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UOAQ Review on the Disability (Access to Premises - Buildings) Standards

The comments in this paper are confined to Queensland, as Queensland is the area of experience of the Unit Owners Association of Queensland (UOAQ).

The UOAQ was established in 1978 to represent the interests of Queensland Unit Owners (both able-bodied and disabled). Since that time there has been considerable legislative change much of which has imposed hardship and inequity on unit owners. Queensland has 410,000 units representing 1 million people, being one quarter of the population and increasing by an estimated 600 per month.

The UOAQ supports the introduction of the Disability (Access to Premises - Buildings) Standards 2010 as a necessary measure to protect the health and safety of persons with a disability in Queensland. The Queensland Government has consistently and persistently failed to enforce the Building Code Australia (BCA) correct use of Class 2 and Class 3 buildings, allowing Class 2 buildings without adequate access or egress for persons with a disability and, inadequate fire standards for persons unfamiliar with the building, to be used as short stay transient accommodation. This has compounded the shortage of Class 3 buildings, complying with the disability access standards, because professional hotel operators cannot compete with 'Mum and Dad' operators of Class 2 buildings with lower construction and overhead costs.

A body named the Interstate Standing Committee on Uniform Building Regulations (ISCUBR) was superseded in 1980, by way of an inter-government agreement. A national body called the Australian Uniform Building Regulations Co-ordinating Council (AUBRCC) was formed. This organisation, which consisted of the Commonwealth, state and territory governments, was principally created to develop a national building code. This task was completed in 1990 with the production of the Building Code of Australia (BCA90).

The brief for the AUBRCC was to define the correct use of buildings for purpose, built to standards that achieved structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future, having particular consideration to the cost of building regulations.

This was achieved by a system of building categories adopted and adapted from every state and territory in Australia, New Zealand, Europe and Canada. These were defined in BCA 90:

Class 1:

A single dwelling being—

(i) a detached house; or

(ii) one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house.

Class 2:

A building containing two or more 'sole-occupancy' units each being a separate dwelling.

Class 3:

A residential building, other than Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including-

(a) a boarding house, guesthouse, hostel, lodging-house or backpackers accommodation, or

(b) a residential part of a hotel or motel, or

(c) a residential part of a school, or

(d) accommodation for the aged, disabled or children, or

(e) a residential part of a health-care building which accommodates members of staff, or

(f) a residential part of a detention centre.

The Class 3 category was intended to provide access to an egress, together with aids for persons with a disability. Class 2 buildings were intended as private residential buildings built with lower fire alarm standards and avoiding the cost of providing facilities for persons with a disability in every residential/ accommodation building.

The categorisation followed a logical sequence starting at Class 1 - a private residence, Class 2 - private residences built above, below or beside one another and Class 3 - accommodation for commercial / residential purposes with access and facilities for persons with a disability. Unfortunately, subsequent to the introduction of the Building Code Australia some developers working in concert with corrupt local government building inspectors began a campaign to confuse the intended classification of Class 2 and Class 3 building use. This confusion varied from state to state, but was far more prevalent in Queensland where the State Government turned a blind eye to the incorrect use of buildings.

On 13 April 2013 the Australian Building Codes Board (ABCB) published the following for comment, again clearly showing the understanding of the correct use of Class 2 and Class 3 buildings.

PROPOSED COMMENTARY FOR THE GUIDE¹

Application of BCA Classifications 2 and 3

The application of all BCA classifications, including Class 2 and Class 3, relates to the intended use of the building. For Class 2 the use is as separate dwellings, and for Class 3, the use is as a common place of living for unrelated people, both as discussed below. The classification of serviced apartments also depends on the intended occupancy and use of those apartments and could be either Class 2 or Class 3 depending on that intended use.

Note: The term 'unrelated' does not exclude a situation where all occupants of the premises have an ongoing housemate or flatmate relationship with all other members of the household, where together the occupants take the form of a domestic household and generally are entitled to share use of all the premises even though they may only notionally rent a bedroom each, or where an occupant notionally rents a bedroom of a premises owned by the other occupant.

Serviced apartments

The term 'serviced apartments' itself does not denote the intended use of the building. For example, serviced apartments could include –

¹ What is the *Guide*? The Guide is a companion manual to Volume One of the National Construction Code (NCC). It is intended as a reference book for people seeking clarification, illustrations, or examples, of what are sometimes complex provisions. Volume One and the Guide should be read together. However, the comments in the Guide should not be taken to override the NCC. Unlike the NCC, which is adopted by legislation, the Guide is not called up into legislation. As its title suggests, it is for guidance only.

- A block of self-contained units, intended for short term occupancy, where services are provided. (i.e. Class 3)
- Self-contained units in a residential flat building used as private family residences where services (security, cleaning, laundry etc.) are available to residents. (i.e. Class 2)
- Self-contained units in a retirement village where retirees live and have services provided by the management. (i.e. Class 1 or 2).

The examples indicate that the intended use of the building is the determining factor in its classification.

Class 2

A Class 2 building is a building containing sole occupancy units primarily used as dwellings, similar to Class 1a dwellings. This entails the concept of use for private residential purposes, being a home for the occupants, a permanent domicile and may typically be a person's residential address for purposes such as the electoral roll. It may also include exclusive intermittent use for the stated purpose.

It is not intended as a building containing sole-occupancy units that the public are entitled to enter or use (whether for payment or not) for short term, holiday or business accommodation.

Class 3

A Class 3 building is a building containing sole-occupancy units with a primary purpose as a common place of living for unrelated persons. The time span of occupancy could be long term or transient, depending on the type of Class 3 building.

Examples include –

- a boarding house, lodging house, backpackers etc. (*long term or transient*)
- a hotel or motel – residential accommodation (*usually transient*)
- student accommodation provided in a school or staff accommodation provided in a health care building (*usually transient (e.g. school term) but could be long term (nursing staff accommodation)*)
- detention centre where inmates are accommodated (*transient or long term*)
- accommodation for the aged, children or people with a disability (*usually long term but could be transient*)

The intent of sole-occupancy units in a Class 3 building is for the public to be entitled to enter or use them (whether for payment or not) for residential long or short stay or intermittent use purposes including short term, holiday or business accommodation.

The reference to “long term or transient living” and the examples cited in the BCA classification, as described above, indicate that the defining issue is not the length of stay but rather the risks presented by the intended use. Because a Class 3 building includes the provision of accommodation for unrelated or transient persons, it is possible that in many situations, the occupants may be unfamiliar with the building, presenting a higher risk than a Class 2 building.

Not only has the Queensland Government failed to enforce the correct use of buildings, it has legislated against the correct use of buildings. The Body Corporate and Community Management Act 1997 (BCCMA) prohibits bodies corporate (unit owners) enforcing the correct use of their buildings.

BCCMA section 180(3) Limitations for by-laws.

“If a lot may be lawfully used for residential purposes, the by-laws cannot restrict the type of residential use.”

This legislation effectively denies unit owners the right to determine how their building is used; either for permanent residential or transient accommodation- or both. Permanent residential buildings providing community expectations of lifestyle, amenity, safety and health are effectively prohibited by this clause in the BCCMA. Queensland is the only Australian state prohibiting unit buildings for the exclusive use of long term or permanent residents and prohibits these bodies corporate from complying with the moral and ethical health and safety standards of the national Building Codes Australia.

This legislation is offensive to and conflicts with the Queensland Legislative Standards Act 1992 in that it fails to comply with fundamental legislative principles:

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b)-----

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a)-----

(b) is consistent with principles of natural justice.....

This legislation is also offensive to and conflicts with the BCCMA primary object in that it removes flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

(a) to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes;

(c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;

(f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;

(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes.

The BCCMA s 180 (3) is offensive to and conflicts with the Premises Standards because prior to the introduction of the Disability (Access to Premises - Building) Standards 2010 (Premises Standards) the body corporate (building owners) were forced by legislation to allow public access to buildings not providing disability standards.

Effective 15 March 2011 all new Class 2 buildings open to the public were required to comply with the access requirements for a person with a disability. However; the access standards for existing Class 2 buildings remain unresolved resulting in all existing Class 2 buildings failing to provide the necessary standards for persons with a disability.

The Disability Discrimination Act (DDA) Premises Standards guidelines state in relation to existing Class 2 buildings:

"A Class 2 building is typically a block of residential flats or apartments. While the Premises Standards (pre 2011) do not apply to the internal parts of sole occupancy units (SOU's), they do require that any common areas available for use by all residents be accessible, to persons with a disability, where the SOU's are made available to the public for short-term rent."

The scenario established by the Premises Standards introduces a 'material change of use' from private residential to public commercial accommodation. Historically the National Construction Code (NCC) requires that public buildings comply with NCC fire Specification E2.2a para. 4. (AS 1670). That is a NCC Class 3 building that complies with the DDA. Class 2 buildings were built to NCC Fire Specification E2.2a para. 3. (AS 3786) that is a lower standard permitted only in buildings designed for private residential use. The private residential building by virtue of the type of resident results in long term occupants.

Therefore, any Class 2 building being operated as short term commercial accommodation building available to the public is in breach of the NCC fire standards even if it does comply with DDA access requirements.

“The goals of the NCC are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future.”

The outcomes of retention of BCCMA s180 (3) is:

- Class 2 buildings continue as fire traps for short term residents not familiar with the building and no escape for persons with a disability.
- New Class 2 buildings continue to be approved for Class 3 use.
- Hotel / Motel operators are reluctant to build new Class 3 buildings to compete in same market against less expensive Class 2 buildings.
- There is a growing shortage of Class 3 buildings to provide a quality tourist experience.
- The tourist experience is degraded by ‘mum & dad’ amateur operators running Class 2 buildings, compared to professional tertiary qualified operators of Class 3 buildings.
- The availability of Class 2 residential units is being depleted by conversion of Class 2 buildings to incorrect Class 3 use.
- There is a shortage of Class 2 residential units in the capital city CBD’s.
- Permanent residents in Class 2 building have their lifestyle amenity, safety and health degraded by holidaymakers in their building.
- Queensland is not complying and conflicts with Commonwealth ‘Premises Standards’ legislation requiring Disability Discrimination Act access standards to all Class 2 buildings open to the public.
- The body corporate is placed in a position of conflict between the requirements of the BCCMA and the DDA thus exposing the owners to prosecution.

Queensland Building Occupations Act 2014

Removing the requirement for a resident letting agent to live on-site.

The concept of resident letting agents was to provide 24 hour security and services to buildings, especially those residential buildings that provide tourist accommodation. In Queensland many Class 2 permanent residential buildings are misused for short term tourist accommodation without suitable modification of the fire detection and alarm system that is the buildings are only designed for permanent residential occupation. In the event of a fire, without an onsite letting agent or caretaker, there will be no direction of guests to the fire

escapes or fire refuge areas. Moreover, many of the misused Class 2 buildings do not have a direct fire alarm connection to the fire service. Therefore, a telephone call to the fire service is required, historically, the responsibility of the caretaker/letting agent.

Costs to the Community

As previously stated the UOAQ recognises and supports the Disability (Access to Premises - Buildings) Standards 2010 as a necessary measure to protect the health and safety of persons with a disability. The intransience of the Queensland Government to the misuse of Class 2 buildings forced the introduction of disability standards to all new Class 2 buildings and NCC 2015 is further closing the gap between new Class 2 and Class 3 building - eliminating the previous cost advantage to developers of building Class 2 buildings. This situation is an unfortunate but essential consequence of the Access to Premises Legislation.

The situation of pre 2011 Class 2 building being misused as public accommodation building, with inadequate fire alarm standards , rather than as private residential buildings continues as a matter of concern to the UOAQ, but is beyond the scope of the DDA and Premises Standards. Unfortunately these building remain inaccessible to persons with a disability and sadly will most probably require a major loss of life by fire before the Queensland Government introduces the necessary legislation to correct the situation.....an avoidable and unacceptable situation to the UOAQ and its owner members.

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