



22 January 2021

The Hon Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au
Minister for Industry, Science and Technology, The Hon Karen Andrews MP
industrydlo@industry.gov.au

Dear Attorney-General,

Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Incorporation – compliance with Legislation Act and access and use

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act) in relation to the incorporation of external documents. In addition, Senate standing order 23(3)(f) requires the committee to scrutinise each instrument as to whether it, and any document it incorporates, may be freely accessed and used.

The Disability (Access to Premises – Buildings) Amendment Standards 2020 (the instrument) amends the Disability (Access to Premises – Buildings) Standards 2010 to set performance requirements and technical specifications in relation to access and use of buildings for people with disability.

The instrument's explanatory statement explains that the following Australian Standards are incorporated by the instrument:

- Australian Standards 1428.1 (2009 Design for access and mobility, Part 1: General requirements for access—New building work);
- Australian Standards 1428.4.1 (2009 Design for access and mobility, Part 4: Means to assist the orientation of people with vision impairment – Tactile ground surface indicators);
- Australian Standards 1735.12 (1999 Lifts, escalators and moving walks (SAA Lift Code) Facilities for persons with disabilities (incorporating amendment 1)); and
- Australian Standards 2890 (2013 Slip resistance classification of new pedestrian surface materials (incorporating amendment 1)).

However, neither the instrument nor the explanatory statement explains how these standards may be accessed or obtained, and whether they are freely available.

The committee considers that all documents incorporated by reference into the instrument should be freely accessible to all people who wish to access them, including those outside the construction industry such as persons with a disability.

In addition, the instrument also appears to incorporate Volume Three of the National Construction Code (NCC Volume Three). However, the explanatory statement does not clarify whether this document is incorporated as in force from time to time or as existing at a particular date. In addition, although the instrument provides a link to access NCC Volume Three, it is not clear whether this material is freely available.

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement to an instrument that incorporates a document to contain a description of that document, the manner in which it is incorporated, and indicate how it may be obtained. In addition, subsection 14(2) of the *Legislation Act 2003* provides that legislative instruments may not incorporate documents other than provisions of an Act, a Commonwealth disallowable legislative instrument or rules of court as in force from time to time, unless a specific provision in the instrument's authorising Act (or another Act of Parliament) provides that the document can be incorporated in this manner.

In light of the above, the committee requests your advice as to:

- **how the Australian Standards incorporated by this instrument and Volume Three of the National Construction Code (NCC Volume Three) may be obtained free of charge; and**
- **whether NCC Volume Three is incorporated as in force at a particular point in time, or as in force from time to time, and, if so, whether this is authorised by the instrument's enabling Act.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 2 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **5 February 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General

MC21-002304

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
sdlc.sen@aph.gov.au

Dear Chair *Connie,*

Thank you for your letter of 22 January 2021 to the Attorney-General, regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) consideration of the Disability (Access to Premises – Buildings) Amendment Standards 2020. The Attorney-General has referred your correspondence to me for response, as the issues raised fall within my portfolio responsibilities. Please find enclosed a response to the queries posed by the Committee which I trust will be of assistance. An updated Explanatory Statement is being prepared to incorporate this information.

The Attorney-General's Department and the Department of Industry, Science, Energy and Resources also welcome an opportunity to brief the Committee if any further information would be of assistance.

Yours sincerely

Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General

Encl. *Response to* Senate Standing Committee for the Scrutiny of Delegated Legislation's request regarding the *Disability (Access to Premises – Buildings) Amendment Standards 2020*

Response to the Senate Scrutiny of Delegated Legislation Committee

Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245]

Legislative Context

In 2001, the Australian Building Codes Board (ABCB) was asked to develop a proposal for technical requirements which could form the basis of a standard regulating non-discriminatory access to buildings under section 31 of the *Disability Discrimination Act 1992* (DDA). The 2010 explanatory statement to the Premises Standards states that the purpose of the standards was to establish a nationally applicable set of provisions that provide for non-discriminatory access to public buildings for people with disability, bringing together the access requirements under the DDA and building law.

The *Disability (Access to Premises – Buildings) Standards 2010* (Premises Standards) sets out the technical requirements in the Access Code at Schedule 1.

The Access Code is replicated in the access provisions of the National Construction Code (NCC) 2019 Volume One, which is developed by the Australian Building Codes Board (ABCB). The NCC sets out the minimum requirements for design and construction of new building work (including in existing buildings), plumbing and drainage. The NCC is given legal effect by the relevant building, plumbing and related legislation of each State and Territory. This combination ensures there is a consistent approach to disability access to premises across Australia.

The first review of the Premises Standards resulted in the amendments contained in the Disability (Access to Premises – Buildings) Amendment Standards 2020 (Amendment Standards). The review commenced in 2015 with over 350 submissions received, including from people with a disability, carers and advocates. The resulting Amendment Standards include technical amendments to re-align the Premises Standards with technical changes in the NCC and, notably, the addition of new provisions for adult accessible change facilities (AACF). AACFs are sanitary facilities with additional features (i.e. hoists, change tables, grab rails) to assist people with more profound or complex disability who are unable to use standard accessible facilities independently. The Amendment Standards were approved by all relevant State and Territory Ministers.

The DDA does not prescribe any specific order in which the regulatory framework for equitable access to public buildings is to occur. This has meant that changes to the NCC have occurred in advance of changes to the Premises Standards. While many of the changes set out in the Amendment Standards are technical, one important benefit of the Amendment Standards is to ensure regulatory certainty for both the building industry and citizens by aligning (after appropriate public consultation and review) the requirements of the Premises Standards with the NCC.

Question One: how the Australian Standards incorporated by this instrument and Volume Three of the National Construction Code (NCC Volume Three) may be obtained free of charge

The purpose of incorporating Australian Standards

Australian Standards have been incorporated in the Premises Standards since inception. This is because the Australian Standards provide expert technical information to the cohort that the Premises Standards regulate, the building and construction industry. The technical committees that produce these standards are industry-led.

The Premises Standards do not generally mandate compliance with referenced Australian Standards. This is because there are two options available to enable compliance and certification by a building certifier under the Access Code. The first is complying with the ‘Deemed-to-Satisfy’ provisions of the Access Code (see section 3.2 of the Premises Standards). The Deemed-to-Satisfy provisions primarily refer to technical details found in the Australian Standards (see D3.0 of the Access Code). If the relevant

Australian Standard is complied with as per the Deemed-to-Satisfy provision, then the performance requirements of the Access Code are taken to be met. Consequently, use of the referenced Australian Standards by the building profession is a cost-effective solution to achieving compliance with the relevant requirements of the Premises Standards. The second option for compliance is by using Performance or Alternative Solution pathways to meet the performance requirements (see subsections 3.2(2) and (3) of the Premises Standards). This requires pursuing engineer-approved custom performance solutions, which may be more expensive. A combination of these options may also be pursued.

However, there are some provisions in the Premises Standards where mandatory compliance with the relevant Australian Standard is necessary, including to ensure consistent approaches are taken to the issue (for example, clause H2.2(6) of the Premises Standards dealing with manoeuvring areas for wheelchair turns requires mandatory compliance with clause 6.2 of AS 1428.2 on enhanced and additional requirements for access to public transport buildings). A list of the referenced Australian Standards within the Premises Standards and their costs is at Appendix A.

Those required to comply with the Premises Standard (e.g. building certifiers, building developers and building managers) typically use and refer to the relevant Australian Standards in the ordinary course of their business and the costs of accessing the referenced Standards are a business expense.

Public Access to Australian Standards

Non-commercial access to Australian Standards is currently facilitated by some public and some university libraries for personal, domestic and household use. To improve and facilitate access for non-commercial use to the referenced Australian Standards in the Premises Standards, the Department of Industry, Science, Energy and Resources (DISER) proposes to:

- Promote awareness of Australian Standards' availability via public, and some university, libraries on the Premises Standards website landing page within the next 10 business days.
- Encourage consumers who have complex needs or issues to contact DISER to seek advice and assistance to access referenced Australian Standards on a case by case basis. The Premises Standards website landing page would be updated with this information within the next 10 business days.

Whether it remains appropriate to continue to incorporate Australian Standards across the standards made under the DDA is the subject of ongoing consideration, including as part of the legislated 5 yearly reviews of the standards. The second statutory review of the Premises Standards was launched in 2020, with the review expected to be completed in mid-2021. Implementation of the review, including any amendments to the Premises Standards, will occur in the following years.

Feedback received during current consultations in the second review of the Premises Standards indicates that even when consumers do gain access to Australian Standards, they can be challenging to read and interpret because they are designed for a professional audience. Based on this feedback, DISER is examining whether existing guidance material and the complaints resolution processes for breach of the Premises Standards (for example, via state and territory processes) are helpful, nationally consistent and easy to understand and follow. There is an opportunity through the review to assist individuals, businesses and state and territory authorities to avoid non-compliance in the first instance and to better address complaints related to Premises Standards. The review is also seeking to identify, through detailed consultations with stakeholders, further options to improve the quality of existing documentation, accessibility and awareness amongst stakeholders.

There is a substantial amount of guidance material available to assist builders and people living with disability to understand the requirements under the NCC and Premises Standards. Examples of guidance material include:

- The AHRC Guidelines prepared after the Premises Standards came into effect.
- The ABCB Guide to NCC Volume One.
- State and territory building authorities have guidance material available for building professionals that provides information on the building sector and the Premises Standards. Also, many state and territory community outreach departments have information available for people living with disability; for example, the Western Australian Department of Communities.
- The majority of states and territories have Access Panels, staffed by volunteers with expertise in building and disability issues, to assist building professionals to overcome technical problems when trying to comply with the Premises Standards requirements.
- Many local councils also provide guidance on compliance with the Premises Standards.
- The Australian Network on Disability provides a rich resource for both building professionals and consumers on the Premises Standards and other disability standards and issues.

This approach seeks to maintain the immediate benefits of the Amendment Standards, notably including regulatory certainty and the new provisions dealing with AACFs, while also ensuring appropriate access to the Australian Standards while work on long term solutions is being completed.

Further, the Standards Australia Distribution and Licensing Policy Framework (November 2019), has outlined a commitment to make Australian Standards for personal, domestic or household use available at no cost to end users. At this stage, it is anticipated that this type of access will be provided online directly by Standards Australia. Standards Australia has stated that it will fund and make available this access to Australian Standards by no later than December 2023.

Question Two: whether the NCC Volume Three is incorporated as in force at a particular point in time, or as in force from time to time, and, if so, whether this is authorised by the instrument's enabling Act

The reference to 'Part B2 of NCC Volume Three' in subclause F3.5(7) of Schedule 1 of the Amendment Standards is a reference to the relevant part of the National Construction Code 2019 in force at the time the Amendment Standards commenced. By virtue of section 2 of the Amendment Standards, this would be the day after they were registered on the Federal Register of Legislation (30 September 2020).

The DDA does not authorise the incorporation of material 'as in force or existing from time to time', nor do the Amendment Standards reflect such an intention. For example, the definition of 'NCC' in item 5 of Schedule 1 includes a note stating that '[i]n 2020, the National Construction Code could be accessed from www.ncc.abcb.gov.au', and a similar note is included for the reference to 'Part B2 of NCC Volume Three' in subclause F3.5(7) of Schedule 1. This is reinforced by the Explanatory Statement for the Amendment Standards, which says at page 4:

The Premises Standards only requires compliance with the specific editions of Australian Standards referenced in the Access Code. Later and earlier versions of those Australian Standards are not recognised. However, this would not prevent a building owner from complying with newer Australian Standards as an alternative solution, if it would satisfy the performance requirements of the Access Code.

Referenced Australian Standards adopted by Premises Standards

Attachment A

No	Standards	Version	Title	Cost to Purchase via SAI Global (AUD\$) + links
1	AS 1428.1	2009	Design for access and mobility Part 1: <i>General requirements for access - New building work</i>	\$276.57
2	AS 1428.1	2001	Design for access and mobility Part 1: <i>General requirements for access - New building work</i>	\$198.67
3	AS 1428.1 (Supplement 1)	1993	Design for access and mobility Part 1: <i>General requirements for Access - Buildings - Commentary (Supplement to AS 1428.1 - 1993)</i>	\$81.60
4	AS 1428.2	1992	Design for access and mobility Part 2: <i>Enhanced and additional requirements - Buildings and facilities</i>	\$178.22
5	AS 1428.4	1992	Design for access and mobility Part 4: <i>Tactile ground surface indicators for the orientation of people with vision impairment</i>	\$81.60
6	AS/NZS 1428.4.1	2009	Design for access and mobility Part 4.1: <i>Means to assist the orientation of people with vision impairment - Tactile ground surface indicators</i>	\$243.02
7	AS 1735.1	2003	Lifts, escalators and moving walks Part 1: <i>General requirements</i>	\$225.35
8	AS 1735.2	2001	Lifts, escalators and moving walks Part 2: <i>Passenger and goods lifts - Electric</i>	\$299.40
9	AS 1735.3	2002	Lifts, escalators and moving walks Part 3: <i>Passenger and goods lifts - Electrohydraulic</i>	\$225.35
10	AS 1735.7	1998	Lifts, escalators and moving walks Part 7: <i>Stairway lifts</i>	\$58.61
11	AS 1735.8	1986	SAA Lift Code Part 8: <i>Inclined lifts</i>	\$81.60
12	AS 1735.12	1999	Lifts, escalators and moving walks Part 12: <i>Facilities for persons with disabilities</i>	\$116.42
13	AS 1735.14	1998	Lifts, escalators and moving walks Part 14: <i>Low-rise platforms for passengers</i>	\$81.60
14	AS 1735.15	2002	Lifts, escalators, and moving walks Part 15: <i>Low-rise passenger lifts - Non-automatically controlled</i>	\$165.26
15	AS 1735.16	1993	Lifts, escalators and moving walks Part 16: <i>Lifts for persons with limited mobility - Restricted use - Automatically controlled</i>	\$110.91
16	AS/NZS 2890.6	2009	Parking facilities Part 6: <i>Off-street parking for people with disabilities</i>	\$110.32



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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25 February 2021

Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: AMO.DLO@ag.gov.au

Dear Assistant Minister,

Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245]

Thank you for your response of 11 February 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument.

The committee considered your response at its private meeting on 24 February 2021. On the basis of your advice and your undertaking to amend the explanatory statement to the instrument the committee has concluded its examination of the instrument.

In light of this, the committee has resolved to withdraw the disallowance notice in place on the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation