

Change to heritage buildings

(Application of Clauses 93 and 94 of the EP&A Regulation)

Heritage buildings have particular issues when alterations, additions and/or changes of use are proposed. The Environmental Planning and Assessment (EP&A) Regulation's clauses 93 and 94 may assist in resolving potential conflicts in the application of legislation by permitting discretion and the flexibility to seek alternatives when a consent authority considers the fire safety and appropriateness of the existing building for its new use or alteration.

Building code matters that must be considered

This publication primarily details a consent authority's statutory responsibilities when assessing development applications involving existing buildings, including heritage buildings.

There are two statutory considerations involving 'building code' matters (clauses 93 and 94 of the Planning Regulations) that consent authorities are required to consider when determining development applications. This document focuses on these two provisions.

The information provided will also be beneficial to building owners and designers who wish to alter a building or change its use.

Addressing the matters outlined in this document in the design and development applications phases may also help minimise delays in obtaining development consent and may also reduce potential adverse impacts on heritage buildings.

Overview

The Building Code of Australia (BCA) and other building regulations are not generally applicable retrospectively to existing buildings, including buildings that are listed heritage items or which may have significant heritage fabric or design elements. The legislation only requires new building work to comply with the BCA.

When a development application for development associated with an existing building is lodged with a consent authority, usually a local council, the authority must consider certain statutory matters prescribed by the EP&A Act and Regulation. Two key provisions relating to fire safety and structural adequacy of the existing building for its new use or alteration are clauses 93 and 94 of the EP&A Regulation 2000.

These provisions provide specific mandatory considerations that a consent authority must make when dealing with a development application involving an existing building in terms of the appropriateness of the fire protection and structural capacity for the new use (clause 93) or whether it would be appropriate for an existing building to be upgraded to comply with the BCA, in whole or part (clause 94). The provisions are structured to allow discretion by consent authorities to determine the extent of any upgrading that may be needed.

.The discretion and flexibility of the consent authority is important for buildings that have heritage significance, as upgrading to achieve compliance with the BCA can impact on the heritage significance of the building, without specific considerations being made.

The intent of these provisions is to require the consent authority to assess the fire safety and adequacy of existing parts of buildings and to ensure that upgrading is required where considered necessary to ensure that the building is safe for its intended use and/or alteration.

It should be noted that the terminology of clauses 93 and 94 does not refer specifically to heritage buildings. References in the provisions to “an existing building” includes a building of heritage significance.

The Building Code of Australia

The BCA is a performance-based document that prescribes the outcomes that must be achieved in a set of *Performance Requirements**. The BCA offers detailed technical provisions as an acceptable method of achieving the required performance in the *Deemed-to-Satisfy Provisions (DTS)**. Another compliance method is to develop an Alternative Solution to directly demonstrate compliance with the Performance Requirements.

The BCA is applicable to the design and construction of **new** buildings and to **new** building work being done on existing buildings. The EP&A Act and Regulation require **building work** associated with a development to comply with the BCA, thereby requiring **new** building work in an existing building to comply with the BCA.

The BCA addresses technical building issues only. It does not specifically address existing buildings or parts, or elements of heritage significance. Minimising potential impacts on heritage elements need to be considered along with the BCA requirements as part of any proposal affecting a heritage item or a building having significant heritage attributes.

* See Attachment for terms defined in the BCA.

Statutory matters that must be considered

A consent authority has a statutory and therefore a mandatory obligation to consider clauses 93 and 94 to ensure adequate fire safety in an existing building in which work is to be undertaken or whether a building should be brought into full or partial conformity with the BCA. Consent authorities have discretion through these two clauses to determine how this is to be achieved. The two clauses are reproduced in full in the Attachment.

The two clauses are summarised as follows:

- Clause 93 applies where there is a change of building use with no building work. In considering a development application a consent authority must, for the building’s proposed new use/classification:
 - take into consideration whether the fire safety and structural capacity of a building are appropriate; and
 - apply the provisions for specified mandatory fire and life safety standards.

Note that the term ‘change of building use’ is defined in the EP&A Act as a change in classification under the BCA.

- Clause 94 applies when alterations and additions, including those planned or required for any change of use/classification, are proposed to an existing building. The consent authority must take into consideration whether it would be appropriate to require the existing building or part to be brought into full or partial compliance with the BCA. Clause 94 is applicable where proposed new work (including any work completed in the previous 3 years) represents more than half the total volume of the existing building, or if fire safety measures of the existing building are inadequate in terms of occupant protection and evacuation or restriction of spread of fire to other buildings.

It should be noted that Clause 94 (if triggered) requires the consent authority to determine whether the existing building should be made to comply with the BCA. This can have significant impacts on a heritage building and fabric, therefore any BCA issues should be identified and resolved early in the development design and application process.

Application of Clauses 93 and 94

Compliance with the BCA for existing parts, including existing building elements, is not a statutory requirement. The basis of this is that building regulations are not generally applied retrospectively by legislation due to the individual nature of existing buildings, the physical constraints that may exist in a building, such as the location of masonry walls etc. and the validity of the regulations that applied at the time the building was constructed. However, the level of safety offered by the current BCA provisions (including referenced Australian Standards) is likely to be used by a consent authority as the basis or yardstick, to determine the following:

- what an “appropriate” standard is for an existing element;
- whether it should be allowed to remain without alteration; or
- what an acceptable level of upgrading is, which may be required to improve a building’s performance against the provisions of the BCA.

These are matters that consent authorities must consider and resolve when determining development applications for existing buildings undergoing change.

Clauses 93 and 94 in Detail

- Clause 93 – Fire safety and structural considerations

Clause 93 applies to proposals to change the use/classification of a building, or part of a building, where the change does not propose or intend any alterations, additions or rebuilding. This does not preclude minor works such as painting or repairs.

Consideration of a consent authority is required to determine whether the fire safety and structural capacity of a building are appropriate for the proposed new use/classification. The clause also requires a building to meet adequate minimum fire and life safety standards for the proposed use/classification. These are known as ‘*Category 1 fire safety provisions*’ that are defined in the EP&A Regulation as comprising of the BCA Performance Requirements for fire-fighting and fire safety facilities.

Depending on the classification and size of a building, not all Category 1 provisions may need to be satisfied. For example, emergency lifts as prescribed by Performance Provision EP3.2, will only apply to buildings that have a height greater than 25 metres and some Class 9a (health care) buildings. The applicable Performance Requirements for the Category 1 fire safety provisions can be found in the Attachment.

Where adequate fire safety standards are not provided in an existing building, consent authorities must require that they be complied with. This applies to all existing buildings including heritage buildings, where a change of use is proposed, even if such works do not form part of the original proposal. Compliance could be achieved by addressing relevant Performance Requirements of the BCA or by some other acceptable level of adequate fire safety upgrading works being approved and implemented.

- Clause 94 – Assessment of the need for upgrading of a building, under specified circumstances

Clause 94 applies to alterations and/or additions to a building or part of a building, including any works associated with a change of use (which become alterations and/or additions).

Under this provision, if:

- the amount of proposed building work to be undertaken, and any works within the previous 3 years together amount to more than half of the volume of the building; or

- a determination that the existing building measures are inadequate to protect persons using the building and to facilitate their egress in the event of fire; or to restrict the spread of fire from the building to other nearby buildings,

the consent authority must consider whether “*it would be appropriate to require the existing building to be brought into total or partial conformity with the Building Code of Australia*”

A consent authority’s decision to require any building upgrading works will be made against the above criteria. The extent or level of compliance will be determined by a number of factors including physical constraints of the building, type of materials used in the building and the existing standard of building services. Consideration could also include the degree of safety already provided and in the case of a heritage building, the heritage significance.

Clauses 93 and 94(1)(b) allow consent authorities to apply discretion in the assessment of the adequacy of fire and life safety and other aspects of existing elements and to accept a building without alteration or to require some level of upgrading to improve the performance of an existing building either partially or totally in accordance with the BCA provisions.

In situations in which a condition of development consent has been imposed requiring upgrading of an existing building or part to comply with the BCA, the flexibility inherent in the performance-based BCA could be utilised where permitted by the consent condition (*see below*). The significance of the fabric in many heritage buildings and the need to retain significant elements unaltered can make it difficult and sometimes impossible to comply with the DTS provisions of the BCA. In such cases, an ‘*alternative solution*’ * may need to be developed.

An Alternative Solution must demonstrate that the building (or part of a building proposed to be altered) will comply with the Performance Requirements of the BCA. Such a solution can involve innovative design, special materials, enhanced or additional fire services and/or construction methods that differ from the DTS requirements.

Alternative Solutions are generally prepared or evaluated by persons with skills and expertise in specific areas of building design, materials and/or the BCA. For the fire safety aspects of a development this is typically a fire safety engineer or other appropriately qualified person, in conjunction with a suitably skilled heritage practitioner.

Consultation with consent authorities and other government agencies

In the case of heritage buildings, whether of local or State significance, it may be appropriate to discuss the proposed development with other relevant authorities before lodging a development application with the consent authority. Where a State-significant item is affected, the NSW Heritage Office could be consulted to provide advice on methods of preserving or minimising the impacts of upgrading works on heritage fabric. In cases where fire-fighting and search and rescue operations may be affected (i.e. Category 1 fire safety provisions), the NSW Fire Brigades may also need to be consulted. If a consent authority’s operations permit, consultation could be undertaken prior to applying for development approval, to discuss the proposal and the advice given by other authorities.

For any consultation to be the most effective, it should be done at an early stage in the planning and design process of the project. This will assist in establishing the standard of occupant protection and fire safety already present in the existing building or part and whether or not any upgrading work will be required.

Where the upgrading of a building has been required, conditions to require works to meet the BCA provisions could be expressed in a number of ways;

- to meet ‘the BCA’ - permits compliance with either the DTS provisions or the Performance Requirements via an Alternative Solution (or a mixture of both);
- to meet ‘the BCA DTS provisions’ – limits compliance to the requirements expressed in the DTS provisions; or

- to develop an Alternative Solution to meet the 'Performance Requirements of the BCA'.

A condition requiring an Alternative Solution to be developed to address clauses 93 or 94, could be the result of a consultation process that established that it may not be appropriate for the building to comply with the DTS provisions of the BCA, due to special circumstances or physical constraints of a building, including significant heritage fabric.

The method of complying with the BCA is a matter for the consent authority to determine, however any consultation that may be undertaken should discuss the most appropriate method to deal with any BCA issues.

The qualitative nature of the BCA Performance Requirements allows flexibility in the development of Alternative Solutions for the upgrading of existing buildings. Advice sought at an early stage in the development process from building professionals that are experienced in this field will assist applicants in satisfying any conditions of consent regarding BCA compliance matters.

Note: For a building on the State Heritage Register or subject to an interim heritage order, section 129 of the Heritage Act 1977 provides for the Minister to set aside other NSW legislation, under certain circumstances. Refer to the Heritage Act for details.

ATTACHMENT

*** Terms defined in the BCA:**

(Note: terms in italics are other defined terms)

Alternative Solution means a *Building Solution* which complies with the *Performance Requirements* other than by reason of satisfying the *Deemed-to-Satisfy Provisions*.

Building Solution means a solution which complies with the *Performance Requirements* and is —

- (a) an *Alternative Solution*; or
- (b) a solution which complies with the *Deemed-to-Satisfy Provisions*; or
- (c) a combination of (a) and (b).

Deemed-to-Satisfy Provisions means provisions which are deemed to satisfy the *Performance Requirements*.

Performance Requirement means a requirement which states the level of performance which a *Building Solution* must meet.

Extracts from the Environmental Planning and Assessment Regulation 2000

Clause 93 *Fire safety and other considerations*

- (1) *This clause applies to a development application for a change of building use for an existing building, or the use of an existing building as a place of public entertainment, where the applicant does not seek the rebuilding, alteration, enlargement or extension of a building.*
- (2) *In determining the development application, the consent authority is to take into consideration whether the fire protection and structural capacity of the building will be appropriate to the building's proposed use.*
- (3) *Consent to the change of building use sought by a development application to which this clause applies must not be granted unless the consent authority is satisfied that the*

building complies (or will, when completed, comply) with such of the Category 1 fire safety provisions as are applicable to the building's proposed use.

Note. *The obligation to comply with the Category 1 fire safety provisions may require building work to be carried out even though none is proposed or required in relation to the relevant development consent.*

- (4) *Subclause (3) does not apply to the extent to which an exemption is in force under clause 187 or 188, subject to the terms of any condition or requirement referred to in clause 187 (6) or 188 (4).*
- (5) *The matters prescribed by this clause are prescribed for the purposes of section 79C (1) (a) (iv) of the Act.*

Clause 94 Consent authority may require buildings to be upgraded

- (1) *This clause applies to a development application for development involving the rebuilding, alteration, enlargement or extension of an existing building where:*
 - (a) *the proposed building work, together with any other building work completed or authorised within the previous 3 years, represents more than half the total volume of the building, as it was before any such work was commenced, measured over its roof and external walls, or*
 - (b) *the measures contained in the building are inadequate:*
 - (i) *to protect persons using the building, and to facilitate their egress from the building, in the event of fire, or*
 - (ii) *to restrict the spread of fire from the building to other buildings nearby, or*
 - (c) *the development also involves the use of the building as a place of public entertainment.*
- (2) *In determining a development application to which this clause applies, a consent authority is to take into consideration whether it would be appropriate to require the existing building to be brought into total or partial conformity with the Building Code of Australia.*
- (2A) *If the development involves the use of a building as a place of public entertainment, consent must not be granted unless the consent authority is satisfied that the building complies (or will, when completed, comply) with such of the Category 3 fire safety provisions as are applicable to the building's proposed use as a place of public entertainment.*
- (2B) *Subclause (2A) does not apply to the extent to which an exemption is in force under clause 187 or 188, subject to the terms of any condition or requirement referred to in clause 187 (6) or 188 (4).*
- (3) *The matters prescribed by this clause are prescribed for the purposes of section 79C (1) (a) (iv) of the Act.*

Category 1 fire safety provisions

Defined in EP&A Regulation Clause 3 as specified Performance Requirements of the BCA – those Performance Requirements are described below:

EP1.3 *A fire hydrant system must be provided to the degree necessary to facilitate the needs of the fire brigade appropriate to—*

- (a) *fire-fighting operations; and*
- (b) *the floor area of the building; and*
- (c) *the fire hazard.*

EP1.4 *An automatic fire suppression system must be installed to the degree necessary to control the development and spread of fire appropriate to—*

- (a) the size of the fire compartment; and*
- (b) the function or use of the building; and*
- (c) the fire hazard; and*
- (d) the height of the building.*

EP1.6 *Suitable facilities must be provided to the degree necessary in a building to co-ordinate fire brigade intervention during an emergency appropriate to—*

- (a) the function or use of the building; and*
- (b) the floor area of the building; and*
- (c) the height of the building.*

EP2.1 *In a building providing sleeping accommodation, occupants must be provided with automatic warning on the detection of smoke so they may evacuate in the event of a fire to a safe place.*

EP2.2 *(a) In the event of a fire in a building the conditions in any evacuation route must be maintained for the period of time occupants take to evacuate the part of the building so that—*

- (i) the temperature will not endanger human life; and*
- (ii) the level of visibility will enable the evacuation route to be determined; and*
- (iii) the level of toxicity will not endanger human life.*

(b) The period of time occupants take to evacuate referred to in (a) must be appropriate to—

- (i) the number, mobility and other characteristics of the occupants; and*
- (ii) the function or use of the building; and*
- (iii) the travel distance and other characteristics of the building; and*
- (iv) the fire load; and*
- (v) the potential fire intensity; and*
- (vi) the fire hazard; and*
- (vii) any active fire safety systems installed in the building; and*
- (viii) fire brigade intervention.*

EP3.2 *One or more passenger lifts fitted as emergency lifts to serve each floor served by the lifts in a building must be installed to facilitate the activities of the fire brigade and other emergency services personnel.*

P2.3.2 *(Volume 2 of the BCA) - Fire detection and early warning*

In a Class 1 building, occupants must be provided with automatic warning on the detection of smoke so that they may evacuate in the event of a fire to a place of safety.