

Building permits and other exemptions BP 12 | Exemptions for compliance with Regulations

Audience

The audience/s for this Practice Note include/s:

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|---|---|
| <input checked="" type="checkbox"/> Architects / Designers | <input checked="" type="checkbox"/> Owner Builders |
| <input checked="" type="checkbox"/> Builders | <input type="checkbox"/> Plumbers |
| <input checked="" type="checkbox"/> Building Surveyors / Inspectors | <input type="checkbox"/> Real estate management agents |
| <input checked="" type="checkbox"/> Engineers | <input type="checkbox"/> Trades and Maintenance (inc. Electricians) |
| <input type="checkbox"/> Home Owners | |

Purpose

The purpose of this Practice Note is to provide guidance to building surveyors and other practitioners about a building surveyor's discretion to exempt building work or buildings from complying with the Building Act 1993 (the Act) and the Building Regulations 2018 (the Regulations) in certain circumstances.

The content below provides guidance on:

- Exemptions from compliance with Regulations
- General principles
- The application of new regulations to building work
- Historic buildings and special buildings
- Combined allotments
- Change of use
- Subdivision of existing buildings
- Alterations to existing buildings
- Alterations affecting exits and paths of travel

Abbreviations & Definitions

The abbreviations and definitions set out below are for guidance only. They are not intended to vary those set out in the Building Act 1993 or the Building Regulations 2018 or the National Construction Code.

- **Act** – Building Act 1993
- **AS** – Australian Standard
- **BAB** – Building Appeals Board
- **BCA** – Building Code of Australia
- **DtS** – Deemed-to-Satisfy provision of the BCA
- **MBS** – Municipal Building Surveyor



- **NCC** – National Construction Code 2022
- **Regulations** – Building Regulations 2018
- **RBS** – Relevant Building Surveyor

Exemptions from compliance with Regulations

The Building Act 1993 and the Building Regulations 2018, including the National Construction Code, set out the requirements for health, safety and amenity in new buildings or new parts of existing buildings.

In some circumstances, compliance with the current requirements may be onerous, especially when an existing building is being altered or when a design for building work has commenced and regulations change.

The Act and Regulations give building surveyors discretion to exempt building work from complying with the Regulations in certain circumstances.

It is important that these discretionary decisions are exercised transparently, fairly and must not adversely affect the safety of the public or occupiers of the building.

The Regulations require the building surveyor to consider various factors when exercising discretion and to clearly record their decision and lodge their records with the relevant council.

This practice note sets out the various provisions and administrative requirements that must be considered, including prescribed the use of prescribed and or approved Forms that must be used when documenting and recording decisions.

General principles

Existing buildings need not be upgraded when regulations change

In Victoria, buildings and building work must comply with the Act and the Regulations, including the NCC. The Act, Regulations and NCC are amended from time to time as new building methods and technologies emerge and as community expectations and public policy change.

Buildings that comply with today's regulatory requirements should be safer and more efficient than buildings built under previous regulations. However, when regulations change, there is generally no obligation for owners of existing buildings to automatically upgrade their building to meet the current regulations unless there is an express requirement to bring an existing building into compliance with the regulations. This means existing buildings will only need to be upgraded to current standards if there are substantial alterations to the building, it is sub divided or the use of the building is changed.

Records of discretionary decisions

The various discretionary decisions referred to in this Practice Note can result in building work, or a building, not needing to comply fully with the Regulations. The making of such decisions requires careful consideration of any prescribed matters.

It is important the decision, and reasons for the decision, are clearly documented for reference by owners and others when maintaining or changing the building in the future.

Most of the matter's referred to in this Practice Note must be recorded in writing and lodged with the relevant council. For others, there may be no express requirement to record the decision or lodge it with the relevant council, however for best practice and record keeping requirements refer to section 6 of the Code of Conduct for Building Surveyors.



In some cases, the Regulations require the person seeking the exemption to apply in writing to the building surveyor. Where this is not mandatory, it is good practice to request a written application be made. This provides transparency, accountability and a record that is available to future owners and occupiers.

How to decide what is reasonable

Where permitted under the Act or Regulations, a RBS may exercise discretion by determining what is reasonable. This relies on the application of professional expertise as a building surveyor to the specific matter being assessed.

When deciding what is reasonable, consideration should be given to the following:

- the context under the Act or Regulations, and the extent to which a discretionary decision is available,
- the information and reasoning put forward to the RBS demonstrating merit for a decision,
- the objectives under section 4 of the Act, in particular;
 - safety and health
 - amenity
 - cost effective construction and maintenance.
- the objectives, functional statements, and performance requirements of the relevant parts of the NCC,
- the overall building performance, including whether improved outcomes are achieved for the existing building (i.e. the existing building will perform better based on the consent to partial compliance).
- Any unintended consequences that the decision may cause.

In most instances an RBS should be able to apply their professional judgement to the specific matter being assessed and reach a reasonable decision. It may be appropriate to seek additional support from another registered practitioner or appropriately qualified and experienced person (e.g. academic, energy assessor, or the like) where there is a specific need or complexity that is relevant to the project.

It may also be appropriate to seek a decision from the Building Appeals Board under s160 or 160A of the Act, particularly when an outcome cannot be agreed upon by all parties involved.

The application of new regulations to building work

Section 10(2) of the Act provides that a new building regulation or an amendment to a building regulation does not apply to building work if the RBS is satisfied, and certifies in writing, that substantial progress was made on the design of the building before the regulation or amendment commenced.

Section 10(2) only applies to regulations which relate to the design of a building. Section 10 does not apply to a new regulation or an amendment which is administrative. For example, any amendments to require the use of prescribed forms, lodgement of documents with the relevant council or payment of prescribed fees cannot be accepted by the RBS as not applying to the carrying out of building work under section 10.

Section 10 cannot be used to exempt building work from compliance with amendments to planning schemes or other planning requirements.

Important things to note about the certification that the RBS may give under section 10(2) are:

the RBS must have regard to Minister's Guideline MG-13 Exercise of Discretion When Applying a New Building Regulation or an Amendment to a Building Regulation when making a certification



under section 10(2) which includes the following criteria:

- i. the design must directly relate to the allotment in respect of which the building permit is to be issued.
- ii. the design must be for future building work, not building work that has already been constructed.
- iii. in determining whether substantial progress has been made on the design before an amendment commences, the RBS can have regard to dating mechanisms on design documents or to evidence of payments for design development.
- iv. the certification must be in writing.
- v. the certification should state the evidence that was relied on to determine whether substantial progress had been made on the design the certification should be made during the assessment of the application for the building permit and before the building permit is issued.

Historic buildings and special buildings

Section 28 of the Act provides a power for the RBS to issue a building permit for building work that does not comply with the regulations if the work is to be carried out in connection with a building included on the Heritage Register established under the Heritage Act 2017.

The building permit may be issued to enable the carrying out of work appropriate to the style, manner of construction and materials of the building.

In deciding whether to rely on section 28 to issue a building permit for building work that does not comply with the regulations, the building surveyor is required by section 28(3) to consider:

- i. the structural adequacy of the building; and
- ii. the requirements necessary to make reasonable provision for the amenity of the building and the safety and health of people using the building.

Section 28(4) of the Act requires the consent and report of the Executive Director under the Heritage Act 2017 to be obtained to an application to demolish or alter a building which is on the Heritage Register.

Once these matters are considered and if a building permit is to be issued for building work that does not comply with the regulations, a written statement should be prepared by the building surveyor setting out what regulations the decision applies to.

There is no express requirement to lodge a statement under section 28 with the relevant council, however it is recommended as good practice so future owners can have access to the decision that was made and the basis for that decision.

Combined allotments

Part 4 Division 8 of the Regulations provides that an MBS or a private building surveyor appointed as the RBS for an application for a building permit, may treat a combined allotment as one allotment for the purposes of the Act and Regulations.

A combined allotment is defined as two or more adjoining allotments or an allotment and adjoining land.

For example, where an owner owns two adjoining allotments and proposes to construct a single building that is on both allotments, the two allotments can be treated as one combined allotment.

The regulations provide that:

- An application to the building surveyor to treat allotments as a combined allotment must



contain prescribed information and be accompanied by prescribed documents set out in regulation 61

- Regulation 62 allows the building surveyor to request additional information be provided within a specified period. If it is not provided, the building surveyor may refuse the application after giving the applicant 30 days' notice of their intention to refuse.
- The building surveyor, may make a determination, and in doing so must take into account the matters in regulation 64(2)
- The determination of the building surveyor must be in the prescribed form of Form 5
- The building surveyor must give the applicant a copy of the determination within 7 days after making the determination.
- Regulation 66 allows the municipal building surveyor to revoke the determination.

In deciding whether to make the determination under regulation 64, the building surveyor must be satisfied:

1. of the structural adequacy of any building on the combined allotment; and
2. that reasonable provision is made for—
 - i. the amenity of any building and the safety and health of people using any building on the combined allotment; and
 - ii. avoiding the spread of fire to or from any adjoining building on the combined allotment.

The Form 5 must be lodged with the relevant council with building permit documents in accordance with section 30 and regulation 44(1)(k) and any occupancy permit documents under section 73(1A) and regulation 203(k).

A determination under regulation 64(1) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

Change of use

Regulation 229 makes it an offence for a person to change the use of a building or place of public entertainment unless the building complies with the requirements of the Regulations applicable to the new use.

Despite this requirement, the municipal building surveyor or a private building surveyor that is appointed as the RBS, may exempt a building or place of public entertainment from compliance with any regulation applicable to the new use.

In deciding whether to grant an exemption, the building surveyor must consider:

3. the structural adequacy of the building or place of public entertainment; and
4. the requirements necessary to make reasonable provision for—
 - i. the amenity of the building or place and the safety and health of people using the building or place; and
 - ii. avoiding the spread of fire to or from any adjoining building.

Where a building surveyor grants an exemption, that decision must be recorded in the form of Form 18 in Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30 and regulation 44(1)(n) and any occupancy permit documents under section 73(1A) and regulation 203(p).

An exemption under regulation 229(2) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).



The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of each month when a building permit is issued for building work where an exemption under regulation 229(2) has been granted by the RBS.

Subdivision of existing buildings

Subject to regulation 233, regulation 231(1) makes it an offence for an existing building, whenever constructed, to be subdivided without each building resulting from the subdivision being brought into conformity with the Regulations.

Despite this requirement the MBS or a private building surveyor that is appointed as the RBS, may exempt a building from all or any of the requirements applicable under regulation 231(1).

For example, exemptions can be granted where a building is subdivided, and each portion sold to separate owners.

In deciding whether to grant an exemption under regulation 231(2), the building surveyor must consider:

1. the structural adequacy of any building to which the exemption applies; and
2. the requirements necessary to make reasonable provision for—
 - i. the amenity of any building and the safety and health of people using any building to which the exemption applies; and
 - ii. avoiding the spread of fire to or from any adjoining building.

Where a building surveyor grants an exemption, that decision must be recorded using a Form 18 from Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30 (see regulation 44(1)(n)) and any occupancy permit documents under section 73(1A) (see regulation 203(p)).

An exemption under regulation 231(2) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where an exemption under regulation 231(2) has been granted by the RBS.

Alterations to existing buildings

Regulation 233 has specific provisions regarding the NCC compliance including situations where consent to partial compliance may be considered. These requirements are based on volume for alterations and floor area for additions.

Under regulation 233(2), subject to regulation 234 and 236, if proposed alterations to an existing building, together with any other alterations completed or permitted within the previous 3 years, relate to more than half the original volume of the building, the entire building must be brought into conformity with the Regulations. The original volume of the building refers to the volume immediately before the previous 3 years.

Subject to regulation 233(6), the RBS may consent to partial compliance of building work, or an existing building, with regulations 233(1) and 233(2).

Regulation 233(6) says that if the alteration is an extension to an existing building, the RBS may only consent to partial compliance in respect of the extension if the floor area of the extension is not greater than the lesser of 25% of the floor area of the existing building



- 1,000 m2.

Therefore, in the case of an extension to an existing building, consent to partial compliance with regulation 233(1) or 233(2) cannot be given if the extension is larger than 1,000 m2 or more than 25% of the floor area of the existing building.

Requirements for the application of partial compliance is summarised in Table 1: Application of Regulations and availability of partial compliance for **alterations** to existing buildings

Volume alteration	Application & Limitations	Consent to partial compliance
Less than 50% of existing building, including work done in the past 3 years	<ul style="list-style-type: none"> • New building work only must comply with the Regulations - reg 233(1) & (2) 	Available
50% of existing building or greater, including work done in the past 3 years	<ul style="list-style-type: none"> • New building work and existing building must comply with the Regulations - reg 233(1) & (2) • Existing building may be considered in partial compliance determination - reg 233(3) • Limitations on partial compliance remain present for extensions - see Table 2 	Available

Table 1: Application of Regulations and availability of partial compliance for **alterations** to existing buildings

Floor area of extension	Application & Limitations	Consent to partial compliance
Less than 25% of existing building	<ul style="list-style-type: none"> • New building work only must comply with the Regulations - reg 233(6) • New building work and existing building may be considered in partial compliance determination 	Available
Extension greater than 25% of the existing building (or the lesser of 25% or 1000m ²)	<ul style="list-style-type: none"> • New building work only must comply with the Regulations - reg 233(3) & (6) • Applies to the extension component of building work only • Existing parts of the building may still be subject to partial compliance determination - see Table 1 	Not available

Table 2: Application of Regulations and availability of partial compliance for **extensions** to existing buildings

Calculation of volume

There is no specific provision that details how to calculate volume for the purpose of regulation 233. The RBS can use their professional judgement and discretion to apply the most appropriate method for the particular circumstance. The method to calculate volume should be documented for future reference.

The volume calculation is relative to the alteration component of the existing building under regulation 233 (2), which permits the use of the consent to partial compliance pathway. If the calculation has uncertainty that the work may exceed half the original volume, it may be appropriate to assess and document under the consent to partial compliance process.



The following may assist the assessment of volume:

- Volume will be the floor area of the room or part of the building multiplied by the height of that part of the building. Height in relation to a building (other than a wall or fence) is defined in regulation 5(1) at any point as the vertical distance between natural ground level and the top of the roof covering.
- In determining what work constitutes an alteration, only work that required or would require a building permit (see Practice Note BP-01 When is a building permit required) should be considered, e.g., repainting of a room with no other work, would not be considered as an alteration to that room for the purposes of regulation 233.
- If a room or part of a building is to be completely stripped out and refurbished, then it may be appropriate to consider all that space as being altered. Examples include a tenancy fit out, or conversion of a bedroom to a bathroom in a dwelling.
- If a room or part of a building is to be partially altered, then only the volume being altered will be relevant to the assessment. Examples might include an office fit-out where some existing partitioning will remain; or the retrofitting/relocation of sprinklers in an existing building; or where existing bedrooms remain at the front of a dwelling, but other parts of the dwelling are being altered and extended.
- Volume for minor works may consider just the section altered, and not the volume of the entire room. For example, it may not be appropriate to use the volume of two complete rooms when widening an existing doorway between them.

Consent to partial compliance of building work

Regulation 233(3) provides the RBS with discretionary power to consent to partial compliance with sub-regulations (1) or (2). When determining whether to consent to partial compliance under regulation 233(3), the RBS must take the following into account:

- the structural adequacy of the building, and
- the requirements necessary to make reasonable provision for:
 - the amenity of the building and the safety and health of people using the building, and
 - avoiding the spread of fire to or from any adjoining building.

The discretion to allow partial compliance applies to both the building work associated with the alteration (except any extensions for which partial compliance is excluded under regulation 233(6)), and the requirement to bring the remainder of the building into compliance. In granting partial compliance, the RBS should consider what work is reasonable to ensure an improved outcome is achieved.

Where the RBS consents to partial compliance, that decision must be recorded in the form of the Form 18 from Schedule 4 to the Regulations, be recorded in the relevant building permit, occupancy permit or certificate of final inspection, and lodged with the relevant council with building permit documents under section 30 and any occupancy permit documents under section 73(1A).

The VBA must also be informed by the RBS (regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where consent to partial compliance under regulation 233(3) has been given by the RBS.

Alterations affecting exits and paths of travel

Regulation 234(1) provides that where a proposed alteration to an existing building, other than a Class 1 or 10 building, would adversely affect any exit or path or travel to an exit, the building must comply with Part D of the NCC Volume One.

Under regulation 234(2), the RBS may consent to partial compliance with regulation 234(1).



In determining whether to consent to partial compliance, the RBS must consider the requirements necessary to make reasonable provision for:

1. the amenity of the building; and
2. the safety and health of people using the building.

Where the RBS consents to partial compliance, that decision must be recorded in the form of Form 18 from Schedule 4 to the Regulations.

The Form 18 must be lodged with the relevant council with building permit documents under section 30 (see regulation 44(1)(n)) and any occupancy permit documents under section 73(1A) (see regulation 203(p)).

Consent to partial compliance under regulation 234(2) must be recorded in the building permit (Form 2), occupancy permit (Form 16) and/or certificate of final inspection (Form 17).

The VBA must also be informed by the RBS (under regulation 47(2)) within 7 days of the end of a month when a building permit is issued for building work where consent to partial compliance under regulation 233(3) has been given by the RBS.

Related Documentation

- Building Act 1993
- Building Regulations 2018
- Building Practice Note BP-01: When is a building permit required
- Code of Conduct for Building Surveyors in Victoria
- Commonwealth Disability Discrimination Act 1992
- Heritage Act 2017
- Minister Guideline MG-05: Professional Standards- Building Surveyors
- Minister Guideline MG-13: Exercise of Discretion When Applying a New Building Regulation or an Amendment to a Building Regulation:
- National Construction Code 2022
- Occupational Health and Safety 2004
- Prescribed forms: Form 2, 5, 16, 17 & 18

List of Amendments

- Update of NCC references to align with new 2022 referencing system.
- Update format and content review.
- Content revision for sections ‘how to decide what is reasonable’ and ‘alterations to existing buildings’

Document history

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