

## **Disability (Access to Premises – Buildings)**

### **Standards 2010 and Potential Affects on the Construction Industry**

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#### **Introduction**

The *Disability (Access to Premises – Buildings) Standards 2010* represents the culmination of a process that commenced in 2001. The goal of this process was to develop a set of uniform access provisions that would provide industry stakeholders certainty that development would not breach the provisions of the *Disability Discrimination Act 1992* (DDA), the legislative head of power. As stated in the *Access All Areas* report; 'Premises Standards would harmonise the requirements of the Building Code and the Disability Discrimination Act in relation to access to buildings through the incorporation of the Access Code into the Building Code.'<sup>1</sup> The Disability (Access to Premises – Buildings) Standards 2010 thus represent an attempt to codify the general duties contained within the DDA, as 'the technical provisions of the Premises Standards are to be adopted under the Disability Discrimination Act 1992 (DDA) and mirror provisions will be included in a revised BCA.'<sup>2</sup>

Anecdotal evidence supports the creation of more robust prescriptive standards to ensure that building industry professionals discharge their obligations under the DDA. This view is supported by the Australian Human Rights Commission: 'Unfortunately, inquiries and complaints to the Commission would suggest that, when it comes to the question of access, in far to many cases the requirements of even the current BCA and its referenced technical specifications found in a number of Australian Standards are not being met<sup>3</sup>.' Of concern to building industry professionals, the commission considers that '...the reasons for this may be that either designers, builders and certifiers misinterpret the BCA and it's referenced Australian Standards; only have access to old and out of date copies of technical documents or don't have access to the relevant documents at all.'

The Disability (Access to Premises – Buildings) Standards 2010 are proposed to be introduced into the Building Code of Australia 1 May 2011.

This paper will briefly examine the background of the Disability (Access to Premises – Buildings) Standards 2010 (hereafter described as the Access Standard), identify significant changes contained within the Access Standard and finally consider how these changes may impact upon building surveyors/designers. A brief précis of the key amendments to AS1428.1 – 2009 are contained in appendix 1. Appendix 2 contains a description of acronyms used in this paper.

#### **Legislative Background**

The genesis for the creation of the Disability (Access to Premises – Buildings) Standards 2010 lies within s.23 – Access to Premises of the DDA, specifically;

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<sup>1</sup> Para 1.6 Access All Areas

<sup>2</sup> Annual Review of Regulatory Burdens on Business: Business and Consumer Services Research Report, p.195

<sup>3</sup> The good, the bad and the ugly: Design for construction and access, Australian Human Rights Commission

*It is unlawful for a person to discriminate against another person on the ground of the other person's disability:*

- (a) *by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not)<sup>4</sup>;*

Although a statutory nexus has existed between the Building Code of Australia (BCA) and AS1428.1 since the inception of the BCA, subsequent experience has shown that the existing BCA and referenced standard provisions have failed to adequately achieve the general duties contained within the DDA. Further, the compliant based approach of the DDA has not served to significantly increase building accessibility. The introduction of the Access Standard is intended to provide consistent and non – discriminatory access to buildings by strengthening the link between the DDA and BCA. Importantly, by complying with the Access Standard, building certifiers, developers and managers will be protected from claims of discrimination in relation to access. Conversely, failure to satisfy the performance requirements of the Access Standard is unlawful and is in breach of the DDA.

In common with the BCA, the Access Standard adopts a performance based methodology, with qualitative performance requirements and prescriptive acceptable solutions provided. As with the BCA methodology, meeting the performance requirements may be achieved by:

- Adopting the prescriptive, Deemed to Satisfy (DtS) provisions, or
- Formulating an alternative solution that satisfies the performance requirements or is equal to, or exceeds, the DtS requirements

Additionally, the Access Standard has adopted the BCA building classifications with the extent of the Access Standard being limited to the relevant BCA building classes. Thus, whilst the scope of the DDA is quite broad in defining premises (including for example; aircraft and vehicles, playgrounds and parks), the Access Standard will only apply to the listed BCA classes of building.

## **Scope**

Part 2 of the Access Standard identifies the scope and limitations of the standard. As noted, the standard adopts BCA classification methodology, and is applicable to the following classes of buildings:

- Specified 1b building
- Class 2
- Class 3 & 4
- Class 5 – 9
- Class 10A
- Class 10B

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<sup>4</sup> Disability Discrimination Act 1992, 2010

Before examining important concessions and wants applying to classes of buildings, the issue of *new* and *not new* buildings will be considered.

As the term suggest, a new building represents new construction (not an existing part of a building) where application for building approval was lodged after 1 May 2011, or if a government building, where no application for building work is required to be lodged, work commenced after 1 May 2011. This definition is unambiguous and should create no difficulties when determining the application of the Access Standard 1 May 2011.

Alterations or extensions to an existing building is considered a 'new part' where application for building approval was lodged after 1 May 2011, or if a government building, where no application for building work is required to be lodged, work commenced after 1 May 2011. The definition 'affected part' is related to and relevant to new part work. In the case of an alteration or addition, the specific area of the alteration or addition represents the 'new part', and this area must comply with the Access Standard. Additionally, the affected part, being defined as the principle pedestrian entrance and any required path of travel from the entrance to the new part must also comply. Section 4.3 however provides a lessee concession whereby a person leasing the part of a building undertaking 'new work' does not have to ensure that the affected part complies with the Access Standards. For example, if the lessee is undertaking new part work on the 2<sup>nd</sup> floor of a 5 storey building, there is no requirement to upgrade the building entrance or path of travel. Note that this concession does not extend to a building having only one tenant or where the building owner is performing new part work. However, no requirement exists to ensure that ancillary access features beyond the new part work or affected part complies with the Access Standards. For example, toilets located on the access path, but not forming part of the new work part would not need to comply with the Access Standards.<sup>5</sup>

This section of the discussion will seek to identify some of the specific requirements and concessions as applicable to specific BCA building classifications.

**Class 1b** - the Access Standard is applicable to Class 1b buildings in the following circumstances:

- All new Class 1b buildings where 1 or more bedrooms is available for rent
- An existing Class 1b building having more than 4 bedrooms and where new part building work is being undertaken
- A building that has 4 or more single dwellings on the same allotment that are used for short term accommodation. Although the term building is somewhat confusing in this context it is assumed that this requirement is aimed at capturing cabin type accommodation on caravan parks etc.

**Class 2** – the application of the Access Standard to Class 2<sup>6</sup> buildings represents a fundamental shift in philosophy and application, given that the BCA has never sought to impose access requirements on Sole Occupancy Units (SOU) being separate dwellings contained within a building (such as

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<sup>5</sup> Refer Para. 86 Explanatory Statement - The Disability (Access to Premises – Buildings) Standards 2010

<sup>6</sup> Class 2: a building containing 2 or more sole occupancy units each being a separate dwelling

owner/occupied home units). The Access Standard is applicable to Class 2 buildings in the following circumstances:

- The Access Standards only apply to Class 2 buildings where 'short term accommodation' is provided. Whilst the term 'short term accommodation' is not defined, Para.185 of the Explanatory Statement provides that holiday accommodation is of a class that '...is typically rented out on a commercial basis for short periods and generally does not require the signing of a lease agreement'. Examples provided include serviced apartment, holiday units and time share facilities
- The Access Standards do not apply to the internal parts of a SOU within a Class 2 building
- The Access Standards do not apply to new part work carried out on an Class 2 building in existence prior to the commencement of the Access Standard
- Areas required to be accessible by the Access Standard include; from the required pedestrian entrance to one floor containing sole occupancy units and to each unit on that floor and to common areas such as gyms, saunas and swimming pools

**Class 3** - The application of the Access Standard generally mirrors the Class 2 requirements (although no 'long term' rental concessions exist). Additional requirements within the Access Standard reflect the spatial arrangement of the units and ratio of accessible units to total units.

In the case of the ratio of accessible units to total units, significant increases in numbers have been proposed. Figures provided by the Tourist & Transport Forum and the Australian Hotels Association<sup>7</sup> show that currently the BCA requires an average of 3.5% accessible rooms to be provided in new Class 3 buildings, whilst actual occupancy rates show a take up rate of 0.47% accessible rooms in each required building. The new Access Standard ratios would increase the amount to 4.5% to be provided.

**Class 5 -9** - The application of the Access Standard generally reflects the existing BCA requirements, although access is required to be provided 'to and within all areas normally used by the occupants'<sup>8</sup> rather than the existing requirements for Class 5, 6, 7 and 8 buildings that requires access to be provided to and within the entrance floor and any other floor to which vertical access by way of a ramp, step ramp or kerb ramp complying with AS 1428.1 or a passenger lift is provided<sup>9</sup>

**Class 10a** – Again, generally reflects the existing BCA provisions, with public shelters being added to the range of applicable buildings and structures

**Class 10b** – The Access Standards have introduced the requirement for disabled access in relation to swimming pools into the BCA. The type of access required to be provided is governed by the pool perimeter (greater or less than 40 l/m) and the degree of access exclusivity to a pool in a Class 1b, 2 or 3 building.

## **Exemptions and Concessions**

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<sup>7</sup> Annual Review of Regulatory Burdens on Business: Business and Consumer Services Research Report, p.196

<sup>8</sup> (The Disability (Access to Premises – Buildings) Standards 2010, p.30)

<sup>9</sup> BCA 2010 Volume 1, Table D3.2

The Access Standard introduces a limited range of exemptions and concessions where exceptional circumstances may conspire to deny full extent of the standard. Significant to potential concessions is the concept of unjustifiable hardship, which will be considered in further detail.

Broadly speaking, in accordance with Part 4 of the Access Standards, the following circumstances may support a claim of unjustifiable hardship:

- Financial imposts as a result of implementing the Access Standards, including overcapitalisation of the asset
- The extent, or otherwise of community benefit associated with the building
- The financial circumstances of the applicant
- Exceptional technical factors that may limit the reasonable application of the Access Standards
- Diminution of buildings of heritage significance

It should be emphasised that in granting a concession of unjustifiable hardship, the applicant is not relieved of reasonably complying with other Access Standard requirements (refer s.4.1 (2)). For example, whilst it may not be justified to compel a building owner to enlarge an existing lift, other matters such as upgrading tactile controls would need to be upgraded. Finally, the burden of proving unjustifiable hardship rests with the applicant.

Explanatory Statement - The Disability (Access to Premises – Buildings) Standards 2010 provides commentary<sup>10</sup> as to in what circumstances a claim of unjustifiable hardship may succeed. In the case of a heritage building for example the following factors may assume relevance:

- Where the application of the Access Standard would effect significant heritage features and detracting from these features, a claim of unjustifiable hardship may prevail
- Conversely, a claim for unjustifiable hardship may not prevail where the application of the Access Standard would only affect elements incidental to the heritage significant place. For example, if heritage significance is limited to a buildings internal features, not impediment would exist to providing an accessible entry point
- Heritage significance in itself may not exclude the application of the Access Standard, as the application of unjustifiable hardship would involve consideration of fact and degree. For example, if the heritage features of a building involved the main external façade, providing access through alternate means (such as the side of the building) would still be necessary. Further, if the reason for heritage significance is historical, rather than architectural it is unlikely that a claim of unjustifiable hardship would succeed.

Importantly, the determination of unjustifiable hardship must be determined by the Court, not the building surveyor. The Court will take into account the relevant circumstances of each case, considering the intent of the Act and relevant case law.

In considering a claim of unjustifiable hardship, the extent of the hardship will be examined. As observed in *Finney v Hills Grammar School (1999)*<sup>11</sup> 'The objectives of the Act make it clear the

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<sup>10</sup> Refer Para 111 -121 Explanatory Statement - The Disability (Access to Premises – Buildings) Standards 2010

*elimination of discrimination as far as possible is the legislation's purpose. Considered in this context, it is reasonable to expect that the school should have to undergo some hardship in accepting Scarlett's enrolment.'* The issue as to whether such hardship is unjustifiable will consider the applicants' circumstances relative to the extent of the required works and contrast this against the benefits arising from the application of the DDA.

Further, a review of previous cases suggests that it may be difficult to construct an argument of unjustifiable hardship based on purely financial grounds is unlikely to succeed. In the case of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council (2004)*<sup>12</sup> it was observed that whilst the Council's financial circumstances were important they *'...must be considered in the context of the DDA's objects – the financial burden may be justified.'* In this instance the Council was faced with an estimated maximum of \$75250.00 to modify 6 toilet facilities that had been constructed in accordance with the existing AS1428.1. In relation to this impost, the Court found *'I am satisfied even at a cost of \$75,250.00 this Council can make the necessary adjustments to its budget to remedy the unlawful discrimination found by me.'*

Of interest is the degree of proximity required for a party to commence action against the provisions of the DDA. As demonstrated in the case of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*, when considering *'the nature of the benefit or detriment likely to accrue or be suffered by any person concerned'* the phrase *'any person concerned'* provides broad standing beyond the immediate parties to the dispute. This will allow advocates to launch actions under the Act even when they have not personally been the subject of alleged discrimination.

Finally, the question of concessional building approvals permitted by State legislation will be considered. Queensland practitioners may be familiar with s.61 Building Act 1975, which allows (with health and safety qualifications) building certifiers to apply any building laws that may have been in existence from when the building was initially constructed to present times for the assessment of the work. This section essentially allows building certifiers the option to ignore certain assessment provisions (such as energy efficiency) when approving additions and alterations to safe existing building work.

To apply s.61 of the Act to the Access Provisions may be a courageous decision however, with the following points needing due consideration before considering this approach;

- Energy efficiency requirements (for example) are contained within the BCA, which is given legislative standing by the Building Act 1975, State legislation
- The Access Standards that apply to alterations and additions are given legislative standing by the Disability Discrimination Act 1992, Commonwealth Legislation
- Section 109 of the Commonwealth Constitution provides that *'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of any inconsistency, be invalid.'* Thus it may be argued that s.61 of the Building Act 1975 is invalid in this circumstance

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<sup>11</sup> *Finney v Hills Grammar School (1999)*, p.48

<sup>12</sup> *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council (2004)* Para.85 & 91

- The Access Standard provisions contained within the BCA apply only to new buildings, so are not covered by the application of s.61

### **Additional comments in relation to discretionary legislation**

In isolation, the enhanced provisions contained within the Access Standards have the potential to significantly impact upon the built environment. However, when considered in concert with significant Queensland legislative amendment applicable to swimming pools, owners of commercial properties containing swimming pools may be faced with considerable additional costs to ensure compliance.

The issue is the amendments to the Building Act 1975 that have broadened the scope of new and existing swimming pools requiring to be fenced from those associated with Class 1A dwellings, to swimming pools associated with Class 2 & 3 buildings, with a phase in period of between 6 months and 5 years depending on the class of building. Refer to the Queensland Department of Infrastructure and Planning web site: <http://www.dip.qld.gov.au/pool-safety/pool-safety-laws.html> for additional information.

With reference to the Building Regulation 2006, it is seen that any building work associated with pool fences (with the exception of a narrow range of minor repairs necessary to make existing pools compliant) are assessable development, requiring a building approval and inspections. The risk for property owners of existing Class 2 & 3 buildings is that if they delay until after 1 May 2011, the Access Standard requirements for pools will apply. Consideration of Table D3.1 the Access Standards shows that the standards apply to a Class 10 building, being a swimming pool for new work or assessable development proposed to be carried out upon an existing swimming pool (such as building a compliant fence).

#### **2.1 Buildings to which Standards apply**

*(1) Subject to subsection (2), these Standards apply to the following:*

*(a) a new building, to the extent that the building is:*

*(i) a specified Class 1b building; or*

*(ii) a Class 2 building that has accommodation available for short-term rent; or*

*(iii) a Class 3, 5, 6, 7, 8, 9 or 10 building;*

*(b) a new part, and any affected part, of a building, to the extent that the part of the building is:*

*(i) a specified Class 1b building; or*

*(ii) a Class 2 building that:*

*(A) has been approved on or after 1 May 2011 for construction; and*

*(B) has accommodation available for short-term rent; or*

*(iii) a Class 3, 5, 6, 7, 8, 9 or 10 building;*

*(4) A part of a building is a **new part** of the building if it is an extension to the building or a modified part of the building about which:*

*(a) an application for approval for the building work is submitted, on or after 1 May 2011, to the competent authority in the State or Territory where the building is located;*

#### **Table D3.1: Requirements for access for people with a disability**

*To and into swimming pools with a total perimeter greater than 40m, associated with a Class 1b, 2, 3, 5, 6, 7, 8 or 9 building that is required to be accessible, but not swimming pools for the exclusive use of occupants of a 1b building or a sole-occupancy unit in a Class 2 or Class 3 building*

Given the additional cost that may arise from providing access to a swimming pool, it may be prudent for affected persons to seek a building approval for pool fencing prior to 1 May 2011 to avoid the works being captured by the Access Standard.

## **Conclusion**

This paper has sought to examine the broad scope of the Access Provisions and consider what possible consequences may arise from the introduction of these standards.

It must be noted however that these are draft standards and it is possible that amendments may occur between now and the proposed introduction date of 1 May 2011. However, robust, quantifiable representations made by the Tourist & Transport Forum and the Australian Hotels Association to the Australian Productivity Commission arguing that the proposed increases were excessive and unwarranted was met with the following rebuttal ‘...given that the Premises Standards have only recently been agreed after a long development process, it would not be appropriate to recommend changes at this time. The Standards are to be reviewed five years after their commencement.’ and ‘the first scheduled review would be the appropriate time to reconsider the level of the accessible room requirements.’<sup>13</sup>

Consequently, it may be a hopeful and futile exercise to expect that the Access Standard will be watered down prior to introduction. If your clients do not wish to comply with the Access Standard, applications for building work must be lodged prior to 1 May 2011.

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<sup>13</sup> Annual Review of Regulatory Burdens on Business: Business and Consumer Services Research Report, p.197

