



Building newsflash number 468

New disability access standards commenced

1 May 2011

Purpose

To advise of the new arrangements for the design, construction and approval of buildings following adoption of the Premises Standards from 1 May 2011.

Background

The Disability (Access to Premises—building) Standards 2010 (the Premises Standards) and the Building Code of Australia 2011 (BCA) apply nationally on 1 May 2011. The Premises Standards contain:

- provisions for non-discriminatory access to public buildings for people with a disability; and
- consistent and uniform requirements for non-discriminatory building access by bringing together the Commonwealth *Disability Discrimination Act 1992* (the DDA) and the various state/territory building laws, including the BCA.

The Premises Standards apply to the building certifier responsible for the building approval and the individuals responsible for the design, construction and management of a building. As they are made under the DDA, they will apply regardless of inclusion in the BCA.

They also apply to government projects and other self-assessable building work from 1 May 2011.

Section 34 of the DDA provides that if a person acts in accordance with a disability standard (i.e. the Premises Standards), Part 2 of the DDA does not apply. Therefore building certifiers, designers, developers, builders and managers will be protected from complaints of unlawful discrimination under the DDA.

The Premises Standards do not cover all requirements of the DDA in relation to access to premises. Access requirements beyond the scope of the Premises Standards include:

- existing buildings not being altered
- Class 1a buildings and some Class 1b buildings
- the internal areas of sole occupancy units in Class 2 buildings.

For these types and parts of buildings, the general requirements of the DDA will continue to be relevant, meaning that complaints of unlawful discrimination can be made under the DDA.



Building Code of Australia 2011 provisions

On 1 May 2011, BCA (now part of the National Construction Code series) commenced in Queensland and includes the technical requirements of the Premises Standards in order to harmonise the requirements of the BCA and the DDA.

Changes to discretionary provisions under the *Building Act 1975*

The *Building Act 1975* contains a number of provisions which give building certifiers discretion to apply older laws to new building work and existing buildings undergoing assessable building work, such as alterations and additions (for example, sections 37, 61, 81 and 112 of the *Building Act 1975*).

Because the Premises Standards override state laws where there is an inconsistency, building certifiers **should not use their discretionary powers under the *Building Act 1975*** when assessing or deciding new building work and alterations to existing buildings that are lodged on or after 1 May 2011 with regard to access for people with a disability. To do so may contravene the DDA and may result in a complaint of discrimination against all concerned being made to the Australian Human Rights Commission for failing to comply with the Premises Standards and the DDA.

For example, section 37 (d) of the *Building Act 1975* applies to the planning of the carrying out of building work and allows a building certifier to use discretion to enable the laws in force prior to an amendment commencing to be used instead of the new provisions if:

- the design or substantial progress on the design was completed before the amendment commenced; or
- major changes to the design would be needed to comply with the amended provisions.

The DDA requires all new and altered buildings to comply with the Premises Standards. Because the DDA prevails over state requirements where there is an inconsistency, building certifiers should apply the Premises Standards to all development applications lodged on or after 1 May 2011, even if substantial design of the work has been undertaken.

Concessions and exemptions under the Premises Standards

The Premises Standards include some concessions for the upgrading of existing buildings. These relate to:

- lessees (section 4.3)
- existing accessible lifts (section 4.4)
- existing accessible toilets (section 4.5).

Lessee concession

Where a building is occupied by a number of lessees (for example in a shopping centre) and an application for approval of building work is made by one of the lessees for work on the area of the building that they lease, there is no requirement on the lessee or any other person to provide a continuous accessible path of travel to the area of new work which the person leases.



Lift concession

This provides a concession from the requirements of Table E3.6(b) of the BCA in relation to lift dimensions for existing lifts.

Where an existing lift travels more than 12 metres and has a lift floor of not less than 1100 millimetres by 1400 millimetres (i.e. if it complies with access requirements imposed by the BCA prior to the commencement of the Premises Standards) it does not have to meet the new Premises Standards requirements.

For new lifts that travel more than 12 metres, the Premises Standards require the floor space to be a minimum of 1400 millimetres by 1600 millimetres.

Other access features on a lift undergoing upgrade required by Table E3.6(b), such as requirements for accessible lift controls and provision of audible information, are not affected by this concession and must be provided.

Toilet concession

Certain existing accessible toilets do not have to comply with AS 1428.1—2009 as generally required by the Access Code.

The concession is available only where an existing toilet complies with the circulation and fit out requirements of AS 1428.1—2001 and is in a 'new part' or an 'affected part' of an existing building. If an existing accessible toilet does not meet those requirements, it must be upgraded to meet the requirements of AS 1428.1—2009.

Unjustifiable hardship

There may be situations where practical constraints will prevent compliance with the BCA. The Premises Standards recognise this by allowing discrimination on the grounds of unjustifiable hardship. However, determining if unjustifiable hardship exists is not a building certification function. The DDA provides a mechanism for practitioners to seek advice on whether unjustifiable hardship exists in particular circumstances through what are known as 'Access Panels'. Where advice is sought from an Access Panel, and the Access Panel considers the issues set out in the relevant Commonwealth protocol for deciding unjustifiable hardship, this may reduce the possibility of a successful challenge under the DDA to the decision.

Building Codes Queensland will keep a register of approved access experts for this purpose.

Expressions of interest are sought from industry access experts. Persons who consider they have relevant qualifications and experience to undertake this important role should apply to Building Codes Queensland at the address below marking the application to the attention of the Director of the Building Legislation and Standards Branch. Successful applicants will need to agree to abide by a code of conduct and to follow the relevant Commonwealth protocol for deciding unjustifiable hardship.



However, building industry practitioners should note that only the federal court can conclusively determine whether or not a defence of unjustifiable hardship exists in the context of a specific complaint.

Alternative solutions

Alternative solutions may be developed to meet the requirements of the BCA. Building certifiers can rely on any suitable evidence to assist them in making a decision on an alternative solution (refer to section 17 of the Building Regulation 2006 and Part A2 of Volume 1 of the BCA). However, it should be noted that any alternative solution that does not comply with the Premises Standards can be subjected to a complaint of discrimination under the DDA. Access Panels may also be used to provide advice on the use of performance solutions under the BCA and this process is designed to limit the incidence and success of appeals.

Appeals against decisions of a building certifier

Any decision of a building certifier, including a decision about BCA matters relevant to the access requirements for people with a disability, can be appealed to the Building Development and Dispute Resolution Committees. The Committees' decision is binding unless overturned by a Court. However, if the decision of the Committees is inconsistent with the Premises Standards, it can also be subjected to a complaint of discrimination under the DDA. Committees may also seek advice from an Access Panel to assist in deciding appeals.

Further Information

The Australian Human Rights Commission has published a Guideline to assist with complying with the Premises Standards. A copy of the Guideline can be viewed at the following web site:

http://www.hreoc.gov.au/disability_rights/standards/Access_to_premises/Premises%20Standards%20Guideline_Final_2.pdf

Contact for further information

Department of **Local Government and Planning**

Building Codes Queensland Division

tel +61 7 3239 6369

buildingcodes@dlgp.qld.gov.au

DISCLAIMER: The information contained in this Newsflash is provided by the State of Queensland in good faith. The material is general in nature and before relying on the material in any important matter, users should carefully evaluate its accuracy, currency, completeness and relevance for their purpose. It is not intended as a substitute for consulting the relevant legislation or for obtaining appropriate professional advice relevant to your particular circumstances. The State of Queensland cannot accept responsibility or liability for any loss, damage, cost or expense you might incur as a result of the use of or reliance on information contained in this Newsflash. It is not intended to be, and should not be relied upon as the ultimate and/or complete source of information.