

Building Regulation 2021

Explanatory notes for SL 2021 No.126

made under the

Building Act 1975

Fire and Emergency Services Act 1990

Major Sports Facilities Act 2001

Planning Act 2016

Queensland Building and Construction Commission Act 1991

State Penalties Enforcement Act 1999

General Outline

Short title

Building Regulation 2021

Authorising law

Section 261 of the *Building Act 1975*

Section 154E of the *Fire and Emergency Services Act 1990*

Section 33 of the *Major Sports Facilities Act 2001*

Section 284 of the *Planning Act 2016*

Section 116 of the *Queensland Building and Construction Commission Act 1991*

Section 165 of the *State Penalties Enforcement Act 1999*

Policy objectives and the reasons for them

The policy objective of the *Building Regulation 2021* is to remake the *Building Regulation 2006* which will expire on 31 August 2021, under section 54 of the *Statutory Instruments Act 1992*.

Section 54 of the *Statutory Instruments Act 1992* states subordinate legislation expires on 1 September first occurring after the tenth anniversary of the day of its making, unless it is sooner repealed or expires, or a regulation is made exempting it from expiry.

The *Building Regulation 2006* commenced in 2006 and has been exempted from expiry since 2016 as the *Building Act 1975* (Building Act) was undergoing review as a part of the *Building Industry Fairness (Security of Payment) Act 2017*, *Building Industry Fairness and Other Legislative Amendments Act 2020* and certification reforms being progressed through the Queensland Building Plan. Further the COVID 19 pandemic delayed the progress of the *Building Regulation 2006* remake.

On 20 August 2020, the *Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2020* (the Extension Regulation) exempt the *Building Regulation 2006* from expiry until 31 August 2021 and it is proposed to remake the regulation before it expires.

The Building Regulation will continue to support the objectives of the Building Act and prescribe, among other things, matters relating to:

- building work regulated under the Act
- the occupation of buildings
- the performance of building certifying functions and private certifying functions
- the licensing of building certifiers
- the performance of pool safety inspection functions
- the licensing of pool safety inspectors
- the fees payable under the Act
- flammable and combustible liquids
- the records required for this Act
- fixing a penalty for an offence against a regulation (including different penalties for successive offences against a regulation) of a fine of not more than 165 penalty units.

Achievement of policy objectives

The *Building Regulation 2021* will commence on 1 September 2021 and is proposed to continue to support the objectives of the Building Act.

The *Building Regulation 2021* generally preserves the matters prescribed through the *Building Regulation 2006*, except for the following changes to:

- consider human rights in line with the *Human Rights Act 2019*
- renumber sections
- reorder parts of the regulation to improve useability
- make administrative and drafting style updates
- make clarifying amendments
- remove redundant transitional provisions
- provide for necessary transitional arrangements, including for the administration of the obligations for private building owners to complete the combustible cladding checklist under the *Building Regulation 2006* to ensure fire safety for building occupants
- increase the maximum penalty for giving false or misleading documents/certificates from 20 penalty units to 100 penalty units, to strengthen the certification inspection framework
- enhance the integrity of documents relied on by the certifier to certify a building meets all the necessary requirements by aligning the level of accountability with the seriousness of the offence
- splitting one offence provision for record keeping into two to improve compliance
- restate the delegated legislated powers for a local government to manage any fire prone areas, areas with flood risks and simple building work in their local areas that are remote
- make consequential amendments to other legislation where necessary, including consequential amendments to the *State Penalties Enforcement Regulation 2014* to prescribe infringement notice offences.

Part 8, Division 1, Subdivision 3 (Carrying out inspections)

Part 8, Division 1, Subdivision 3 (Carrying out inspections) of the *Building Regulation 2021* clarifies the process and enforcement responsibilities regarding the issuing of a noncompliance notice for a stage of work that fails to comply with a building development approval.

Part 6, Division 1, Subdivision 3 (Carrying out inspections) of the *Building Regulation 2006* provides that either the building certifier or a competent person (who is assessed and appointed by the building certifier to give inspection help) must give a noncompliance notice to the builder requiring the builder to rectify the work. If the builder fails to rectify the work the subject of the notice, the building certifier (not the competent person) must take enforcement action against the builder, except when the notice is issued by the competent person and the building certifier disagrees with the notice.

While a builder has appeal rights when a notice is issued by the building certifier, no appeal rights exist where a notice is issued by a competent person.

Section 48 of the Building Act reflects the policy that the building certifier, as the accountable person for the certification of a building, be the enforcement authority until they issue the final certificate or certificate of occupancy for the building. The policy intent however is unclear in the *Building Regulation 2006*.

The *Building Regulation 2021* will clarify that while a competent person can give inspection help to the building certifier, it is a building certifier's responsibility to issue the noncompliance notice and take the relevant enforcement action. This approach is also consistent with the appeal rights under the *Planning Act 2016*, where an appeal to the Development Tribunal can only be made against a decision made by a building certifier about the inspection of building work for a building development approval under the Building Act.

Section 36 (Building certifier's obligation to keep record of decision)

A building certifier commits an offence under section 19 of the *Building Regulation 2006* if they fail to keep records containing the information they relied on in making a decision to appoint an individual as a competent person to give design/specification or inspection help. These records must be kept for at least seven years. The provision prescribes the information that must be contained in the records, however, fails to distinguish between the act of keeping records and the act of ensuring the records contain the correct information. These two actions are different and should be treated as such to reflect the degree of conscious decision making when failing to fulfill the requirement. For example, a person who deliberately fails to keep any records is more reckless than a person who may omit one aspect of information.

Section 36 of the *Building Regulation 2021* separates the two distinct actions of keeping records and ensuring the records comprise the relevant information into two offence provisions. One offence (section 36(1)) for failing to keep the records that contain the prescribed information and a separate offence (section 36(2)) for failing to keep records for seven years. Both offence provisions will carry a maximum penalty of 20 penalty units consistent with the current offence provision.

The splitting of the offence provision encourages open and transparent decision making when appointing a competent person and will help maintain integrity in the certification and inspection process.

Section 40 (Competent person must not give false or misleading documents)

It is critical the building certifiers have confidence that the information and documentation provided to them is accurate, as it is used to inform compliance of building work with the building development approval.

Under section 23 of the *Building Regulation 2006* it is an offence for a person to give a certifier a document or certificate that the person knows is false or misleading (maximum penalty - 20 penalty units).

The offence provision is intended to act as a deterrent for individuals acting recklessly or deliberately in a way that could undermine the certification process and potentially endanger health and safety. However, the difficulty in prosecuting a person for this offence is proving the level of culpability and is such that it has rendered the provision ineffective.

Section 40 of the *Building Regulation 2021* will maintain the intent of the offence provision, however, rather than requiring proof that the person knew the document or certificate was false or misleading, it will suffice to prove that the person knew or reasonably suspected the document or certificate was false or misleading. This amendment is consistent with other statutory bodies for this type of offence provision including the *Queensland Building and Construction Commission Act 1991*. This change will improve confidence in the integrity of the inspection and certification process.

Under section 261 of the Building Act a regulation may make a provision fixing a penalty for an offence against a regulation of a fine of not more than 165 penalty units.

In recognition of the seriousness of the offence and for consistency with other statutory bodies for this type of offence, the *Building Regulation 2021* increases the maximum penalty, for committing an offence under section 40, from 20 to 100 penalty units. This penalty increase aligns the maximum penalty with similar offence provisions under the *Plumbing and Drainage Act 2018* and *Queensland Building and Construction Commission Act 1991*.

Section 71 (section 45 *Building Regulation 2006*) applies to Queensland Building and Construction Commission (QBCC) licensees and is the same offence as that applied to competent persons under section 40 of the *Building Regulation 2021*. Consistent with the maximum penalty increase in section 40, the maximum penalty for section 71 has been increased from 20 to 100 penalty units.

Transitional arrangements for private building owners to complete the combustible cladding checklist

In 2018 the *Building and Other Legislation (Cladding) Amendment Regulation 2018* (Cladding Regulation) introduced a process (combustible cladding checklist) to determine the extent of the use of potentially combustible cladding on private buildings in Queensland and raise awareness about the risks associated with potentially combustible cladding.

The Cladding Regulation compelled owners of buildings considered 'in-scope' to complete an online checklist to identify which buildings are affected by combustible cladding.

The Cladding Regulation did this by establishing a three-stage process, managed through an online system, for building owners to identify whether their building has combustible cladding.

- Part 1 - register and answer generic questions about the building by 29 March 2019.
- Part 2 - engage a building industry professional to answer technical questions by 31 July 2019.
- Part 3 - engage a fire engineer to prepare a building fire safety risk assessment by 3 May 2021

Further amendments were made to the process through the *Building and Other Legislation Amendment Regulation 2019*, including the ability to re-submit checklist parts and a

requirement for Fire Engineers to notify building owners and the QBCC when the Fire Engineer reasonably believes that a building will require fire risk mitigation measures.

Even though the deadline of 3 May 2021 for completing the process has passed, building owners that have not completed the process still have an obligation to complete the checklist under section 16X of the *Building Regulation 2006* or face penalties for not doing so.

Transitional provisions (section 95 and 96 specifically) have been included to preserve requirements under the expired provisions. This also provides that a proceeding against an offence under the expired Part 4A of the *Building Regulation 2006* may be commenced after the expiry. It is also important that building owners continue to maintain these obligations, including:

- keeping of records
- display of affected building notices
- QBCC ability to replace a checklist

For example, the keeping of the completed checklist submitted as part of the combustible cladding checklist process in Part 1 or the engagement of a building industry professional in Part 2 is very important. The repealed provisions also required the building owner to keep these with the fire safety plans required under the *Building Fire Safety Regulation 2008*. Inadequate or poor record keeping was a key reason for establishing the combustible cladding checklist process and it is important that this information is preserved for future use.

Miscellaneous minor amendments

A building certifier's functions are prescribed under the Building Act and involve assessing building development application and issuing the building development approval. The building certifier is responsible for certifying that building work complies with the building development approval, which states what inspections are required and at what stages of construction they are required.

Section 35 of the *Building Regulation 2021* (section 18A of the *Building Regulation 2006*) prescribes stages of assessable building work that must be inspected. The provision clarifies for a single detached class 1a building a stage of work for a footing system includes all types of footing including a slab.

Section 46 of the *Building Regulation 2021* (section 21 of the *Building Regulation 2006*) clarifies that a relevant building certifier is not required to appoint another building certifier as a competent person to enable them to sign a compliance certificate for particular mandatory stages of work for detached Class 1a (houses) or class 10 buildings (sheds) or structures (decks).

Section 70 of the *Building Regulation 2021* (sections 43 and 44 of the *Building Regulation 2006*) clarifies that a QBCC licensee can give the appointed competent person as well as the building certifier an aspect inspection certificate for an aspect of work for a single detached class 1a building (i.e. house) or a class 10 building (i.e. garage) or structure (i.e. deck). An aspect inspection certificate states an aspect of work complies with the building development approval. This clarification reflects contemporary industry practice.

Section 3, Schedule 1 of the *Building Regulation 2021* (section 3, Schedule 1 of the *Building Regulation 2006*) replaces the term 'natural ground surface' with the newly defined term "finished ground level". This amendment clarifies when a retaining wall can be constructed without a building development approval. Consistent with the National Construction Code the

newly defined term also provides that the final height of a 1 meter retaining wall does not include the footing.

In Schedule 1, section 9 of the *Building Regulation 2021* (section 9, Schedule 1 of the *Building Regulation 2006*) a smoke detector has been added as an example of what is considered to be a minor component of a fire safety system for the purposes of the section.

Consequential amendments

The *Building Regulation 2021* makes minor consequential amendments that replaces reference to the *Building Regulation 2006* with the new *Building Regulation 2021* in the following regulations:

- *Building Fire Safety Regulation 2008* (sections 104 -106)
- *Major Sports Facilities Regulation 2014* (sections 107,108)
- *Planning Regulation 2017* (sections 109-111)
- *Queensland Building and Construction Commission Regulation 2018* (sections 112-114)
- *State Penalties Enforcement Regulation 2014* (sections 115,116)

Consistency with policy objectives of authorising law

The *Building Regulation 2021* is consistent with the policy objectives of the Building Act.

Inconsistency with policy objectives of other legislation

The *Building Regulation 2021* is consistent with the policy objectives of other legislation in Queensland.

Alternative ways of achieving policy objectives

The policy objectives can only be achieved by making the *Building Regulation 2021* to replace the *Building Regulation 2006* before it expires on 31 August 2021.

Benefits and costs of implementation

The *Building Regulation 2021* will provide greater clarity to building certifiers, builders and building owners on the existing policy objectives relating to building matters. The matters prescribed in the regulation support and implement the objectives of the Building Act and ensure buildings constructed in Queensland are safe and fit-for-purpose for occupants.

There are no additional costs associated with commencing the *Building Regulation 2021*.

Consistency with fundamental legislative principles

Although most provisions of the *Building Regulation 2021* are consistent with fundamental legislative principles (FLPs) under the *Legislative Standards Act 1992*, a number of provisions potentially breach FLPs. Details of the potential breaches and the reasons for them are set out below.

Sections 40 and 71 – offence provisions

It is an FLP that legislation has sufficient regard to the rights and liberties of individuals. In considering whether legislation has sufficient regard to the rights and liberties of individuals, consideration must be given to the penalties imposed for the offences to ensure they are proportionate and relevant to the act or omission constituting the offence. A penalty should be proportionate to the offence. Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Also, penalties in legislation should be consistent with one another.

Building certifiers rely on other competent or QBCC licensed individuals to determine whether building work complies with a building development approval. It is with this information that the building certifier certifies that a building meets the relevant standards and codes and is safe to occupy. Therefore, it is critical that the information and documentation provided to them is accurate and reliable.

Under section 23 and 45 of the *Building Regulation 2006* it is an offence for a competent person or QBCC licensee to give a certifier a document or certificate that the person knows is false or misleading (maximum penalty for each offence - 20 penalty units).

These offence provisions are intended to act as a deterrent for individuals acting recklessly or deliberately in a way that could undermine the certification and inspection process and potentially endanger health and safety of individuals.

Sections 40 and 71 of the *Building Regulation 2021* preserve the objectives of sections 23 and 45 of the *Building Regulation 2006* respectively, while increasing the maximum penalty for each offence from 20 to 100 penalty units and changing the level of culpability.

The two offence provisions, as drafted in the *Building Regulation 2006* are ineffective because proving the level of culpability is extremely problematic. The consequences of the actions arising from the offence are serious and significant, potentially fatal.

It is not in the public interest to have offence provisions that cannot be enforced due to the need to prove a person knew (as opposed to reasonably suspected) that the documents that they had completed or provided were false or misleading. Therefore, on balance it is considered appropriate and proportionate to the seriousness of the offences to prove that the person knew or reasonably suspected the document or certificate was false or misleading.

Also, the maximum penalty for each of the offence provisions under the *Building Regulation 2006* is not proportionate to the potential serious consequences of the offence. In addition, the maximum penalties do not act as a deterrent for reckless or deliberately dishonest behaviour. The increased penalty values for sections 40 and 71 are more proportionate to the seriousness of each offence and are likely to act as a deterrent for dishonest behaviour that potentially endangers lives. Further, the increased penalty values are consistent with similar offence provisions in the *Plumbing and Drainage Act 2018* (section 84 - 100 penalty units) and the *Queensland Building and Construction Commission Act 1991* (section 53B - 100 penalty units or 2 years imprisonment).

These amendments will improve confidence in the integrity of the inspection and certification process.

Sections 7, 8 and 45 – subdelegation of legislative power

It is an FLP that that legislation has sufficient regard to the institution of Parliament. Section 4(5)(e) of the *Legislative Standards Act 1992* provides that subordinate legislation should allow the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act. The principle may be infringed by subordinate legislation that authorises a person or entity other than Parliament to decide the content of the subordinate legislation. The principle is related to a concern to ensure sufficient parliamentary scrutiny of a delegated legislative power and the exercise of delegated legislative power. Matters that are relevant to determining whether the principle is infringed in a particular case include the importance of the subject matter and practicalities in dealing with the subject matter entirely in subordinate legislation.

Sections 7 and 8

Section 7 of the *Building Regulation 2021* restates the subdelegated legislative power in section 12 of the *Building Regulation 2006* for a local government to designate, under a local planning scheme, a bush fire prone area for all or part of its local government area for the purposes of the Building Code of Australia or the Queensland Development Code (QDC). Once an area is designated, the relevant fire safety provisions and standards applicable to the construction of dwellings apply. Subdelegating legislative power to a local government promotes the safety of building occupants who live in areas prone to bushfires.

Section 8 of the *Building Regulation 2021* restates the subdelegated legislative power in section 13 of the *Building Regulation 2006* for a local government to designate, in a local planning instrument, all or part of its local government area as a flood hazard area. The power also allows the local government to declare certain matters for a flood hazard area, including the defined flood level for the area. A particular part of the QDC named *MP 3.5 – Construction of Buildings in Flood Hazard Areas* applies to the carrying out of building work within a flood hazard area. That part of the QDC is intended to ensure particular buildings located in flood hazard areas resist flotation or collapse, and safeguards occupants against illness or injury caused by flood water affecting buildings. Section 8 allows local governments to address local flood risks by ensuring the safeguards mentioned are provided.

The importance of the subject matter of the subdelegations of legislative power in sections 7 and 8 is indisputable. Also, as parts of local government areas that are prone to bush fires or floods can change frequently, it is considered that it would be impractical for the designation of those areas to be dealt with entirely in subordinate legislation. In addition, it is considered that it is appropriate for local governments to exercise the power as they are government entities and are well placed to exercise the power for their local government areas. For these reasons, it is considered that to the extent that sections 7 and 8 breach FLPs, the breach is justifiable.

Section 45

Assessable building work is usually required to be inspected at each stage of the work. However, section 45 of the *Building Regulation 2021* restates the subdelegated legislative power in section 25 of the *Building Regulation 2006* for a local government to declare, by resolution, a locality or type of building or structure in the locality exempt from inspection at a stage of assessable building work if the work is for a single detached class 1a building (a detached house) or a class 10 building or structure (a garage, carport or shed) and is not for a swimming pool. The resolution may only be made if the local government is satisfied the exemption will not adversely affect public safety. Once the resolution is made, the relevant

building certifier need not inspect the relevant stage of the work but must inspect the work at all of the other stages of the work.

Section 45 supports local governments in adjusting their inspection requirements, so they are appropriate for their local government areas. This is particularly important for remote or rural areas within their local government areas because there is a shortage of inspectors who can carry out inspections of work in remote areas. Section 45 allows a local government to have the flexibility to change particular inspection requirements for houses and garages in remote areas according to the availability of inspectors, provided that those changes do not compromise public safety.

Given issues associated with carrying out inspections in remote areas, it is considered that the subject matter of the subdelegated legislative power is important. Also, given that the availability of inspectors in remote areas fluctuates, it is considered that it would be impractical for the exemptions provided for in section 45 to be dealt with entirely in subordinate legislation. In addition, it is considered that it is appropriate for local governments to exercise the power as they are government entities and are well placed to exercise the power for their local government areas. For these reasons, it is considered that to the extent that section 45 breaches FLPs, the breach is justifiable.

Consultation

Consultation about the remaking of the *Building Regulation 2006* occurred in early 2020 and further consultation on the *Building Regulation 2021* was held in 2021.

The consultation sessions were attended by members of the Ministerial Construction Council comprising representatives from peak industry and professional bodies including:

- Australian Institute of Building Surveyors
- Royal Institute of Chartered Surveyors
- Master Builders Queensland
- Housing Industry Association
- Local Government Association of Queensland; and
- Queensland Building and Construction Commission.

Individual local governments, the independent building certifier forum, the Board of Architects of Queensland and the Board of Professional Engineers also participated in a line by line review of the *Building Regulation 2006*.

All parties consulted raised no objections to the proposed remake of the *Building Regulation 2006* including other minor and consequential amendments in the *Building Regulation 2021*.

The Office of Best Practice Regulation was consulted about the *Building Regulation 2021* and advised that the objectives for sunset reviews set out in the *Queensland Government Guide to Better Regulation* have been met, and no further regulatory impact analysis is required.