

Reference to the Building Code of Australia (BCA) in this Practice Note means Volumes One and Two of the National Construction Code Series.

Purpose

The Building Appeals Board (BAB) is an independent statutory body established under the Building Act 1993 (the Act). This practice note provides guidance on making an application to the BAB in accordance with sections 160, 160A or 160B of the Act, for modification, variation and compliance determinations.

For the BAB to assess these applications appropriately and make a meaningful determination, the quality of the submission is important.

Before lodging an application to the BAB under section 160 or 160A, the applicant should consider making a submission for a Performance Solution (BCA A.03 or 1.0.3) to the relevant building surveyor (RBS) showing compliance with the performance measure requirements or at least equivalence with the Deemed-to-Satisfy Provision (DTS) or a combination of both.

If an RBS refuses the Performance Solution, an application for a dispute under Section 157 of the Act can be made to the BAB.

Situations may also arise where the parties listed in section 157 are in dispute regarding the application or effect of the Building Regulations 2018 (the Regulations) or about compliance, therefore any of those parties may refer the matter to the BAB.

Information to accompany application

It is important the application form is completed accurately to avoid delays in processing the application.

When preparing the submission to accompany the application form, the following information should be incorporated:

General requirements (Sections 160 and 160A):

- describe the background to the proposal (i.e. proposed building work including use of the building, height of the building, rise in storeys and Class of building);
- describe the nature of the modification(s) or compliance assessment(s) (i.e. reason for the application). This should include details of the part of the building that is affected and what is the extent of the variation being sought; and
- where the application relates to the Building Code of Australia (BCA), nominate the applicable DTS provision(s), together with the relevant primary performance requirement(s).

Explain why the regulation ought not to apply or explain why it is reasonable to vary the regulation.

Where the application relates to a BCA performance requirement(s), the applicant must provide commentary and justification supported by quantitative evidence on each of the individual clauses for each performance requirement.

The applicant must provide commentary on the issues relevant to the regulation to be modified, including but not limited to, the following:

Issues relevant to fire safety:

- fire compartment size;
- fire-source features;
- protection from spread of fire;
- exposure to allotment boundary;
- special characteristics of fuel load;
- potential ignition sources;
- performance of lining materials;
- fire load in escape routes;
- bushfire protection; and
- fire brigade intervention.

Issues relevant to occupant life safety:

- structural stability;
- special characteristics of occupants;
- the extent of the deviation from the DTS

- provision;
- number and width of escape routes;
- clear lines of sight to an exit;
- length of dead-end paths;
- smoke hazard management systems;
- active fire detection and early warning systems;
- internal or external fire suppression systems;
- egress signage and emergency lighting;
- evacuation procedures and staff training;
- health and amenity of occupants; and
- safe movement and access to and within the building and evacuation time.

The application to the BAB must include the application form, two sets of appropriately scaled drawings, a detailed submission and the relevant fee. Applications can be posted, hand-delivered or lodged electronically.

Drawings may be submitted as A3 or A4 documents provided that the scale of the drawings meets the requirements of regulation 25.

Supporting documentation accompanying the application should be clearly referenced and noted in the submission (i.e. drawing numbers, photographs and any other supporting information submitted).

View examples of modification applications on the website.

Additional information required only for section 160A application(s)

Building solution(s):

- Nominate the relevant BCA assessment method(s) adopted for the application, clause A0.5 BCA Class 2 – 9 buildings or clause 1.0.5 BCA Class 1 and 10 buildings, as listed below:
 - evidence as listed under clause A2.2 of BCA – Volume 1 for Class 2 to 9 buildings;
 - or under clause 1.2.2 of BCA - Volume 2 for Class 1 and 10 buildings;
 - verification methods;
 - comparison with DTS provisions of the BCA; or
 - expert judgement, including details of the qualifications and experience of the person carrying out the

assessment.

Nominate any reference materials, standards, codes of practice, specifications or any other research that has been relied upon in this application.

Provide conclusion(s) and recommendation(s) in the application satisfying clauses A0.3, A0.5 and A0.7 of BCA – Volume 1 for Class 2 – 9 buildings and clauses 1.0.3, 1.0.5 and 1.0.7 of BCA – Volume 2 for Class 1 and 10 buildings.

Essential safety measures

If an application affects or is reliant upon an essential safety measure(s), use a table like the following:

Example: Application to permit extended travel distances.

Essential Safety Measure	Description (design & installation standards)	Maintenance requirements
Path of travel to exits	BCA Part D	Every three months, to confirm travel paths are intact
Emergency evacuation lighting	BCA Part E4, AS2293.1	Every three months, to confirm AS1851.10 is complied with
Automatic sprinkler system	BCA Part E1	Weekly, to confirm AS1851.3 is complied with

Relevant Building Surveyor (RBS) comments

Every application to the BAB will require the RBS to provide their comments. RBS comments should address the requirements of the Act, as follows:

- Section 160 Modifications: Provide an opinion that the regulation does not apply/applies with the modifications or variations specified. Also, identify whether the application is reasonable and not

- detrimental to the public interest.
- Section 160A Compliance assessments: Provide an opinion whether the building solution complies with the relevant performance requirement or is equivalent to the DTS provision of the BCA. When referencing the BCA provisions, the RBS should ensure that the applicable BCA sections and parts are included in the submission.

Referral of application

Before the BAB determines an application for a modification, it must consult applicable referral authorities/bodies to comply with section 162 of the Act. Comments from referral authorities/bodies are subject to a time limitation of 10 business days. If comments are not received within this 10-day period, the application may be presented to the BAB for consideration at the next available meeting. The BAB may decide to grant additional time to enable the comments to be received or they may determine the matter then.

If the response from the referral authority does not support the application, the comments are then referred to the applicant for them to address.

Note: Under section 162(d), the BAB may also consult any other body or person before determining an application.

Below is the list of referral authorities / bodies. The BAB may also consult any other body or person, when appropriate.

Relevant Building Surveyor

All applications relating to a building permit.

Municipal Building Surveyor

Shared accommodation buildings.

Bushfire prone areas.

Termite risk management.

Siting of single dwellings.

Department of Health and Human Services

All hospitals, nursing homes, residential aged care buildings, crematoria, vaults, mortuaries, churches and children's service centres (Class 3 and 9), except applications relating to BCA Class 2 – 9 buildings Part B1 (Structural provisions).

All residential care buildings (as defined in regulation 146).

Victorian Building Authority

Applications disclosing that any aspect of the matter has been considered by the Authority.

Electricity Supply Authority

For applications relating to electricity sub-stations.

Heritage Victoria

For buildings included in the Register established under the *Heritage Act 1995*.

To check such properties, refer to:

<https://vhd.heritagecouncil.vic.gov.au/>

Chief Officer (MFB and CFA)

Applications regarding bushfire-prone areas

Fire safety in buildings included in the Register established under the *Heritage Act 1995*.

All residential care buildings for modifications of regulation 146.

Class 1b or 3 buildings for modification of regulation 145.

Shared accommodation buildings for modification of regulation 147.

Fire safety matters pertaining to the BCA Class 2 – 9 buildings clauses listed in Table 1 are applicable to:

- All buildings with an effective height of more than 25 metres pertaining to the following BCA One clauses;
- Class 3 and Class 9 buildings and Class 5, 6 7 and 8 buildings that exceed the compartment limits set out in Table C2.2. with an effective height of 25 metres or less pertaining to the following BCA - Volume One clauses.

Part C	Part D	Part E	Part G	Part H	Part I
C1.1, C1.4, C1.5, C1.7, C1.10, C1.11, Part C2, Part C3	Part D1, D2.1 to D2.12, D2.18 to D2.22	Parts E1, E2, E3 and E4.9	Parts G3, G4.8 and G5	H1.1 to H1.3, H1.5,	All parts

Table 1 – Class 2 – 9 Building

- The following classes of buildings with an effective height of 25 metres or less pertaining to the following BCA - Volume 1 clauses (listed in Table 2 below):
 - Class 2
 - Class 4
 - Class 5, 6, 7 and 8 complying with the compartment limits set out in Table C2.2.
- Fire safety matters pertaining to the BCA Class 2 – 9 buildings clauses listed in table 2 below are applicable to the following classes of buildings with an effective height of 25 metres or less:
- All Classes of Buildings.

Part C	Part D	Part E	Part G	Part H	Part I
Nil	D1.2 to D1.5	Parts E1 & E2	Parts G3, G4 & G5	Nil	All Parts

Table 2 – Class 5,6, 7 and 8 Buildings

Applications

Applications for an exemption, modification or variation to an access provision based on unjustifiable hardship.

Under section 160B of the Act an owner of the building or land, the purchaser under a contract of sale of a lot, a lessee of the building, who proposes to have, or is carrying out building work in respect of the building, or any person acting on behalf of a person mentioned above, may make an application to the BAB for a determination that an access provision will not

apply, or apply as modified or varied, to the building or land specified in that application on the basis of unjustifiable hardship.

A person may make an application to the BAB for a determination that meeting a performance requirement, or a component of a performance requirement would impose unjustifiable hardship on the person.

The person still needs to comply with the access provisions to the maximum extent not involving unjustifiable hardship.

The Act also provides for matters, which the BAB must consider when making a determination based on unjustifiable hardship. The BAB has to consider the matters set out in section 160B, subsections (3) to (7).

In preparing your application to the BAB under section 160B you should consider these factors and provide any information relevant to the application and the matters set out in section 160B, subsection (4).

One of the matters referred to under section 160B(4) (n) refers to an ‘action plan’. Guidance on preparing an action plan under the Disability Discrimination Act 1992 (DDA) is available from the Australian Human Rights Commission (AHRC). An action plan must be lodged on the AHRC website and although the BAB will not endorse an action plan, it may consider an action plan in its deliberations.

Refer to: www.humanrights.gov.au for further information regarding action plans.

Information to accompany application

In making a determination under section 160B, the BAB must take into account all of the relevant circumstances of an application, including circumstances listed in section 160B sub-section (4) of the Act, paragraphs (a) to (o).

To enable the BAB to make a determination for a claim of unjustifiable hardship the applicant’s written submission should address all of the circumstances listed in paragraphs (a) to (o).

In summary, the circumstances comprise:

- increases in costs or loss of revenue likely to result from compliance;
- reductions in costs and increases in revenue likely to result from compliance;

- the extent to which construction has been or will be financed by government funds;
- the extent to which the building is used for public purposes and has a community function;
- the financial position of the person required to comply;
- the effect that compliance is likely to have on the financial viability of that person;
- any exceptional technical factors;
- resources available to the person required to comply;
- whether the cost of alterations to make a premise accessible is disproportionate to the value of the building, taking into account the improved value that would result from the alterations;
- benefits reasonably likely to accrue from compliance including benefits to people with a disability and other building users, and detriments likely to result from non-compliance;
- detriment likely to be suffered as a result of compliance by the applicant, building developer or manager, or by people with a disability and other building users;
- the extent to which the heritage features on the building that would be affected are essential to the heritage significance of the building;
- evidence of efforts made in good faith by a person to comply with the access provision, including consulting access consultants and the RBS;
- the terms of any action plan that a person may have given to the AHRC, and any evidence about its implementation; and
- the nature and results of any consultation about means of achieving compliance with the access provision.

In addition to the above, the written submission must include:

- a background of the proposal (what work has or will occur, and what has led to the submission to the Board);
- the nature of the modification (specific details of what is required by the specific DTS provision or performance requirement in the BCA and why compliance with that requirement will cause unjustifiable hardship). It is recommended that an applicant consider proposing a partially

complying outcome rather than to not comply;

- justification for why your variation should be approved (by listing any Alternative Solutions proposed, providing any supporting documentation or reports including action plans, reports from consultants with expertise in access matters, details and results of any consultation on the development, etc.);
- a statement of whether the application is seeking a determination that a regulation:
 - does not apply; or
 - applies with the modification or the variation specified; and
- A statement of which access provision(s) the applicant is seeking an exemption from or modification or variation to, including whether it is a performance requirement or DTS.

Your written submission should also address the specific circumstances relevant to the Class of building, rise in storey, type of construction, occupant characteristics, use of the building and the extent of the deviation from the DTS requirements in the access provisions.

Applications forms and fees

Application forms, information sheets and fees can be obtained from the Building Appeals Board website.

An application must be accompanied by the relevant fee which is calculated per determination (individual nature) being sought.

Further information

If you have a technical enquiry, please email registry@buildingappeals.vic.gov.au or call 1300 421 082.

Building Appeals Board
733 Bourke Street Docklands VIC 3008

www.buildingappeals.vic.gov.au