

Australian Capital Territory

# Building (ACT Appendix to the Building Code) Determination 2019 (No 3)

**Disallowable instrument DI2019-175**

made under the

**Building Act 2004, s 136 (Building code)**

## EXPLANATORY STATEMENT

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The Building Code of Australia 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 Australian Government and the building industry.

The *Building Act 2004* (the Act), section 136 (Building code), adopts the Building Code of Australia (BCA) including any ACT-specific requirements as published in the appendices of volume one and volume two of the BCA as part of the building code for the purposes of the Building Act.

Section 136 (3) of the Act empowers the Minister to make an ACT appendix to the building code to provide a mechanism for the ACT to amend the BCA from time to time, including to amend the date an edition of the BCA, or a provision of the BCA, comes into effect in the ACT.

The BCA is divided into two volumes. Volume 1 provides for standards for class 2 to class 9 buildings, as classified under the code, which includes apartments, commercial residential buildings such as motels, and non-residential buildings. Volume 2 provides standards for class 1 and class 10 buildings, which 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 appendices form part of ACT law. The published ACT appendices in Volumes 1 and 2 of the 2019 BCA do not include specific provisions but instead refer readers to the page for the *Building Act 2004* on the ACT Legislation Register, where all instruments made under the Act can be found. This is so that there is a single location for ACT appendices, and a single version published as current at any one time, which can be amended if required.

The ACT appendices apply only to the ACT and Jervis Bay Territory.

## **Retrospective commencement of certain provisions**

Section 76 of the *Legislation Act 2001* allows that a statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.

The determination provides that ACT DP0.1, ACT DP0.2, ACT DP0.3, ACT DP0.4, and ACT DP0.5 and Part D3 in the schedule (which relate to Volume 1 of the BCA) and ACT 7, which relates to energy efficiency provisions for Volume 2 are taken to have commenced on 1 June 2019. This is before the instrument's notification day.

The retrospective commencement is for continuity of the provisions that prescribe how to make extensions to existing buildings comply with the building code's energy efficiency provisions, and concessions for certain accessibility provisions, as was provided for in the ACT Appendices in Volumes 1 and 2 of the 2016 BCA. Those Appendices cease to be in force from the start of 1 September 2010 and apply only in respect of the 2016 edition, and not the 2019 BCA which is adopted from 1 June 2019 and may have been applied to new building approvals from that date. Therefore the determination needs to continue the relevant provisions with effect from 1 June 2019.

The retrospective commencement will not operate to the disadvantage of a person by adversely affecting the person's rights, or imposing liabilities on the person. Rather, the determination generally provides concessions on otherwise full regulatory compliance, which will reduce constriction costs and regulatory burdens.

Conversely, if the provisions do not commence 1 June 2019 it may adversely affect industry and property owners because of the inability to make buildings comply with the relevant energy efficiency provisions or accessibility provisions. Commencement on 1 June 2019 is necessary to coincide with the adoption of BCA 2019 on that date.

The effect of the relevant provisions is outlined below.

### ***Commonwealth concessions on disability access***

The 2012 BCA contained disability access provisions that generally align with the *Disability (Access to Premises — Buildings) Standards 2010*, (premises standards) determined under the *Disability Discrimination Act 1992* (Cwlth). In some cases that represented an increase in regulatory stricture over the disability access provisions provided in BCA 2010. States, Territories, and the Australian Government agreed that BCA 2011 and subsequent BCAs would have provisions that if complied with would achieve compliance with the premises standards, and BCAs from 2011 and onward have achieved that.

The main objective of the disability access provision is to align the building code with the comparable provisions of the premises standards, particularly concessions of otherwise full compliance, so that neither renders the other ineffective.

However, while the BCA generally only has provisions that apply to new construction rather than to extensions, alterations or modifications of existing buildings, the premises standards have provisions that apply in those existing building cases. The premises standards also have concessions on full compliance with their access provisions when they are applied to certain lifts and toilets in existing buildings and to certain small scale short-term accommodation buildings. The concessions are not reflected in the BCA, as it

was expected such administrative arrangements would be placed in State or Territory building laws rather than in the BCA.

However, it is more convenient administratively, and for industry, to place those concessions into the ACT appendix to the BCA, rather than have them appear in the *Building (General) Regulation 2008*. The determination has the effect of reflecting the concessions in the ACT appendix to the BCA, to apply in the same circumstances that the concessions apply in the premises standards. The intention is that if circumstances exist that permit the application of the concession provide by the premises standards, then the determination places a corresponding concession into the BCA.

Retrospective commencement gives continuity for owners and industry members and provides for consistent with relevant Commonwealth law.

### ***Energy efficiency provisions for houses***

The BCA is drafted to only apply to construction of whole new buildings. It does not have provisions that specifically cater for upgrading, altering or extending buildings.

Historically, the *Building Act 2004* has required all building work (unless exempted) to be done in a way that is likely to produce a building (or part of a building) that complies with the building code. That requirement applies to building new houses as well as extending or altering pre-existing houses. That Act also requires whole buildings to be brought into compliance with the building code when the building is substantially altered, as prescribed.

A significant portion of the ACT's housing stock was constructed prior to 1990, and was therefore not required to meet any energy efficiency standards. Altering or extending such stock presents opportunity to improve and enhance the pre-existing house and the overall level of performance of the building. However, pre-existing houses with poorly orientated windows that are poorly sized and of poor thermal performance can make it unfeasible for an extension to the house to meet much of the energy efficiency provisions of versions of the BCA from 2010 onwards because it is impractical for the extension to compensate for the poor performance of the pre-existing part of the house, or the cost of doing so is disproportionate to the scale of the work. This will be exacerbated by the increased stricture of the energy efficiency provisions in the 2019 BCA.

Importantly, the concessions in ACT7 do not exempt smaller alterations and additions from making any changes to the building. The concessions do require a reasonable improvement in the efficiency of the building. However, the concessions make it possible for houses to comply with the intention of the BCA and improve the efficiency of the existing dwelling, without having to comply with requirements for onerous or unfeasible upgrades to the existing part of the building.

### **Adoption date of the 2019 Building Code of Australia**

The 2019 BCA is not retrospectively applied by this instrument. DI2019-55 *Building (ACT Appendix to the Building Code) Determination 2019 (No 3)* amended the adoption date for the ACT for certain provisions of the code to 1 June 2019 to allow earlier

adoption of the majority of the provisions with transitional arrangements for plumbing work approved or carried out before 1 September 2019.

The general adoptions and transitions are carried over to this instrument.

### **Energy efficiency**

Other than ACT 7 for Volume 2, the amendments to the energy efficiency provisions in both volumes respond to the unique situation in the ACT where policies and programs will lead to the ACT's electricity being sourced from or offset by renewable sources by 100% in 2020. As such, standard emissions factors that indicate electricity is a relatively high emissions option are not appropriate in the ACT. Alternative factors that effectively reduce emissions from electricity to zero would also be inappropriate because this would allow a building to comply with unlimited electricity use.

ACT experience and modelling for the ABCB on the 2019 provisions noted that the most likely outcome under the new emissions-based verification methods was to further encourage the use of gas systems in climate zone 7 (which includes the ACT). Therefore, the amendments require that compliance with certain verification methods is demonstrated by use of energy metrics and models rather than methods that use emissions factors. All of the verification methods in the code can still be used, but with modifications.

Modelling undertaken for the code showed that the proposed stringency of the performance requirement is cost effective. Work undertaken on potential further improvements to codes and standards, including work undertaken on behalf of the COAG Energy Council, indicates that in many cases building to higher requirement than those in the BCA is also likely to be cost effective.

[http://coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/document/s/Achieving%20Low%20Energy%20Commercial%20Buildings%20in%20Australia\\_0.pdf](http://coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/document/s/Achieving%20Low%20Energy%20Commercial%20Buildings%20in%20Australia_0.pdf)

The proposed amendments also allow a proponent to design an all-electric building without requiring a performance solution. This increases, rather than restrict options to demonstrate compliance.

The provisions do not encourage the use of one fuel source over another, and do not remove or reduce options for use of natural gas or LPG.

The provisions do not affect the transition in the code, which will still run to 1 May 2020.

### **Other historical provisions**

The determination also provides for the ACT appendices published by the ABCB with the BCA to form part of the ACT appendices. They have changed little over the years and provide for local requirements specific for the ACT, such as for control of litter on building sites, requirements for waste collection from premises, notices in fire stairs, relating to ACT emergencies laws, swimming pool safety, and installation requirements for certain chimneys, flues, and storage tanks.

### **Displacement of Legislation Act, section 47(5).**

Section 4 of the instrument 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, 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 Australian Building Codes Board (ABCB). It would not be appropriate to publicly notify the code on an ACT Government website. Section 5 of the instrument provides for alternative access to the BCA as it is not being notified on the Legislation Register.

The ACT Appendix also reference standards developed by the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) and makes reference to other Australian Standards already adopted under the BCA.

Australian Standards are subject to copyright, and cannot be republished by the ACT Government. Adopted standards are available for inspection at the ACT Environment, Planning and Sustainable Development Directorate shopfront during business hours and can be purchased at [www.standards.org.au](http://www.standards.org.au).

ASHRAE standards are subject to copyright, and cannot be republished by the ACT Government. The content of these standards is generally highly technical and used by specialist practitioners, rather than members of the general public. The instrument includes advice to readers of where read-only versions of ASHRAE standards can be found.

The breadth of subjects and the level of expertise required to develop standards means that not all standards are developed by governments or to be provided available without cost. Adoption of technical standards is important to the effective functioning of building regulation. Where it is not possible to publish a standard, the instrument and schedule provide information on where to access standards.

### **Regulatory Impact Statement (RIS)**

Section 34 of the *Legislation Act 2001* 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 (the administering Minister) must arrange for a regulatory impact statement to be prepared for the proposed law.

A RIS is not required for this instrument as the provisions of the ACT Appendix are not expected to impose appreciable costs on the community or part of the community. This instrument continues some long-standing ACT-specific requirements for . It also introduces variations to energy efficiency standards that complement the ACT Government's policies for renewable electricity, which mean that there is greater choice

in the type of electric systems that can be installed in the ACT under deemed-to-satisfy pathways. The variations to the energy efficiency verification methods do not require people to use a particular method, or remove existing options. The change to the NABERS for Offices pathway represents an increase in stringency; however, that pathway is not compulsory.

This instrument is not the primary mechanism for adopting the 2019 BCA, which is adopted by force of the Building Act. In relation to the new standards in the BCA, s 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.

The ABCB has undertaken and published on its website ([www.abcb.gov.au](http://www.abcb.gov.au)) comprehensive regulatory impact analysis, including regulatory impact statements, for the other increased regulatory stricture provided by BCA 2019.

### **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. It provides for technical building standards that do not impact on human rights. With regard to concessions for accessibility standards, the concessions provide for consistency with established limitations in relation to the upgrade of existing buildings in Commonwealth law.

### **Provisions of the determination**

**Section 1** names the determination as the *Building (ACT Appendix to the Building Code) Determination 2019 (No 3)*.

**Section 2** provides that Section D, which includes ACT DP0.1, ACT DP0.2, ACT DP0.3, ACT DP0.4, and ACT DP0.5, Part D3, and ACT 7 are taken to have commenced on 1 June 2019. All other provisions commence on 1 July 2019.

**Section 3** makes Schedule 1 to the instrument as an Australian Capital Territory Appendix to the Building Code of Australia (BCA).

**Section 4** provides that the requirement of the *Legislation Act 2001*, section 47 (5) is disapplied. 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, and therefore must be published on the Legislation Register.

The BCA and other standards are subject to copyright, making it inappropriate to notify them on the legislation register. The BCA is freely available online to any person via the ABCB web site (see section 6).

**Section 5** revokes DI2019-55 *Building (ACT Appendix to the Building Code) Determination 2019 (No 2)*.

**Section 6** is to make the community aware of how they can access a copy of the ACT Appendix.

**Section 7** is to make the community aware they can access the Building Code of Australia for free at <https://ncc.abcb.gov.au/ncc-online/NCC>.

**Section 8** is to make the community aware where they can access Australian Standards.

**Schedule 1** makes amendments to both Volume 1 and 2

#### Volume 1 amendments

**History of adoption** amendments preserve the general adoption and transitional arrangements outlined in DI2019-45 *Building (ACT Appendix to the Building Code) Determination 2019*, with additional notes for users.

**Section D** amendments continue existing concessions in relation to accessibility requirements for buildings built before current access standards were in force, and notices for fire-isolated stairs.

**Section E** inserts a new note corresponding to the requirement in the ACT Appendix to the Plumbing Code of Australia for signage for isolation valves in a FPAA101D fire sprinkler system.

**Section F** continue long-standing provisions about control of litter on building sites and waste management.

This section also includes additional explanatory and guidance information on condensation management.

**Section G** continues pre-existing requirements for swimming pools (G1) and installation of appliances (G2).

G3 introduces new requirements for building over drains, which make the building code consistent with existing requirements in the ACT Appendix to the Plumbing Code and improve consistency between the volumes for related work.

**Section J** amendments:

- Revise the following verification methods and specifications to align them with the energy metric in the performance standard rather than the greenhouse gas emissions factors used in the methods as these do not take into account the relative emissions factors for electricity and gas in the ACT.
  - JV1 NABERS Energy for Offices
  - JV2 Green Star

- JV3 Verification using a reference building
- Specification JVb
- Revise the following deemed-to-satisfy provisions to allow for use of electric options in recognition of the relatively lower emissions profile of electricity in the ACT given investments in renewable electricity.
  - J5.9(a) for space heating

**Schedule 3 Definitions** includes new definitions of corresponding provision in relation to the transitions outlined in History of Adoption.

**Schedule 4 Referenced documents** inserts additional referenced documents as relevant to the provisions listed in the table.

## Volume 2 amendments

### **History of adoption**

**ACT 1 and 2** provide for pre-existing existing provisions about control of litter on building sites and waste managements.

**ACT 3** includes additional guidance in relation to condensation management in explanatory information.

**ACT 4** provides for pre-existing requirements for swimming pool construction.

**ACT 5** introduces new requirements for building over drains, which make the building code consistent with existing requirements in the ACT Appendix to the Plumbing Code of Australia and improve consistency between the volumes for related work.

**ACT 6** provides explanatory information in relation to greenhouse emissions and energy efficiency standards applicable in the ACT.

**ACT 7** continues provisions first introduced in 2012. A change in the 2019 BCA introduced separate heating and cooling requirements for new buildings using the Nationwide House Energy Rating system compliance option. The only change to these provisions from the ACT Appendix to the 2016 BCA is to allow smaller alterations and additions not to have to comply with this additional requirement if compliance is demonstrated using the energy rating pathway.

**Schedule 3 Definitions** includes new definitions of corresponding provision in relation to the transitions outlined in History of Adoption.

**Schedule 4 Referenced documents** inserts additional referenced documents as relevant to the provisions listed in the table.