

## Changes to Building Legislation in Tasmania

### Building Legislation (Miscellaneous Amendments) Act 2018

#### What is it for?

The emphasis of this Act is on solving practical problems of administration or interpretation with the new Building Framework Legislation, that have been raised by stakeholders, including councils, industry associations, building surveyors and individual practitioners. In particular, that applies to any issues relating to the approvals of work, or completion of work, including extending the duration of approvals granted. It therefore continues with prior policy decisions behind the current system and does not introduce new requirements, only clarifications of existing provisions or arrangements.

#### What is the timing?

This Act received Royal Assent and commenced on 17 December 2018

#### What legislation does it change?

1. The *Building Act 2016*
2. The *Occupational Licensing Act 2005*
3. The *Building Regulations 2016*
4. The *Occupational Licensing (Building Services Work) Regulations 2016*
5. The *Residential Building Work Contracts and Dispute Resolution Regulations 2016*
6. The *Urban Drainage (General) Regulations 2016*

#### Where can I read the new Act?

On the Tasmanian legislation website [www.legislation.tas.gov.au](http://www.legislation.tas.gov.au)

Amendments it makes to the legislation listed above, have been incorporated into those documents.

#### What are the main issues it addresses?

The table below list the main issues the Act changes, and the stakeholders who had initially raised the matter.

**Changes to the *Building Act 2016*:**

<b>Issue requiring change to <i>Building Act 2016</i></b>	<b>Issue raised by</b>	<b>Sections of 2016 Act affected</b>	<b>(Clauses of amendment Act)</b>
When substantial progress was made on design – it can still be accepted after the law had subsequently changed. Extends coverage of similar laws that have applied since 2004.	Building surveyors	11, 20, 288, 290	5, 6, 45, 46
Clarifies permit extension procedures in the Act. Allows for a permit to be extended, but renewal application must be submitted before expiry date. If renewal application made, permit does not expire prior to the formal renewal being granted.	Councils, building surveyors and owners	99, 110, 122, 146, 147, 172, 173, 196, 197, 262	12, 14, 16, 23, 24, 28, 29, 31, 32, 42, 43
“Old building permits” (granted pre 2012) which were due to expire on 1 January 2019 have been extended to 1 July 2020 Any further extension will require an application for renewal to be submitted	Councils and owners	Schedule 2	49
If no standard of work certificate is available, a certificate of completion can be applied for if work is completed and inspected	Councils, building surveyors and owners	104, 115, 127, 152, 153, 178, 202, 203	13, 15, 17, 25, 26, 30, 33, 34
Role of Function Control Authorities (FCA) their functions and interaction with building surveyors clarified	FCA including the DHHS, building surveyors	98, 134,	10, 11, 18, 19, 20
Director of Building Control may make other Determinations, including on upgrading of existing buildings	CBOS, industry associations, building owners	20, 53	6, 8
Building upgrading is not required if work is only “like for like” repairs	Industry association on behalf of a building owner	53	8
Removes any role for a Permit Authority requiring “further assessments” of performance solutions for building work	Industry associations, building surveyors, councils	141	22
Definition of owner – occupier liable for maintenance and work that they contract for	Solicitor	4, 204	4, 35
Certificate of Likely Compliance (plumbing work) and the Plumbing Permit can be applied for at same time by the owner	Councils	165	27
Maintenance schedule can be created just for “high risk” plumbing work	Councils	206	36
Reference to “premises” instead of a “building” (when serving Building or Plumbing Notices)	Councils	237, 238	37, 38
References to “Prescribed fees” in Act omitted	CBOS	147, 153, 173, 178, 197, 203, 255, 258	24, 26, 29, 30, 32, 34, 40, 41

## Other changes this Act makes to building legislation

### ***Building Regulations 2016***

Provides for a new provision regarding temporary swimming pools (of sizes or types to be determined) – that may be required to have a temporary occupancy permit issued by a building surveyor (section 51).

### ***Occupational Licensing Act 2005 and Occupational Licensing (Building Services Work) Regulations 2016***

These amendments only affect practitioner licensing and owner builder issues:

- i. clarify what work types owner builder permits are granted for. Addresses questions or clarifications sought by owners and building surveyors (who act on behalf of owners in making applications for an owner builder permit) (sections 54 and 64).
- ii. ensures that practitioner licensing decisions (refusing applications) are consistent and based on recognised criteria; this affects CBOS administrative actions in issuing licences (sections 65-67).
- iii. “entity licensing” - clarifies the arrangements when a business organisation needs to apply for a licence in its own right if it will be performing, or contracting for, building services work (section 63).
- iv. abolition of a \$20,000 threshold for Low Risk Work. Instead the Director of Building Control’s Determination on Categories of Building and Plumbing Work determines the types of work and whether persons who can do it need a licence (section 55).

### ***Residential Building Work Contracts and Dispute Resolution Regulations 2016***

- Correct minor numbering mistakes (sections 72-73).

### ***Urban Drainage (General) Regulations 2016***

- Corrects two out-of-date references to the repealed Building Act 2000 (section 75).

## Questions and Answers

(sections number quoted refer to those in the amendment Act)

### **Why are some parts of the retrospective?**

#### ***Section 2***

#### **Key message:**

To allow seamless operation of amendments, some parts of the Act are deemed to have commenced on 1 January 2017.

Some parts of the Act apply retrospectively from when the Building Framework Legislation commenced on 1 January 2017 (the *Building Act 2016* and amendments to the *Occupational Licensing Act 2005* were major parts of that legislative package). This is intended because the Act corrects a number of matters with the operation of the Building Act. In particular with contracts for building work or maintenance (see Section 4 & 35) that provide that the occupier is the responsible party, so that the amendments restore the “status quo” which existed before the commencement of the *Building Act 2016*. Provisions that relate to an offence, or fees, apply from date of the commencement of this Amendment Act.

## **Building Act 2016 amendments**

### **What happens if design work was underway and the law changed?**

**Sections 5, 6, 45, 46**

**Key message:**

An owner does not have to pay for expensive amendments to their plans and suffer delays because a building law changed after design work was underway.

If *substantial progress* was made on a design before the change came into effect, that design could still be accepted after the law had subsequently changed. This concept has been extended to any legal changes including any Director’s Determinations, the National Construction Code (NCC), Building Act and Building Regulations. The term “substantial progress” (of design work) has been used in the Building Act since 2004 and it has not caused any difficulties of interpretation. It is a matter of being more than minor or insignificant progress or application of effort.

### **Is the creation of a “performance solution” for designs affected?**

**Section 7**

**Key message:**

Designs based on performance solutions require details of how they are to be assessed against NCC performance requirements before they can be accepted.

The intent of amendment of section 44 is to provide a clear duty on the designer to provide adequate information that can be assessed as a performance solution, including what method or methods may be appropriately used for an assessment. Allowing inadequate or unclear information will lead to poor decision making and will not encourage designers to develop performance solutions that are actually compliant with the National Construction Code.

### **Why are changes needed for expiry/ extension of approvals? (permits)**

**Section 12, 14, 16, 23, 24, 28, 29, 31, 32, 42, 43**

**Key message:**

Approvals of work have a finite life and if an extension is required, it must be applied for before the permit expires. Failure to extend an approval may remove the owner’s right to build or perform plumbing work.

Consumer Building and Occupational Services (CBOS) has received a number of enquiries about expiry of building permits or Certificates of Likely Compliance for Notifiable Work, and what happens if that occurs. These amendments provide clarity to councils, building surveyors and owners.

- If an extension is required on an approval for work, application must be made at least five days before it expires. If not renewed and allowed to expire, the owner needs to apply for a new permit.
- Making an application allows that permit to continue until the renewal is granted. The building surveyor or permit authority then has seven days to renew the approval.
- The five days is the minimum cut off before an application has to be made for a renewal.
- The Director will also be able to make a Determination that in certain circumstances an expired permit can be accepted. CBOS is working on a draft that will be made available for stakeholder comment. (For example, if the majority of required building work had progressed through most inspection stages and requires only a short extension to enable all work to be completed).

## What about “old” building permits that were transitioned into the new Act?

### Section 49

#### Key message:

An extra 18 months “life” is given to old permits transitioned into the Act – for owners and councils to finalise the many incomplete permits still on council registers.

Some permits granted before 2017 did not have an expiry date. With the introduction of the *Building Act 2016*, an expiry date of 1 January 2019 was set for these permits.

This has now been extended to 1 July 2020. This will allow councils more time to work on a campaign to encourage owners to finish off their projects legally by that date. CBOS will assist councils with a campaign.

As the “life” of a permit will be automatically extended, there is no need for an owner to make an application to the council to extend it.

- Permits that had expired *before* the commencement of the *Building Act 2016* are not affected by this amendment. Owners need to make a new application.
- ‘Old’ permits (i.e. issued after November 2012) that had a specific expiry date, will still expire on that date, even after their transition into the current Building Act.

## Completion of Work / Standard of Work Certificate availability

### Section 13, 15, 17, 25, 26, 30, 33, 34

#### Key message

Owners should not be disadvantaged if a Standard of Work Certificate cannot be produced to enable them to complete their approved work.

## What is the problem? Should contractors withhold that certificate?

The Building Act requires that the responsible person for work (builder, demolisher or plumber) provide the owner with their Standard of Work Certificate and a copy is to accompany application for a Certificate of Completion. However, if that certificate is not available, (for example the responsible person has died or cannot be located) a certificate of completion cannot be applied for. Some councils have rejected applications. Owners are unable to legally complete the work and may later run into difficulties in selling their premises.

The amendments address those situations where the practitioner cannot – or will not – provide a Standard of Work Certificate to the owner. It will only apply when:

- the work (building or plumbing) has been completed.
- there was the opportunity for the work to be inspected by the relevant regulator (building surveyor or council) as evidence of being compliant with the approval.
  - The only missing element is the Standard of Work Certificate from the responsible person.

Where that Standard of Work Certificate cannot be obtained, the Act provides an alternative method, based on an inspection.

A responsible contractor should never withhold the Standard of Work Certificate due to contractual or personal disputes with an owner. If there are disputes between parties, there are other legal means to deal with them (examples are Security of Payment laws, Residential Contracts and Dispute Resolution Act).

## **What are Function Control Authorities (FCA) and what is their role?**

**Section 10, 11, 18, 19, 20**

### **Key message**

These licensing authorities need to be kept informed of proposed building work on types of premises they licence or have control over

FCAs have roles in licensing certain commercial premises (schools, hospitals, meat, shellfish or other primary produce processing facilities, liquor premises) but the detail of Function Control Authorities' activities was left out of the Building Act, although included in the *Building Regulations 2016*. The Act reinstates what was in the previous Act regarding their functions and their interaction with building surveyors – they can comment on a proposed design, as ultimately they will be required to licence it for a particular use.

## **What are Director's Determinations? Why is there a need for more?**

**Section 6, 8**

### **Key message:**

Ability to make binding Determinations is an efficient way to deal with detailed administrative matters that need to be revised from time to time to reflect industry changes.

The Director of Building Control needs the ability to make other "Determinations" for issues such as:

- upgrading buildings where other new work has gone over a threshold figure
- procedures for the rectification of defective work
- "who" can do certain work.

## **Is stakeholder consultation intended to be conducted on any new/ changed Determinations?**

Yes, since 2016 the Director of Building Control has regularly consulted with industry (including advisory Reference Groups) on draft Determinations.

## **Mandatory upgrading of buildings**

**Section 8**

### **Key message:**

Upgrading of existing buildings to current standards can be costly or complex. Industry needs clear guidance on the types of buildings and types of upgrading work that are required.

Section 53 of the Building Act provides that that if an owner alters a building over a certain threshold (volume/ floor area) they are required to upgrade the rest of it to current building standards.

- Director can also make a Determination excluding certain building types from upgrading, as stakeholders have asked for residential houses (Class 1) to be excluded from its operation.
- The Act also clarifies that building upgrading is not required just for "like for like" repairs. This clause is a result of the floods in the Hobart area in May 2018 when repairs were required to many flood damaged buildings.

## **The Certificate of Likely Compliance process and assessing Performance Solutions**

### **Section 22**

#### **Key message:**

Designs based on performance solutions require detail of how they are to be assessed against NCC performance requirements before they can be accepted. That assessment is the statutory role of a building surveyor, not the council.

The council permit authority has no role in requiring “further assessments” of performance solutions for building work. Those clauses have been transferred to the building surveyor’s role in the Act. The building surveyor has to record what they have relied on for assessing that performance solution as National Construction Code compliant.

## **Definitions of “Owner” or “Responsible Owner”**

### **Section 4, 35**

#### **Key message:**

Persons who occupy and control premises they lease also have obligations regarding standards of work and maintenance of essential building services.

Definition of owner changed to reinstate what was in the previous Act – that an occupier/ tenant is responsible for any new building work that they contract for. An occupier with contractual responsibility for building maintenance is legally liable for performing maintenance of the essential building services on their premises

## **Plumbing permit application process**

### **Section 27**

#### **Key message:**

Approval of permit plumbing work can be achieved by making one application.

Some councils suggested that owners have to make two applications for permit plumbing work; first, for a Certificate of Likely Compliance (plumbing work) and then a Plumbing Permit. However, the Building Act was only meant to identify the relevant steps in technical and administrative assessments before granting a permit. The Act clarifies that these processes can be applied for by the owner at the same time in one application and be processed concurrently.

## **Maintenance Schedule of plumbing work/plumbing installations**

### **Section 36**

#### **Key message**

Council permit authorities are provided with the ability to create maintenance schedules for owners where high-risk plumbing work are the only essential building services to be maintained.

The Building Act requires that certain types of plumbing work that need a plumbing permit must be maintained by the owner according to a maintenance plan set by the council permit authority. However, the Act only referred to the building surveyor approving maintenance schedules, but that is not useful where no building work is being performed. The Act allows the permit authority – plumbing to approve such Maintenance Schedules for types of “high Risk” plumbing work.

## **Building/ Plumbing Notices**

### **Section 37, 38**

#### **Key message**

“Premises” is an inclusive term that refers to land and buildings

Reference to plumbing work in a “building” (when giving a plumbing notice) was misinterpreted to mean it excluded plumbing not *in a building* (such as not covering a plumbing blockage in the outside drains). Instead, the broad term of “premises” will be applied to all building or plumbing notices.

## **Appeals by Reporting Authorities**

### **Section 44**

#### **Key message**

Reinstates what was in previous Building Act – the Tasmania Fire Service or an Environmental Health Officer can appeal against a decision of a building surveyor to issue a Certificate of Likely Compliance or an Occupancy Permit.

## **Cause of Action (litigation cut-off date)**

### **Section 47**

#### **Key message:**

Owner now has a right to sue on building work that is “Low Risk” work up to six years after its completion (instead of just two years).

Two years was inconsistent with *Residential Building Work Contracts and Dispute Resolution Act 2016*, whereby builders give statutory warranties of six years, as their warranties would have then been unenforceable after only two years.

## **What is the Court orders issue about? (court of “competent jurisdiction”)**

### **Section 39**

#### **Key message**

Amendment responds to a recent Magistrate’s court decision that found it was not legally able to grant an order sought by a council. That is a potential impediment to the Act’s proper operation.

## **Why are references to “Prescribed fees” omitted?**

### **Section 24, 26, 29, 30, 32, 34, 40, 41**

#### **Key message:**

This amendment will have no impact on local government’s ability to charge any fees for its services.

The Local Government Act covers charging of fees for services – there is no need to mention them in the Building Act, and there are no “prescribed fees” in the *Building Regulations 2016*.



## Other Building legislation amended

### Building Regulations 2016

#### Section 51 Temporary swimming pools

**Key message:**

Provides for a provision regarding temporary swimming pools (of size or type to be determined) – that may be required to have a temporary occupancy permit issued by a building surveyor.

- Changes to pool design and construction technology have seen ever-larger portable and inflatable pools and spas on the market. By prescribing them as “temporary structures”, this provision allows a temporary occupancy permit to be required for a temporary pool, and its barrier, as structures covered by that permit.
- For permanent pools, the current requirements of the Director’s Determination of Categories of Building and Demolition Work applies.

## Occupational Licensing Act 2005 and Regulations – (licensing only)

### Owner Builder changes

#### Sections 54, 64

**Key message:**

A Determination for Owner Builder Permit applications will make the process be made clearer and easier to administer, especially for building large non-habitable structures.

Allows the Administrator of Occupational Licensing to make a binding Determination of:

- The classes/ types of buildings which can be built by an Owner Builder e.g.
  - Class 1a dwelling (single house or unit)
  - Class 10 non-habitable buildings (shed/ garage) larger than allowed as Low Risk Work
  - Class 8 non-habitable farm sheds.
- The amended regulations will allow for an application fee for sheds – at half the fee of building a house.
- Class 7b Farm Sheds are exempt from requiring an owner builder permit.

#### **New Determination available**

A new [Owner Builder Permit Determination 2018](#) has been approved by the Administrator of Occupational Licensing which is available from [www.cbos.tas.gov.au](http://www.cbos.tas.gov.au)

### Licence applications /refusals

#### Sections 65, 66, 67

**Key message:**

Decisions by the Administrator regarding refusing *any type of occupational licence* (not just for Building Services Providers) will be consistent and are based on clearly understood criteria.

The following applies to contractors, but similar provisions will apply to licence applications for all practitioners or building services providers: -

“The Administrator may refuse the application for any reason the Administrator considers appropriate, including but not limited to any one or more of the following reasons:

- (i) the applicant is not a fit and proper person;
- (ii) the applicant does not have the qualifications, experience or competence to perform the functions of, or carry out the work of, a contractor as appropriate for the occupation and class of the licence being sought by the applicant;
- (iii) there are not satisfactory arrangements in place, including the suitability of the nominated manager for the applicant, as to the supervision of the applicant in his or her role as a contractor;
- (iv) the applicant does not, or is not likely to have, a sound and stable financial background;
- (v) the applicant is not, or is not likely to be, covered by the insurance required under section 27;
- (vi) the applicant does not satisfy, or is not likely to satisfy, any applicable requirement of a determination under section 31 or any prescribed requirement;
- (vii) the applicant has previously had a licence, or similar accreditation as a contractor, refused, suspended or cancelled, in Tasmania or in another State or a Territory.

## “Entity Licensing” issue (option for licensing of organisations)

### Sections 59, 63

#### Key message:

An “entity licence” is an option, and not mandatory. Therefore, current licensees operating as a business organisation do not have to apply before the end of 2018 for that type of licence.

An amendment clarifies that the new Entity Licence for building services providers, introduced in 2017, does not have to be applied for, if a building organisation is already associated with an individual’s licence allowing them to perform work. This is similar to licensing arrangements that applied since building practitioner licensing started in 2004. This clarification is applied by two new licence exemptions in section 22A(2) of the *Occupational Licensing Act 2005*.

## \$20,000 threshold for Low Risk Work removed

### Section 55

#### Key message:

Persons carrying out building work in Tasmania will always need a licence as a building services provider – unless they are only doing the minor types of work in Category 1, or are eligible to be an owner builder.

This monetary threshold is abolished as it had been wrongly interpreted as meaning any work below that amount did not need to be performed by a licensed person, or else that work over that amount always needs a licensed builder. Instead, the Director of Building Control’s Determination on Categories of Building and Plumbing Work governs that types of work and who can do it.

1. (Category 3 & 4) - All Permit and Notifiable building work = licensed persons only
2. (Category 2) Low Risk Work = only a licensed builder can construct it
3. (Category 1) Low Risk Work by an owner or a competent person = no licensing of these persons is required.

#### Does this change affect building contracts over \$20,000?

No – it has no impact on current requirements for entering of contracts for Residential Work that require a written contract and giving the consumer guide, cooling off period etc.

## **Why are Demerit points in the Licensing Act abolished?**

**Sections 68, 69, 70**

**Key message:**

This change does not affect licensees. Demerit points have never been used in practice.

A concern by industry was that with new laws and new requirements, small transgressions could lead to points accumulation and an automatic loss of licence, with the loss of livelihood. The provision had also never been applied in practice. Therefore the demerit points sections will be repealed.

## **Residential Building Work Contracts and Dispute Resolution Regulations 2016**

**Sections 72, 73**

**Key message:**

Corrects numbering mistakes in some references to the Principal Act

## Urban Drainage (General) Regulations 2016

### Section 75

**Key message:**

Corrects two out of date references to the repealed *Building Act 2000*

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