS TO BUILDINGS FOR PEOPLE WITH A DISABILITY

This updates the previous practice note 2011-14 issued May 2011.

Reference to the BCA in this Practice Note means Volume One and Volume Two of the National Construction Code Series.

ACCESS PROVISIONS

1. Purpose

This Practice Note provides guidance for building practitioners on how to work with the access provisions in the BCA and how to work with the exemptions from those access provisions.

2. Introduction

From 1 May 2011 certain new buildings, and existing buildings undergoing building work, must comply with the Commonwealth Disability (Access to Premises - Buildings) Standards 2010 (Premises Standards). The Premises Standards have been made under the Commonwealth Disability Discrimination Act 1992 (DDA).

The Premises Standards set out administrative provisions in Parts 1 – 6 which include certain exceptions and concession to the application of the Standards, and an Access Code in Schedule 1 detailing technical requirements. The Access Code is included in Volume One of the BCA and, to ensure consistency with the BCA, sets out

performance requirements and detailed Deemed-to-Satisfy provisions.

The Premises Standards aim to ensure that dignified, equitable, cost-effective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability. It also provides a level of certainty to property developers, building owners and practitioners that if access is provided in accordance with the Access Code it will not be unlawful under the DDA.

By agreement with the Commonwealth, States and Territories will provide for the administrative arrangements set out in the Premises Standards in each jurisdiction's legislative scheme.

Amendments made to the Building Act 1993 (the Act) by the Building Amendment Act 2011 and to the Building Regulations 2006 (the Regulations) by the Building Amendment Regulations 2011 have put in place in the Victorian building scheme the administrative arrangements relevant to the state jurisdiction, comprising the exceptions and concessions set out in Parts 1 to 4 of the Premises Standards.

An access provision is a performance requirement that is contained in Section D, Part E3 or Part F2 of the BCA for which there is an equivalent performance requirement in the Access Code within the meaning of the Premises Standards. The Access Code references DP1, DP4, DP6, DP8 and DP9.

The Premises Standards are made under the DDA, however this Practice Note explains the new access provisions as they apply under the building scheme in Victoria. The Victorian scheme essentially replicates the provisions of the Premises Standards via adoption of the Volume One of the Building Code of Australia (the Access Code) and through amendments to the Act and Regulations (administrative arrangements and exceptions and concessions contained in Parts 1 to 4 of the Premises Standards).

However, it should be noted that the Premises Standards place obligations on building owners, building designers, building developers, builders, building managers, lessees and relevant building surveyors (RBSs) to comply with the Standards.

The obligations under the Premises Standards are given effect by the DDA. The DDA is a complaints-based (as opposed to a compliance based) legislation; if a person does not meet their obligations under the Premises Standards they may be the subject of a complaint under the DDA to the Australian Human Rights Commission (AHRC). To meet the obligations under the Premises Standards and the DDA, building designers, developers and building practitioners need to ensure that building work, complies with the Access Code where a building permit is applied for on, or after, 1 May 2011.

However as noted, the Access Code has been incorporated into Volume One of the BCA so that it consistently prescribes the technical requirements that must be met when new building work is proposed.

It should also be noted that the Victorian Equal Opportunity Act 2010 (EO Act) places positive duties on people to not discriminate on the ground of disability in the area of access to

premises that the public is allowed to enter or use. If a person does not meet their duties under the EO Act they may be the subject of a complaint under the EO Act to the Victorian Equal Opportunity and Human Rights Commission or the Victorian Civil and Administrative Tribunal (VCAT).

3. Buildings to which the new access provisions apply.

The new provisions apply to certain Class 1b buildings, the common areas of Class 2 buildings (built after 1 May 2011), Class 3 buildings, Class 5–9 buildings and certain Class 10a and 10b buildings.

The Regulations contain detailed information specifying the circumstances and types of buildings where the new provisions apply and also exceptions and concessions that also apply under the Premises Standards.

4. Building work to which the new access provisions apply

The new provisions apply to:

- a new building;
- a *new part* of an existing building; and
- the *affected part* of an existing building.

Affected part means:

In relation to a building that is to contain a new part means:

- the principal pedestrian entrance of the building; and
- any part of an existing building that is necessary to provide a continuous accessible path of travel from the entrance to the proposed new part.

New Part means:

In relation to an existing building means a part of that building that is to be altered, including an extension to the building, in respect of which an application for building permit is made on or after 1 May 2011.

Concessions apply to an affected part where the building work is proposed to be carried out by a lessee on a *new part* of the building, if that lessee leases the new part and parts of the building are leased to different persons.

5. How the affected part applies

The affected part of the building:

- must be “upgraded” to comply with the Premises Standards subject to any exceptions or concessions; and
- only applies to any part of an existing building once work requiring a building permit is to be undertaken.

The affected part of the building does not apply to:

existing parts of buildings outside the area of the new work and the affected part upgrade; and
an access way from the allotment boundary, from any accessible car parking space on the allotment or between other buildings on the allotment.

Upgrading works for an affected part may include:

- accessibility of upper floors to new work;
- providing lift access features such as Braille or tactile buttons;
- signage;
- removing a step at a building entrance;
- upgrading handrails on a ramp;
- minimum width requirements of doorways or passageways, including passing and turning spaces.

6. Building Amendment Regulations 2011 Exceptions and concessions under the Regulations

The new regulation 116 (3) provides for certain exceptions from the access provisions.

Regulation 116(2) replicates the policy intention of the Premises Standards so that the access provisions do not apply to any building work where an application for building permit was made before 1 May 2011.

Regulation 116(3)(a) provides that an access provision does not apply to a new part of a Class 1b building that has fewer than four bedrooms that are used for rental accommodation and that was either constructed before 1 May 2011 or an application for a building permit was made before 1 May 2011.

This exemption applies to a single Class 1b building and does not apply to a Class 1b building that comprises 4 or more single dwellings that are on the same allotment; a new part and affected part in a proportion of 4 or more single dwellings on one allotment must comply with the access provisions. It should be noted that 3 or less single dwellings that are on the same allotment are Class 1a buildings and do not have to comply with the access provisions.

Regulation 116(3)(b) provides that an access provision does not apply to a Class 2 building that was constructed before 1 May 2011 or an application for a building permit was made before 1 May 2011.

Regulation 116(3)(c) provides that an access provision does not apply to the internal parts of a sole occupancy unit in the Class 2 building.

Regulation 116 (3)(d) provides that an access provision does not apply to a Class 4 building.

Regulation 116 (3)(e) provides that an access provision does not apply to a Class 10 building associated with a Class 1a or Class 4 part of a building.

Regulation 116(4) replicates certain exceptions and concessions contained in Parts 4.3, 4.4 and 4.5 of Premises Standards.

Lessees – concessions regarding an affected part

Regulation 116(4)(a) provides that a lessee submitting an application for approval for the building work to their leased area only do not need to ensure that the *affected part* of the building complies with the access provisions.

This concession does not apply if a building with a new part is leased to only one person.

Lift concession

Regulation 116(4)(b) provides that the requirement in the access provisions for a lift to have a floor dimension of not less than 1400mm x 1600mm under Clause E3.6(b) does not apply to an existing passenger lift that is in a new part, or an *affected part*, of a building, if the lift:

- travels more than 12 meters; and
- has a lift floor not less than 1100mm by 1400mm (it is accessible to the earlier standard).

If the building is not the subject of the lessee concession and the new part is on a floor other than the ground floor, the affected part upgrade will require that the path of travel, from the principal public entrance to the new part be by way of an access ramp or passenger lift.

The provision of a ramp or lift to provide access to upper levels of a building is not required to a Class 5, 6, 7b or 8 building of no more than three storeys where the floor area of each storey other than the entrance storey does not exceed 200m². This concession is contained in Clause D3.3(f) of the BCA.

Toilet concession

Regulation 116(4)(c) provides that it is not necessary to upgrade an existing accessible

sanitary compartment to comply with F2.4(c) and F 2.4(e) of the BCA that is the subject of new building work provided the existing sanitary facilities comply with AS 1428.1 – 2001. Toilets that are within the 'new part' or the 'affected part' of the building that do not comply with this version of the Standard will need to be upgraded (toilets adjacent to the affected part do not have to be upgraded under the Premises Standards). However, any proposed new toilets must comply with the access provisions.

5.5 Building Act Amendment (2011) and the role of the BAB

The Premises Standards have recognised that there may be exceptional circumstances where there are practical constraints to complying with the access provisions. The DDA provides for an exception where avoiding discrimination would impose unjustifiable hardship.

Part of the Protocol agreed by States and Territories is to provide for an 'Access Panel' which is capable of hearing matters related to unjustifiable hardship. The Victorian Government has determined that the Building Appeals Board (BAB) is the appropriate body to act as an 'Access Panel' within the State of Victoria.

The amendment to the Building Act in 2011 made provision for the BAB to make determinations in relation to unjustifiable hardship. The Act inserts a new section 160(4) which prevents an application for a modification or variation of a building regulation relating to access provisions being made under section 160.

A new section 160B has been inserted which provides for an application to be made to the BAB seeking a determination that an access provision does not apply or applies with the modifications or variations specified in the application. An application under section 160B

can only be made on the grounds of unjustifiable hardship.

An application can be made to the BAB for a determination under section 160B by:

- The owner of the land; or
- A purchaser under contract of sale of a lot (S9AA(1) of the Sale of Land Act); or
- A lessee of the building; or
- Any person acting on behalf of the applicants noted above apart from the RBS for that building work.

The BAB will continue to make determinations in relation to whether or not a proposed Alternative Solution meets the performance requirements of the BCA (including access provisions) through an application for a determination under section 160A.

Unjustifiable hardship

Compliance with the access provisions of the BCA is to be achieved by compliance with the performance requirements. This can be achieved by compliance with the Deemed-to-Satisfy provisions or the development of an Alternative Solution, or by a combination of both, as specified in the BCA.

A person may make an application to the BAB for a determination that meeting a performance requirement or a component of a performance requirement would impose unjustifiable hardship on the person. The person still needs to comply with the access provisions to the maximum extent not involving unjustifiable hardship.

The Act also provides for matters which the BAB must consider when making a determination based on unjustifiable hardship. The BAB has to consider the matters set out in section 160B, subsections (3) to (7). In preparing your application to the BAB under section 160B you should consider these factors and provide any

information relevant to your application and the matters set out in section 160B, subsection (4).

One of the matters referred to under section 160B(4)(n) refers to an 'action plan'. Guidance on preparing an Action Plan under the DDA is available from the AHRC. An Action Plan must be lodged on the AHRC website and although the BAB will not endorse an Action Plan, it may consider a lodged Action Plan as part of its deliberations.

For further information regarding applications to the BAB pursuant to section 160B see Practice Note 2014-39.

7. Using Performance Requirements to develop Alternative Solutions

When using the performance requirements to develop an Alternative Solution, it will be important to ensure that the Alternative Solution meets the access provisions in order to comply with the Premises Standards and the DDA.

To ascertain whether an Alternative Solution meets the access provisions, you are strongly encouraged to seek advice from an expert consultant experienced in assessing design solutions on access matters.. An application may also be made to the BAB for a determination that an Alternative Solution meets the relevant performance requirements under section 160A.

8. Transitional provisions

Section 10(2) of the Act provides that a new building regulation, or an amendment to a building regulation, does not apply to the carrying out of building work if the RBS is satisfied, and certifies in writing, that substantial progress was made on the design of the building before the new building regulation or amendment commenced.

From 1 May 2011, where substantial progress has been made on a design, the RBS will still be able exercise the power under section 10(2) of the Act to consider a building permit application under the Regulations that existed immediately prior to 1 May 2011, including the access provisions of the BCA 2010.

However in using section 10(2) and not complying with the access provisions in the BCA 2011, the RBS and the applicant will be acting unlawfully under the DDA.

For alterations to existing buildings it should be noted that the exemptions relating to existing lifts and toilet facilities in new regulation 116(4) will be consistent with the requirements of the BCA 2010.

Where substantial progress has been made on a design that has involved considerable expense (design progress, application for planning permit etc) and the application for a building permit is made on or after 1 May, consideration could be given to making an application to the BAB under section 160B on the grounds of unjustifiable hardship in that a complete redesign and new planning permit application may be required.

9. Alterations to buildings

Regulations 608 and 609 provide discretion to the RBS to allow partial compliance in certain circumstances where the proposed building work is an alteration. An RBS can continue to apply this discretion but the applicant and RBS will be acting unlawfully under the DDA by approving building work in relation to the new part and the affected part of the building that does not comply fully with the access provisions.

Regulation 116(4) provides exemptions to the new part and affected part requirements. Regulation 608 (2) and (3) have been amended so that they are subject to regulation 116(4).

This means that if compliance in accordance with regulation 608(2) or conformity in accordance with regulation 608(3) is required, the exemptions provided under regulation 116(4) still apply.

10. Change of use, combining allotments and subdividing existing buildings

Regulations 502, 503 and 1011 provide discretion to the RBS to allow partial compliance in certain circumstances where there is a change of use, or an existing allotment is combined or an existing building is subdivided. An RBS can continue to apply this discretion but the applicant and RBS will be acting unlawfully under the DDA by approving building work that does not comply fully with the access provisions.

11. Historic and special buildings

Section 28 of the Building Act 1993 provides for buildings on the Heritage Register established under the Heritage Act 1995. Section 28(1) of the Building Act provides the RBS with the power to issue a building permit which does not comply with the Regulations in relation to a building on the Victorian Heritage Register. An RBS can continue to apply this discretion but the applicant and RBS will be acting unlawfully under the DDA by approving building work that does not comply fully with the access provisions.

Where a building is of heritage significance and compliance with the access provisions would detrimentally affect the features of the building that are essential to the heritage significance of the building an application under section 160B based on unjustifiable hardship would need to be considered.

A determination by the BAB that compliance with the access provisions would result in unjustifiable hardship because of the heritage features of a building may not excuse the

provision of no access features at all.

Compliance with the access provisions is required to the maximum extent not involving unjustifiable hardship.

The Australian Council of National Trusts and the Australian Heritage Commission have produced a useful Technical Leaflet in 2008 on access to heritage places in which a process for improving access is outlined.

This useful guidance is available at the:
Australian Heritage Council

Existing public transport buildings

The mandatory requirements for the upgrade of public transport buildings that were introduced in the Transport Standards in 2002 have been transferred to the Premises Standards and are included in the BCA.

Under the Premises Standards, existing public transport buildings that are in use by passengers on the public transport system will have to comply with a timetable of building changes over a period from 1 May 2011 to 31 December 2022. The AHRC can grant exemptions from the requirements in certain circumstances outlined in Part 5 of the Premises Standards.

Particular Deemed-to-Satisfy provisions for public transport building are contained in Part H2 of the BCA. If designing a new or upgraded public transport building or assessing a design for compliance, it should be noted that some of the referenced Standards that apply in Part H2 are different than those that are referenced for use in Section D or Parts E3 and F2 of the BCA.

12. Ongoing obligations under the Equal Opportunity Act 1995

A similar complaint system to the DDA continues to operate in Victoria. Where a building does not comply with the BCA access

provisions, a complaint can be made to the Victorian Equal Opportunity and Human Rights Commission and if conciliation is not achieved, to the Victorian Civil and Administrative Tribunal (VCAT).

Where to find documents

Building practitioners are encouraged to familiarise themselves with the Premises Standards, Amendment No. 1 and the Explanatory Statement available from Australian Government ComLaw.

The AHRC has issued a Guideline on the application of the Premises Standards to assist in their application. The Guideline is available on-line at Australian Human Rights Commission.

A webcast of the awareness seminars delivered by the AHRC and the Australian Building Codes Board explains the Standards and how they will enable consistency between building law and the DDA.

For more information:

www.ag.gov.au - Australian Attorney General's Department

www.humanrights.gov.au - Australian Human Rights Commission

www.abcb.gov.au - Australian Building Codes Board for the BCA.

If you have a technical enquiry please email: technicalenquiry@vba.vic.gov.au or phone 1300 815 127

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