

Australian Capital Territory

Building (ACT Appendix to the Building Code) Determination 2023 (No 2)

Disallowable instrument DI2023—236

made under the

Building Act 2004, s 136 (Building code)

EXPLANATORY STATEMENT

Overview

This instrument is made under section 136 of the *Building Act 2004* (the *Act*).

The Building Code of Australia (*BCA*) is developed and published by the Australian Building Codes Board (*ABCB*). The ACT is represented on the ABCB along with representatives from all States, the Northern Territory, the Commonwealth Government and the building industry.

The Act, section 136, adopts the BCA including any ACT-specific requirements as published in the appendices of volumes one and two of the BCA as part of the building code for the purposes of the Act.

Section 136 (3) of the Act entitles the Minister to make an ACT appendix to the BCA to provide a mechanism for the ACT to amend the BCA from time to time, including to amend the date and edition of the BCA, or a provision of the BCA.

The BCA is divided into two volumes. Volume 1 deals with all class 2 to class 9 buildings, access requirements for people with a disability in class 1b and 10a buildings and certain class 10b structures including access requirements for people with a disability in class 10b swimming pools. Class 2 to class 9 buildings as classified under the BCA include apartments, commercial residential buildings such as motels, and non-residential buildings.

Volume 2 of the BCA deals with class 1 and 10a buildings (other than access requirements for people with a disability in class 1b and 10a buildings), certain class 10b structures (other than access requirements for people with a disability in class 10b swimming pools) and class 10c private bushfire shelters. Class 1 and class 10 buildings as classified under the BCA include standard houses and non-habitable buildings such as garages, sheds, swimming pools and structures. A third volume, the Plumbing Code of Australia, together with BCA volumes 1 and 2, comprise the National Construction Code.

The BCA and its ACT appendix form part of ACT law. The published ACT appendices in Volumes 1 and 2 of the 2022 BCA (published on the ABCB website) do not include specific provisions but instead refer readers to the ACT Legislation Register, where all instruments made under the Act can be found, including the ACT appendix to the BCA. This is so that there is a single source for the ACT appendix to the BCA, and a single version published as current at any one time, which can be amended as required.

The ACT appendix only applies to the ACT and Jervis Bay Territory.

Adoption date of the 2022 Building Code of Australia

Each volume of the BCA includes an assumed adoption date for each state and territory and the Commonwealth Government of 1 May 2023 for the main requirements, and 1 October 2023 for the energy efficiency, condensation management and new livability (accessibility) provisions.

Some states and territories include automatic transitional provisions in their enabling laws, under which the provisions of the BCA do not come into effect until a specified period after the adoption date published in the BCA. The ACT does not have automatic transitional provisions. Instead, a decision on transitional provisions or later adoption is made based on the nature and effect of the changes in a new edition.

In this case, the 1 October 2023 tranche of changes will be adopted in the ACT from 15 January 2024. This will ensure that all NCC 2022 versions of the Nationwide House Energy Rating Scheme (NatHERS) software tools are accredited, and industry has time to complete any necessary training and finalise their NCC 2022 compliant home designs.

Schedule 2 – application from 15 January 2024

Schedule 2 of this instrument provides for the adoption of the BCA provisions in relation to energy efficiency, condensation management and livable housing in the ACT from 15 January 2024. That schedule retains the other NCC 2022 provisions that commenced on 1 May 2023.

Retrospectivity

Schedule 1 of this instrument could be considered to be being applied retrospectively. This schedule replicates the requirements in the existing ACT Appendix to the Building Code in *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)*.

As a result, any retrospective application of this schedule is non-prejudicial and maintains the status quo for industry but provides for it all to be located in one location.

Minor amendments made in schedule 1 of this instrument to the Schedule in the *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)* are to reflect the change in adoption date for the ACT from 1 October 2023 to 15 January 2024.

Regulatory Impact Statement (RIS)

Section 34 of the Legislation Act provides that if a proposed subordinate law or disallowable instrument (the proposed law) is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement to be prepared for the proposed law.

A RIS is not required for this instrument as the ABCB has undertaken and published on its website (www.abcb.gov.au) comprehensive regulatory impact analysis, including regulatory impact statements, for the increased regulatory structure provided by 2022 BCA. Section 36 (1) (h) of the Legislation Act provides that a regulatory impact statement is not required for a matter involving the adoption of an Australian or international protocol, standard, code, or intergovernmental agreement or instrument, if an assessment of the benefits and costs has already been made and the assessment was made for, or is relevant to, the ACT.

A RIS is not required for the ACT variations to the 2022 BCA contained in this instrument as they are not considered to be likely to impose appreciable costs on the community or a part of the community. The ACT variations only apply to existing buildings and lower the cost burden because they allow for certain things not to be complied with, or give alternative, easier requirements as options. None of the ACT variations increase costs above what the ABCB regulatory impact statements for the 2022 BCA.

Human Rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. There are no human rights impacts related to this instrument.

Clause Notes

Clause 1 names the instrument the *Building (ACT Appendix to the Building Code) Determination 2023 (No 2)*

Clause 2 provides that this instrument commences on the day after notification.

Clause 3 contains the approval of schedules 1 and 2 of the instrument. Schedule 1 contains the ACT Appendix of the Building Code that applies from 1 May 2023 to 14 January 2024. Schedule 2 contains the ACT Appendix to the Building Code that applies from 15 January 2024.

Clause 4 provides for when schedule 1 of this instrument applies and when schedule 2 of this instrument applies.

Clause 5 displaces the requirement in the *Legislation Act 2001*, section 47 (5). Section 47 (5) provides that the text of an instrument applied as in force at a particular time is taken to be a notifiable instrument made under the relevant instrument, and therefore must be published on the Legislation Register. Copyright to the BCA is collectively owned by the Australian Government and the states and territories.

The arrangement between jurisdictions is that the BCA will be published on behalf of the jurisdictions in a single place by the ABCB. It would not be appropriate to publicly notify the code on an ACT Government website. The notes to section 5 of the instrument describe alternative access to the BCA as it is not being notified on the Legislation Register.

Clause 6 revokes the *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)* that is replaced by this instrument.

Schedule 1 is the ACT Appendix of the Building Code that applies from 1 May 2023 to 14 January 2024. This replicates the ACT Appendix previously made through the *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)* and extends its application to 14 January 2024.

Schedule 2 is the ACT Appendix to the Building Code that applies from 15 January 2024.

Schedule 2 contains the ACT specific variations to the energy efficiency provisions covered by ACT Part H6 and continues the ACT's flexible and practical approach to applying energy efficiency upgrades to alterations and substantial alterations of existing buildings. They should be read in conjunction with the *Building (General) Regulation 2008* and the *Building (General) (Alternative requirements for unaltered parts) Determination* (as amended from time to time). New definitions for the terms: alteration; existing building; and unaltered parts, have been added for increased clarity.

One previous ACT specific alternative option for energy efficiency upgrades to the unaltered part of existing buildings has been removed. Previously, the addition of solar control films to existing windows was permitted as a means to complying with the glazing energy efficiency requirements. Given the new, more stringent glazing requirements of NCC 2022, these provisions have been removed, as the solar control film will not be able to achieve the required insulative properties.

The minimum required star rating for a NABERS commitment in Section J1V1 (Volume 1) has been reinstated for this ACT Appendix, as NABERS emission factors have been revised since NCC 2019. However, the requirement to refer to “annual modelled energy”, rather than “annual greenhouse gas emissions” remains.

The alternative provisions for the new Livable Housing requirements of ACT H8P1 only apply to altered parts of an existing building. The unaltered parts of substantial alterations need not be brought up to compliance with the livable housing requirements in NCC 2022. The new definitions for alterations and unaltered parts provide clarity for applying these provisions to existing buildings. These alternative arrangements do not apply to new buildings.