



SUBMISSION BY THE
Housing Industry Association

to the
**House of Representatives - Standing Committee on
Legal and Constitutional Affairs**
on the
**Draft Disability (Access to Premises - Buildings)
Standards 2009**

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CONTENTS

1	Introduction	3
2	Response to Terms of Reference	4
2.1	The appropriateness and effectiveness of the proposed Premises Standards in achieving their objects;	4
2.2	The interaction between the Premises Standards and existing regulatory schemes operating in state and territory jurisdictions, including the appropriateness and effectiveness of the proposed Model Process to Administer Building Access for People with Disability;	10
2.3	Any related matters.	13

HIA ::

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1 Introduction

HIA appreciates the opportunity to make comments in respect to the Draft Disability (Access to Premises – Buildings) Standard and supporting documents released by the Attorney-General in 2008.

Whilst a significant proportion of residential buildings constructed by HIA members will not be affected by this Standard, it is important to recognise that HIA members are involved in the construction of buildings of all classes, in particular other residential buildings, including Class 1b, 3 and 9c buildings which are affected by the Standard. Equally, the business premises of all HIA members will be subject to the requirements of the Standard in some manner and may have a significant affect on the operating costs associated with many thousands of businesses in the residential construction sector.

HIA believes that the introduction of the Premises Standard is an important move in aligning the Disability Discrimination Act (DDA) with the Building Code of Australia (BCA) and providing greater certainty for all building owners, occupants and visitors. Therefore we are supportive of the Standard being introduced at an appropriate time in the cycle of building regulations.

Based on the Terms of Reference for the Standing Committee, HIA would like to make a number of comments in relation to both the Premises Standard and the supporting documents. These comments are aimed at ensuring the regulatory regime for applying the Standard is consistent with current operating practices for obtaining building approvals, avoids duplication of building standards and potential inconsistency between building standards and current procedures, along with minimising any unintended consequences. HIA would not support the introduction of the Standard or the supporting documents without further consideration of the issues addressed in this submission.

HIA is a member of the Australian Standards Committee for AS 1428 and through that Committee, HIA will be providing comments regarding the proposed amendments to AS 1428.1. The primary concern in respect to this Australian Standard is that it aligns completely with the Premises Standard. This is critical to avoid confusion amongst building practitioners, regulators and building owners, by ensuring there are no additional requirements for access either outside the scope of the Premises Standard or in conflict with the Access Code.

HIA would be pleased to provide additional information in support of any of the comments provided in this Submission.



2 Response to Terms of Reference

2.1 The appropriateness and effectiveness of the proposed Premises Standards in achieving their objects;

HIA has a number of concerns regarding the appropriateness and effectiveness of the proposed Standard in respect to Object (b):

- (b) *To give certainty to building certifiers, building developers and building managers that, if access to buildings is provided in accordance with these Standards, the provision of access, to the extent covered by these Standards, will not be unlawful under the Act.*

The majority of issues are administrative matters which can be readily addressed prior to commencement to ensure consistent application and interpretation by all parties who will be required to apply or rely on the Standard in the future.

There are also a small number of issues regarding the proposed technical concessions and standards which HIA also considered can be readily addressed prior to commencement.

2.1.1 Point of Application

Clause 2.1 (3) proposes that a new building or new part of a building will be subject to the Standards where an application for construction approval is submitted on or after the commencement date of the Standard.

The buildings to be subject to the Premises Standard will, in almost every case, require development consent from the relevant consent authority in that State or Territory before building approval can be granted. The Premises Standard, as drafted, will require changes to several aspects of building design which will require the development consent to be modified to ensure consistency between the development and building approvals.

The development approval process is extremely complicated and time consuming. Development consents generally operate for a period of between 2 and 5 years. Therefore a building owner may in good faith receive development approval prior to the commencement of this Standard, yet be required to make significant changes to allow building approval to comply with the Standard. This is likely to entail modification of the development consent.

Whilst this situation can occur across any aspect of building regulation, there are currently some States which acknowledge this issue by providing a transitional or concession period for changes. Western Australia provides a 12 month transition period, whilst Victorian regulations allow discretion where building design can be shown as substantially commenced prior to a change. There is no national transitional period for changes in building regulations.

It is recognised that a building owner may elect to alter their design to gain some protection under the new Standard and this would be an optimal outcome. However, it is considered that this should be a decision of the building owner once the Standard is finalised.



HIA recommends that the Premises Standard provide a 12 month transitional period for building applications to voluntarily comply, where development approval has been obtained prior to commencement of the Standard. This will reduce the need for adjustments to buildings designed in good faith to the current building standards.

2.1.2 Ongoing responsibility of building certifiers and developers

Clause 3.1(1) indicates that a building certifier, building developer or building manager of a relevant building must ensure that the building complies with the Access Code.

This clause could be interpreted as applying some level of responsibility on the building certifier and the building developer beyond their involvement in the construction of a building.

HIA recommends that this clause be clarified through the inclusion of a note, to ensure that the ongoing management and operations of a building remain the responsibility of the building owner and that the building certifier and developer do not have an ongoing responsibility.

2.1.3 Determination of unjustifiable hardship

HIA supports the proposed unjustifiable hardship (UH) provisions in Part 4. However it is unclear who is ultimately responsible for making a determination of UH at the time of a building approval or at any later date.

It is clear that under the DDA, the Australian Human Rights Commission (AHRC) is responsible for any dispute made by a person for access to an existing building. However, the inclusion of the UH provision in the Premises Standard establishes an opportunity for a building developer, owner or manager to make a case for UH at the time of building approval. The proposed *Model Process to Administer Building Access for People with a Disability* (the Protocol) also indicates that a determination of UH may be made at other points in time, such as voluntary upgrading of an existing building.

HIA considers that once the Premises Standard is in place, it is reasonable to expect that a determination of UH can be made as part of a building approval or through a voluntary upgrading process and that such a decision is binding, giving the building owner greater certainty.

In respect to a building approval, it appears that a building certifier will take on a role in determining UH as part of granting a building approval. The Protocol for State and Territory administrations goes onto to suggest that determining UH as part of the building approval process may fall to an Access Panel to provide advice back to the building certifier. However, this is not referenced in any way within the Premises Standard.

HIA believes that responsibility for determining UH as part of a building approval should rest with the building certifier in the first instance and that the Premises Standard should clearly indicate who has this responsibility. It is also essential that the proposed Access Panels, if introduced, are sufficiently authorized and recognised by legislation, either in the Premises Standard or the DDA, to ensure that a determination of UH is binding for the building owner. The decision of an Access Panel could be provided to either the development consent authority or the building certifying authority.



Without this amendment it is considered that decisions made under the Premises Standard will remain open to challenge into the future and detract from the considerable gain that will be made by the introduction of the Premises Standard for building owners.

2.1.4 Proposed concessions for existing buildings

HIA supports the inclusion of concessions for existing buildings which have been constructed in accordance with relevant construction standards that applied previously or currently and will be superseded by the introduction of this Standard.

However, in relation to the proposed toilet concession (Clause 4.5) HIA believes that buildings designed using AS 1428.1 – 1993 and 1998 will also comply. Therefore for ease of interpretation, it is considered that the concession should recognise these past editions, as a minimum using a notation, if not with a specific reference.

In relation to the lift concession, it appears that the current BCA reference standard, AS 1735.12: 1999, will not be adopted in respect of minimum lift floor area when traveling more than 12 metres. Therefore a concession is being provided for existing compliant lifts measuring 1100 x 1400mm. However, HIA notes that the BCA previously called up AS 1735.12 – 1994, which permitted a lift area of 1000 x 1100mm.

The Guidelines indicate that the concession has been applied to protect lifts installed that comply with the current BCA requirements. However, this is not the case for lifts complying with the BCA prior to 1999. Clearly, the retrofitting of lift spaces is not a simple or inexpensive exercise and it is likely to be the focus of many requests for UH in the future.

HIA believes that the previous standard (1999) should be given due consideration as part of the concessions. If it is determined not to include it in the concession, then appropriate advice should be provided, possibly within the Guidelines, to clarify the aspects of the 1999 standard which are no longer appropriate. This information would then be available as guidance for determining UH.

2.1.5 Ongoing changes to standards

The Standard includes provision for a 5 year review. HIA supports this timeframe and believes that each Review should include responsibility for requesting changes to the relevant Australian Standards referenced by the Premises Standard. The draft Guidelines do not support this approach. HIA believes the Guidelines should be amended to ensure consistent interpretation over coming years.

Since 1993 when AS 1428 was first referenced by the BCA, awareness of access requirements and the building construction techniques and technology available has been constantly increasing. To this end, AS 1428.1 has been updated twice (1998 & 2001) with the 2009 edition to provide further amendments.



It is essential for certainty of all building owners, that once an Australian Standard is referenced by the Premises Standard, that the pathway for future amendments to that Standard, if needed, is clear. It is important that amendments occur in a coordinated manner, avoiding interim or adhoc changes within the 5 year review period.

It is suggested that the Guidelines (Part 4¹, 6 and 8) be amended to strengthen this concept and that current reference to building owners being able to comply with an unreferenced, potentially higher standard be adjusted, if not removed.

It is incumbent on the building regulatory process, that adhoc, unreferenced Australian Standards be limited, if not avoided. Where an Australian standard is a reference standard, HIA believes that any review of that standard only be instigated by the relevant regulatory authority and not by any other third party, including Standards Australia. Therefore future amendments to the AS 1428 series or the AS 1735 series should only be made by Standards Australia at the request of either the Attorney-General or the Australian Building Codes Board.

HIA is concerned that the process for Standards Australia to develop AS 1428.1 had not been sufficiently progressed prior to this period of public comment, to prevent future amendments. A public ballot draft of the standards has not been released to the Standards Committee. Therefore the usual processes of Standards Australia are yet to run their course and it is possible that the Committee may seek further changes prior to publication.

This would not be the preferred situation and HIA believes that clear direction to the Standards Committee is urgently needed, or the Premises Standard should not be adopted until such time as the necessary steps in the standards development process have been completed. To this end, HIA seeks confirmation that following the public exhibition of the draft AS 1428.1 – 2009 direction will be given to Standards Australia that all aspects addressed by the Premises Standard (Access Code) are not be amended in any way.

2.1.6 Aligning reference standards

Part A3, Table 1, makes reference to three editions of AS 1428.1 and two editions of Part 4. These overlapping references should be avoided where possible.

It is unclear why both the 2001 and the proposed 2009 editions of AS 1428.1 are to be referenced concurrently, given that the 2009 edition is yet to be finalised. HIA contends that if the relevant provisions of the 2001 standard are considered adequate for the purposes of the Premises Standard, then they should be replicated in the 2009 standard to avoid a conflicting standard being published and creating confusion. The Premises Standard should then only include a single reference to the proposed 2009 edition.

Similarly, retention of the 1993 supplement should be considered in light of the current amendment process and if considered appropriate for the Premises Standard, be replicated in the proposed 2009 standard, allowing the third reference to be removed from Table 1.

¹ Guidelines, pg 8, Clause 4.6(2)



It would appear that AS 1428.4 is also under review, with an undated edition being referred to in Table 1. Again, HIA sees no reason why the new standard should not be aligned for the purposes of the Premises Standard, allowing the 1992 publication to be removed from the list and the relevant provision from the 1992 standard included in the new edition.

2.1.7 Aligning the lift standards

In relation to the concession for lifts, Table E3.6 seeks to apply a higher minimum dimension standard (1,400 x 1,100mm) than AS 1735.12 for lifts traveling more than 12 metres. It is not considered appropriate for this Standard to be changed via the Premises Standard, creating an inconsistency with an Australian Standard also referenced by the BCA.

The dimensions for lifts should be retained as per current Australian Standards until the standard itself is the subject of the appropriate review and the provisions aligned.

As mentioned above, HIA believes that ongoing reviews of these reference standards should be at the request of either the Attorney-General or the Australian Building Codes Board, and incorporated into the 5 year review of the Premises Standards.

2.1.8 Definition of BCA

The proposed definition of BCA, within the Access Code, simply references the expanded term, "Building Code of Australia". The Premises Standard makes several references to the BCA and to particular clauses of the BCA from Volume 1 for Class 2 to 9 buildings, e.g. Clause F2.2 refers to D1.13 of the BCA.

To ensure consistent interpretation, it is recommended that the definition of BCA be amended. One possible option would be "*BCA means the Building Code of Australia, Volume 1 – Class 2 to 9 buildings including reference to an associated Class 10 building*".

It is also suggested that the definition of the *BCA* and subsequent *building classifications* referenced in Part 2 of the Premises Standard warrant inclusion in Part 1.4 Interpretation, as they are not already defined in the DDA or elsewhere in the Standard.

For this purpose, the definition of BCA should be similar to that used in current State and Territory building legislations, such as NSW or Victoria.

"Building Code of Australia means the document, published by or on behalf of the Australian Building Codes Board, that is prescribed for purposes of this definition by the regulations, together with:

- (a) such amendments made by the Board, and
- (b) such variations approved by the Board in relation to New South Wales, as are prescribed by the regulations." ²

² Section 4, Definitions, Environmental Planning & Assessment Act, 1979, NSW Parliament



“Building Code of Australia means the Building Code of Australia published by the Australian Building Codes Board—

- (a) as amended or remade from time to time; and
- (b) as amended by the Victoria Appendix to that Code published by that Board as that Appendix is amended or remade from time to time;³

2.1.9 Calculation of number of occupants and fixtures

Clause F2.2 indicates that the number of persons must be calculated in accordance with Clause D1.13 of the BCA or if not possible “*by other means.*” This is not considered appropriate as it gives the impression that any means may be used to suit a particular outcome.

Clause D1.13 of the BCA recognises that calculation using other means may be required in some circumstances. However, the BCA goes on to provide building designers and certifiers with supplementary tables and other information within the clause itself, which would assist a person requiring an alternative pathway to assess occupancy.

HIA believes that there is adequate information within Clause D1.13 and that the words “if it cannot be more accurately determined by other means” should be deleted.

2.1.10 Change of building use

The Premises Standard is proposed to apply to ‘new parts’ of an existing building. The Guidelines⁴ expand on this concept, suggesting that a ‘change of use’ which involves building approval would qualify as a ‘new part’. However the Guidelines do not refer to the concession which applies under Clause 4.3.

It is clearly not the intention of the Premises Standard to require upgrading of the *affected part of a building* where an individual shop undergoes a re-fitout, for instance changing a dress shop to a jewelers shop. These changes of use may involve building approval only or in NSW complying development approval, to ensure aspects such as counters, stands or racking comply with the BCA, along with minimum essential fire safety measures. HIA recommends that Part 2.3 of the Guidelines be altered to make reference to this type of scenario and the fact that the concession will apply, cross-referencing to Part 5.3 of the Guidelines.

In addition, the Guidelines⁵ indicate that if the building owner is the applicant for the new work that they are not able to rely on the concession. In the scenario set out above, it is unlikely, but not unheard of, that the building owner could be the applicant for the change of use. It is not considered appropriate for this type of application to be excluded from the concession. Advice is required on the accurate interpretation of this concession, to determine whether the Premises Standard, the Guidelines, or both, should be amended.

³ Section 3, Definitions, Building Act, 1993, Victorian Parliament

⁴ Page 6, Clause 2.3(6)

⁵ Page 11, Clause 5.3, last paragraph.



2.2 The interaction between the Premises Standards and existing regulatory schemes operating in state and territory jurisdictions, including the appropriateness and effectiveness of the proposed Model Process to Administer Building Access for People with Disability;

The application of the Protocol does not appear to have been considered in the Regulation Impact Statement for the Standard, therefore HIA contends that the administrative costs associated with the Protocol have not been appropriately addressed.

HIA does not support the proposed Protocol as it will dramatically alter the current accepted administrative practices in all States and Territories with respect to the determination of BCA alternative solutions by the relevant building certifier. The Protocol also makes reference to unjustifiable hardship decisions and existing buildings, making it unclear what the intended outcomes and benefits of the Protocol would be.

It is essential that the Protocol be clear in its coverage – and whether it is seeking to provide controls for:

- building approvals with alternative solutions; and/or
- building approvals with requests for unjustifiable hardship consideration; and/or
- requests for unjustifiable hardship determinations as part of a voluntary building upgrade (building upgrade plans).

It is recognised that the application of an alternative solution under the Premises Standard could increase the potential opportunity for a building owner to be challenged in respect to the DDA at a later date. However, both the BCA and the Premises Standard recognise an alternative solution as providing an equivalent level of access, not a lesser level. Therefore this risk should be minimal.

Article 2 (2) appears to provide a concession for building authorities to make determinations without reference to an Access Panel. The Protocol does not go on to provide details on whether referral to an Access Panel, where established is mandatory. Article 10 provides that the State administration must take appropriate measures to apply the Protocol and ensure effective application. Therefore further information is required as to whether referral will, or is recommended to, be mandatory in any State where an Access Panel is established.

As mentioned in section 2.1.3, it is also unclear what authority, if any, a determination by an Access Panel will have under legislation. HIA would not support mandatory referral to an advisory panel, which will involve time and costs for a building owner, yet deliver no greater certainty under the DDA in respect to a potential challenge.

Based on these initial concerns and the detailed comments below, HIA believes that the Protocol should be completely redrafted, with the intended purpose of an Access Panel being specified in the Premises Standard. If this is not possible, then the Protocol should not be adopted.



2.2.1 Building approvals with alternative solutions

Part 3.2 of the Premises Standard explicitly notes that a performance requirement may be satisfied in other ways than the nominated acceptable solutions, so long as that solution is 'not less than the level that the building would have provided'. The use of an alternative solution, in accordance with Part 3.2, should not be viewed as equating to a request for unjustifiable hardship consideration and a lower level of compliance.

A fundamental principle of the BCA is the inclusion of performance requirements and the ability for a building designer to propose an alternative means of compliance using an alternative solution. There is no limitation in either the BCA, or relevant State or Territory legislation, as to what aspect of building design can be addressed using an alternative solution.

HIA supports the continuation of this principle in the Premises Standard. However, in all jurisdictions an alternative solution is determined as part of the building approval by the relevant building certifying authority. Table 1 shows that in a small number of circumstances relating to fire safety, the certifying authority may be required to seek secondary approval (either referral or certification) to provide support for the proposed alternative solution. However, all other alternative solutions under the BCA are determined solely by the relevant building certifying authority. Such a decision is made using the process outlined in the BCA and has been the accepted process for over a decade.

No justification has been established as to why 'building access' provisions of the BCA are more significant and should require a third party approval, when all other requirements of the BCA, many of which relate to life safety and structural adequacy, are not subject to this additional level of scrutiny.

HIA does not consider that an alternative solution for any matter within the Access Code warrants a different assessment mechanism to all other building standards. On this basis, HIA does not believe that the establishment of Access Panels in each State and Territory is an appropriate regulatory response for the assessment of alternative solutions. Access panels will add an unnecessary layer into the decision making process for building approvals.

2.2.2 Building approvals with requests for unjustifiable hardship consideration

In contrast, a request for UH means that a building owner is seeking to achieve less than equivalent compliance with the Premises Standard. On this basis, HIA would not oppose either a concurrence or advisory role by an Access Panel, with the building certifier retaining the final decision on a building approval. However, it is essential that this process be appropriate in terms of both time and cost.

Practically, all States apart from Western Australia, permit private building certifiers to issue building approvals. In all States, it is expected that existing buildings with new work being undertaken will require both development approval and building approval. Therefore HIA contends that the determination of unjustifiable hardship, as part of an application for a new building or new



building work, should be the responsibility of the development consent authority and not the building authority.

The benefits of this approach are that the building owner will not proceed through the costly and time consuming process to obtain a development approval and then potentially be unable to gain building approval due to a request for unjustifiable hardship being declined.

Whilst in no way a streamlined and necessarily cost effective system currently, the planning systems in all States and Territories already incorporate a framework for concurrences or referrals to secondary bodies, consistent with the intention of the Protocol.

Regardless of which approach is taken - concurrence or comment, the Protocol and the Premises Standard need to clarify whether the responses from an Access Panel will be 'binding' and to what extent they protect a building owner from future action. If a decision by an Access Panel on UH is not binding for a building for at least some minimum period of time in the future, then it seems pointless for the building owner to both with gaining endorsement at the time of approval.

If retained for the purposes of unjustifiable hardship determinations, HIA also has concerns regarding the probably make up of an Access Panel and the relevant authority which would oversee such a Panel.

A determination of unjustifiable hardship under the DDA for an existing building requires knowledge of building construction and an understanding of the construction implications of a required alteration, but equally it requires a determination of the potential discrimination on the grounds of building access, that may flow under the DDA.

In this regard, HIA believes that an Access Panel should be established by and answerable to the relevant human rights/equal opportunity agency in each State and Territory. HIA does not believe that this role is a primary function of State and Territory building administrations.

2.2.3 Building upgrade plans

The Protocol refers to *building upgrade plans*, being a plan to upgrade the accessibility of a building over time. The Premises Standard and Guidelines provide no context for these plans.

It is assumed that there are three possible scenarios where a building upgrade plan may be developed:

- voluntary upgrading by a building owner,
- mandatory upgrading requirements as part of an application for unjustifiable hardship as part of a building approval, and
- mandatory upgrading by a consent authority based on their legislative ability to require upgrading of a building (in some States & Territories).

As stated above, HIA believes that an Access Panel may provide a useful mechanism where a determination of UH is required for a mandatory upgrading requirement. However, it must be clear what authority the Access Panel's recommendations have. HIA recommends that the development consent authority take on this responsibility, rather than Access Panel.



Where a voluntary upgrading is proposed, a building owner may seek expert advice in relation to the approach that should be taken. However, if this advice is provided by an Access Panel, it is essential that it is not assumed that the building owner will provide with any of the suggested works.

2.3 Any related matters.

2.3.1 Existing buildings

The application of the Standard will automatically draw a 'line in the sand' for all existing buildings and potential action under the DDA. It is clear from the Premises Standard that it is not intended to apply to existing buildings where no building work is being undertaken. However, the draft Protocol highlights the potential for building upgrade plans to be developed for existing buildings.

HIA recommends that the Government commit to developing further Guidelines for existing buildings and the potential options for voluntary upgrading, situations which may give rise to mandatory upgrading and the ongoing liability of building owners for existing buildings that pre-date the Premises Standard.

2.3.2 Commencement date – align with BCA

As the Premises Standard is reliant on the BCA and a number of Australian Standards that are, or will become, BCA reference standards, it is recommended that the commencement date for the Premises Standard align with the BCA publication date.

This is also considered essential as the Access Code will amend current BCA performance requirements and it would be contrary to good regulatory practice to have two conflicting performance requirements applicable for the same building.



Table 1: Approval process for alternative solutions under the BCA @ 1 January 2009

State	Approval authority for alternative solutions	Reference/concurrence authority for alternative solutions	Appeal Body
Queensland Building Act 1975 & Building Regulation	Building Certifier, (private or council) The Building Certifier has the discretion to request any additional reference information for an alternative solution.	No.	Building Tribunal
NSW Environmental Planning & Assessment Act 1979 & Regulation 2000	Certifying authority – either council or accredited certifier.	Fire engineer must provide a certification to the certifying authority for alternative solutions relating to: (a) a class 9a building that is proposed to have a total floor area of 2,000 square metres or more, and (b) any building (other than a class 9a building) that is proposed to have: (i) a fire compartment with a total floor area of more than 2,000 square metres, or (ii) a total floor area of more than 6,000 square metres, that involves an alternative solution in respect to Performance requirements EP1.4, EP2.1, EP2.2, DP4 and DP5 (BCA Volume 1).	If approved, limited to only matters arising from a breach of the Act by the approval body (if granted by local government). If not approved: <ul style="list-style-type: none"> • by Council – Land & Environment Court • by accredited certifier – no appeal.
ACT Building Act 2004 & Building Regulation 2008	Building certifier determines alternative solutions as part of building approval.	Alternative building solutions for fire protection – Referred to Chief Officer (fire brigade) or Chief Officer (rural fire service)	Administrative Appeals Tribunal for the review of an appealable decision.



Victoria Building Act 1993 & Building Regulation 2006	Relevant building surveyor (RBS)	No.	If not approved by RBS, a request for a modification can be made to Building Appeals Board.
Tasmania Building Act 2000 & Regulation 1994	Building certifier – council or private	Alternative solutions for certain fire safety requirements are required to be reported to the Chief Officer for their operational suitability only.	Building Appeals Board can review a decision not to approve a building permit.
South Australia Development Act & Regulation 1993	Relevant authority – local council or private certifier	An alternative solution may be voluntarily referred to the Building Rules Assessment Committee for advice.	A person may make a complaint regarding potential a building work assessment being non-compliance with the legislation.
Western Australia Local Government (Miscellaneous Provisions) Act 1960 & Building Regulation 1989	Local Govt Building Surveyor	No. However, where an engineering designed is involved, this must be certified by the relevant engineer.	State Administrative Tribunal
Northern Territory Building Act 2005 & Regulation	Building certifier	No.	Building Appeals Board can review a decision.