

Building Practice Note BP-12: Exemptions from compliance with Regulations

This Practice Note provides guidance to building surveyors and other practitioners about a building surveyor's discretion to exempt building work or buildings from complying with the Building Act 1993 (the Act) and the Building Regulations 2018 (the Regulations) in certain circumstances.

- The context below provides guidance for:
- Exemptions from compliance with Regulations
- General principles
- The application of new regulations to building work
- Historic buildings and special buildings
- Combined allotments
- Change of use
- Subdivision of existing buildings
- Alterations to existing buildings
- Alterations affecting exits and paths of travel

Abbreviations & Definitions

The abbreviations and definitions set out below are for guidance only. They are not intended to vary those set out in the Building Act 1993 (the Act), Building Regulations 2018 (the Regulations) or the National Construction Code 2019 (NCC).

- **Act** – Building Act 1993
- **BCA** – Building Code of Australia (Volume 1 and Volume 2)
- **BAB** – Building Appeals Board
- **DtS** – Deemed-to-Satisfy
- **MBS** – Municipal Building Surveyor
- **NCC** – National Construction Code 2019
- **RBS** – Relevant Building Surveyor
- **Regulations** – Building Regulations 2018
- **VBA** – Victorian Building Authority

Exemptions from compliance with Regulations

The Building Act 1993 (the Act) and the Building Regulations 2018 (the Regulations), including the Building Code of Australia (BCA), set out the requirements for health, safety and amenity in new buildings or new parts of existing buildings.

In some circumstances, compliance with the current requirements will be onerous, especially when an existing building is being altered or when a design for building work has commenced and regulations change.

The Act and Regulations give building surveyors discretion to exempt building work from complying with the Regulations in certain circumstances.

It is important that these discretionary decisions are exercised transparently, fairly and having regard to occupant safety and the public interest.

The Regulations require the building surveyor to consider various factors when exercising a discretion and to clearly record their decision and lodge their records with the relevant council.

This practice note sets out the various provisions, matters which must be considered and administrative requirements, including prescribed Forms that must be used when recording decisions.

General principles

Existing buildings need not be upgraded when regulations change

In Victoria, buildings and building work must comply with the Act and the Regulations, including the BCA.

The Act, Regulations and BCA are amended from time to time as new building methods and technologies emerge and as community expectations and public policy change.

Buildings that comply with today's regulatory requirements should be safer and more efficient than buildings built under previous regulations. However, when regulations change, there is generally no obligation for owners of existing buildings to upgrade their building to meet the amended regulations.

Sometimes government decides that upgrades must occur, for example the Regulations require swimming pool barriers and fire safety systems to be installed in some existing buildings.

Unless there is an express requirement to bring an existing building into compliance with new regulations, existing buildings will only need to be upgraded to current standards if there are substantial alterations to the building, it is subdivided or the use of the building is changed.

Records of discretionary decisions

The various discretionary decisions referred to in this Practice Note can result in building work, or a building, not needing to comply fully with the Regulations. The making of such decisions requires careful consideration of any prescribed matters.

It is important the decision, and reasons for the decision, are clearly documented for reference by owners and others when maintaining or changing the building in the future.

Most of the decisions referred to in this Practice Note must be recorded in writing and lodged with the relevant council. For others, while there is no express requirement to record the decision or lodge it with the relevant council, it would be good practice to do so.

In some cases, the Regulations require the person seeking the exemption must apply in writing to the building surveyor. Where this is not mandatory, it is good practice to request a written application be made. This provides transparency, accountability and a record that is available to future owners and occupiers.

How to decide what is 'reasonable'

In deciding whether to exercise discretion, the building surveyor must act reasonably.

The Macquarie Dictionary defines 'reasonable' as 'agreeable to reason or sound judgment'. The building surveyor must apply their professional expertise to the specific matters being assessed.

Regulation 265 requires that 'a registered building practitioner must perform his or her work as a building practitioner in a competent manner and to a professional standard'. Ministerial Guideline 5 also provides that municipal building

surveyors (MBS) and private building surveyors must only accept appointment as a RBS in the area of their own competence.

When exercising a discretion, the building surveyor may need to seek the advice of other suitably qualified practitioners or industry experts. For example, when assessing structural adequacy, the advice of a suitably experienced registered engineer in the class of civil engineer could be sought.

Sometimes, for complex or unique matters, instead of exercising a discretion to exempt building work from compliance with the Regulations, it may be more appropriate to advise an owner to make an application to the BAB under section 160 or 160A of the Act (as appropriate) to determine if a regulation should be modified or whether the design complies with relevant performance requirements.

Questions for the RBS to consider when deciding whether to exercise a discretion:

- Do I have the competence to assess this issue? If not, what expert reports or advice should I request?
- What are the specific regulations that the building work or building cannot fully comply with?
- Are the reasons why the regulation cannot be met clearly described by the designer or builder?
- Is the level of health, safety and amenity proposed consistent with other similar buildings?
- Have all relevant issues been considered? For example, fire safety matters may impact on fire-fighting operations and require input from, or the consent of, the relevant fire brigade.
- Does the owner, tenant or occupier understand that compliance with the Regulations will not be achieved and this may have an impact on insurance or other legislation they need to comply with? For example, the Occupational Health and Safety Act 2004 or the Commonwealth Disability Discrimination Act 1993. This is especially relevant to government or commercial building owners who may have committed to safety standards in addition to those in the BCA.

The application of new regulations to building work

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

Section 10(2) only applies to regulations which relate to the design of a building. Section 10 does not apply to a new regulation or an amendment which is administrative. For example, any amendments to require the use of prescribed forms, lodgement of documents with the relevant council or payment of prescribed fees cannot be accepted by the RBS as not applying to the carrying out of building work under section 10.

Section 10 cannot be used to exempt building work from compliance with amendments to planning schemes or other planning requirements.

Important things to note about the certification that the RBS may give under section 10(2) are:

- the RBS must have regard to Minister's Guideline MG-13 Exercise of Discretion When Applying a New Building Regulation or an Amendment to a Building Regulation when making a certification under section 10(2) which includes the following criteria:
 - i. the design must directly relate to the allotment in respect of which the building permit is to be issued
 - ii. the design must be for future building work, not building work that has already been constructed
 - iii. in determining whether substantial progress has been made on the design before an amendment commences, the RBS can have regard to dating mechanisms on design documents or to evidence of payments for design development
 - iv. the certification must be in writing
 - v. the certification should state the evidence that was relied on to determine whether substantial progress had been made on the design
 - vi. the certification should be made during the assessment of the application for the building permit and before the building permit is issued

Historic buildings and special buildings

Section 28 of the Act provides a power for the RBS to issue a building permit for building work that does not comply with the regulations if the work is to be carried out in connection with a building included on the Heritage Register established under the Heritage Act 2017.

The building permit may be issued to enable the carrying out of work appropriate to the style, manner of construction and materials of the building.

In deciding whether to rely on section 28 to issue a building permit for building work that does not comply with the regulations, the building surveyor is required by section 28(3) to consider:

- i. the structural adequacy of the building; and
- ii. the requirements necessary to make reasonable provision for the amenity of the building and the safety and health of people using the building.

Section 28(4) of the Act requires the consent and report of the Executive Director under the Heritage Act 2017 to be obtained to an application to demolish or alter a building which is on the Heritage Register.

Once these matters are considered and if a building permit is to be issued for building work that does not comply with the regulations, a written statement should be prepared by the building surveyor setting out what regulations the decision applies to.

There is no express requirement to lodge a statement under section 28 with the relevant council, however it is recommended as good practice so future owners can have access to the decision that was made and the basis for that decision.

Combined allotments

Division 8 of Part 4 of the Regulations provides that an MBS or a private building surveyor appointed as the RBS, may treat a combined allotment as one allotment for the purposes of the Act and Regulations.

A combined allotment is defined as two or more adjoining allotments or an allotment and adjoining land. For example, where an owner has two adjoining allotments and proposes to construct a single building that is on both allotments, the two allotments can be treated as a combined allotment.

The regulations provide that:

- An application to the building surveyor to treat allotments as a combined allotment must contain prescribed information and be accompanied by prescribed documents set out in regulation 61
- Regulation 62 allows the building surveyor to request additional information be provided within a specified period. If it is not provided, the building surveyor may refuse the application after giving the applicant 30 days notice of intention to refuse
- The building surveyor may make a determination and in doing so must take into account the matters in regulation 64(2)
- The determination of the building surveyor must be in the prescribed form of Form 5
- The building surveyor must give the applicant a copy of the determination within 7 days after making the determination
- Regulation 66 allows the building surveyor to revoke the determination.

In deciding whether to make the determination under regulation 64, the building surveyor must be satisfied:

1. of the structural adequacy of any building on the combined allotment; and
2. that reasonable provision is made for—

- i. the amenity of any building and the safety and health of people using any building on the combined allotment; and
- ii. avoiding the spread of fire to or from any adjoining building on the combined allotment.

The Form 5 must be lodged with the relevant council with building permit documents under section 30(1A) (see regulation 44(1)(k)) and any occupancy permit documents under section 73(1A) (see regulation 203(k)). A determination under regulation 64(1) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work to be carried out on land that is subject to a determination under regulation 64(1).

Change of use

Regulation 229 makes it an offence for a person to change the use of a building or place of public entertainment unless the building complies with the requirements of the Regulations applicable to the new use.

Despite this requirement, the municipal building surveyor or a private building surveyor that is appointed as the RBS, may exempt a building or place of public entertainment from compliance with any regulation applicable to the new use.

In deciding whether to grant an exemption, the building surveyor must consider

1. the structural adequacy of the building or place of public entertainment; and
2. the requirements necessary to make reasonable provision for—
 - i. the amenity of the building or place and the safety and health of people using the building or place; and
 - ii. avoiding the spread of fire to or from any adjoining building.

Where a building surveyor grants an exemption, that decision must be recorded in the form of Form 18 in Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30(1A) (see regulation 44(1)(n)) and any occupancy permit documents under section 73(1A) (see regulation 203(p)).

An exemption under regulation 229(2) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where an exemption under regulation 229(2) has been granted by the RBS.

Subdivision of existing buildings

Subject to regulation 233, regulation 231(1) makes it an offence for an existing building, whenever constructed, to be subdivided without each building resulting from the subdivision being brought into conformity with the Regulations. Despite this requirement the MBS or a private building surveyor that is appointed as the RBS, may exempt a building from all or any of the requirements applicable under regulation 231(1).

For example, exemptions can be granted where a building is subdivided and each portion sold to separate owners. In deciding whether to grant an exemption under regulation 231(2), the building surveyor must consider:

1. the structural adequacy of any building to which the exemption applies; and
2. the requirements necessary to make reasonable provision for—
 - i. the amenity of any building and the safety and health of people using any building to which the exemption applies; and

- ii. avoiding the spread of fire to or from any adjoining building.

Where a building surveyor grants an exemption, that decision must be recorded in the form of Form 18 in Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30(1A) (see regulation 44(1)(n)) and any occupancy permit documents under section 73(1A) (see regulation 203(p)).

An exemption under regulation 231(2) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where an exemption under regulation 231(2) has been granted by the RBS.

Alterations to existing buildings

Regulations 233 to 236 apply to alterations to an existing building.

Regulation 233(1) requires work to alter an existing building to comply with the Regulations.

Under regulation 233(2), subject to regulation 234 and 236, if proposed alterations to an existing building, together with any other alterations completed or permitted within the previous 7 years, relate to more than half the original volume of the building, the entire building must be brought into conformity with the Regulations. The original volume of the building refers to the volume immediately before the previous 3 years.

Subject to regulation 233(6), the RBS may consent to partial compliance of building work, or an existing building, with regulations 233(1) and 233(2).

Regulation 233(6) says that if the alteration is an extension to an existing building, the RBS may only consent to partial compliance in respect of the extension if the floor area of the extension is not greater than the lesser of

- 25% of the floor area of the existing building
- 1,000 m².

Therefore, in the case of an extension to an existing building, consent to partial compliance with regulation 233(1) or 233(2) cannot be given if the extension is larger than 1,000 m² or more than 25% of the floor area of the existing building.

Assessment of the Volume of the Building

It is at the discretion of the RBS to determine what the original 'volume' of the building was and whether the total volume of alterations relate to more than half of the original volume.

The following may assist the assessment:

- Volume will be the floor area of the room or part of the building multiplied by the height of that part of the building. Height in relation to a building (other than a wall or fence) is defined in regulation 5(1) at any point as the vertical distance between natural ground level and the top of the roof covering.
- In determining what work constitutes an alteration, only work that required or would require a building permit should be considered, e.g., repainting of a room with no other work, would not be considered as an alteration to that room for the purposes of regulation 233.
- If a room or part of a building is to be completely stripped out and refurbished then all of that space is being altered. Examples include a tenancy fit-out, or conversion of a bedroom to a bathroom in a dwelling.
- If a room or part of a building is to be partially altered, then only the volume being altered will be relevant to the assessment. Examples might include an office fit-out where some existing partitioning will remain; or the retrofitting of sprinklers in an existing building; or where existing bedrooms remain at the front of a dwelling but other parts of the dwelling are being altered and extended.

Granting consent to partial compliance

Regulation 233 provides that in determining whether to consent to partial compliance, the RBS must consider:

1. the structural adequacy of the building; and
2. the requirements necessary to make reasonable provision for—
 - i. the amenity of the building and the safety and health of people using the building; and
 - ii. avoiding the spread of fire to or from any adjoining building.

Where the RBS consents to partial compliance, that decision must be recorded in the form of Form 18 in Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30(1A) (see regulation 44(1)(n)) and any occupancy permit documents under section 73(1A) (see regulation 203(p)). Consent to partial compliance under regulation 233(3) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where consent to partial compliance under regulation 233(3) has been given by the RBS.

Alterations affecting exits and paths of travel

Regulation 234(1) provides that where a proposed alteration to an existing building, other than a Class 1 or 10 building, would adversely affect any exit or path or travel to an exit, the building must comply with Part D of the BCA Volume One. Under regulation 234(2), the RBS may consent to partial compliance with regulation 234(1). In determining whether to consent to partial compliance, the RBS must consider the requirements necessary to make reasonable provision for:

1. the amenity of the building; and
2. the safety and health of people using the building.

Where the RBS consents to partial compliance, that decision must be recorded in the form of Form 18 in Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30(1A) (see regulation 44(1)(n)) and any occupancy permit documents under section 73(1A) (see regulation 203(p)). Consent to partial compliance under regulation 234(2) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where consent to partial compliance under regulation 233(3) has been given by the RBS.

Related Documentation

- Building Act 1993
- Building Regulations 2018
- Heritage Act 2017
- National Construction Code 2019
- Occupational Health and Safety 2004
- Commonwealth Disability Discrimination Act 1993
- Minister Guideline MG-05: Professional Standards- Building Surveyors
- Minister Guideline MG-13: Exercise of Discretion When Applying a New Building Regulation or an Amendment to a Building Regulation

Version History

- Version 2.0, published 28 June 2021, supersedes Practice Note 72: Exemptions from compliance with regulations

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