



Regional demographic variations as the basis of BCA concessions

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Are regional demographic variations legitimate bases of concessions under the Building Code of Australia? To what extent are demographic variations relevant to the Code demonstrable? What is the appropriate procedure for obtaining concessions under the Code related to demographic variations, and what is the appropriate justification for them?

These questions are discussed in relation to a proposed remote area hostel and the number of wheelchair accessible sanitary facilities required for it by the Building Code.

The proposal

A hostel is proposed to be constructed in a remote mining township. The development will consist of almost one hundred and fifty sole occupancy units (SOUs) comprised of a bedroom and a bathroom each. The hostel is a Class 3 building under the Building Code of Australia (BCA). Under BCA Clause D3.2, six of the units are required to be accessible, that is, to include among other features a wheelchair accessible sanitary facility.

The provision of six wheelchair accessible sanitary facilities poses a problem for the developer. Consequently, dispensation is being sought from the BCA requirements to enable only two units that have a wheelchair accessible sanitary facility.

The developer contends that the lesser provision is reasonable because the residents will be predominantly mining employees and therefore not representative of the public generally (upon which basis the BCA is presumably predicated). The underlying contention is that there will be a lesser proportion of the resident population than of the national population who have a disability and that requires a wheelchair accessible sanitary facility.

In effect, a concession is being sought on the basis of a demographic factor, namely, the difference between the proportion of the town population with a disability and the proportion of the national population with a disability¹.

The building certifier for the development has proposed that a concession be allowed under the BCA by means of an Alternative Solution in terms of performance requirement FP2.1. FP2.1 stipulates that suitable sanitary facilities must be provided to the 'degree necessary' and 'appropriate to the function or use of the building' and of 'the disability or other particular needs of the occupants'.

Regional demographic variations as basis of avoidance

The BCA provides not only for the health, safety and amenity for building occupants, but also nominates the proportion of occupants for whom health, safety and amenity

¹ The town population here denotes not only the permanent residents, but also short-term residents and visitors to the town.

must be provided. Hence, not only should sanitary facilities be provided in appropriate forms and locations but they should be provided in sufficient numbers. More particularly, there should be sufficient suitable sanitary facilities for a particular class of the population – people with disabilities.

Obviously, demographic assumptions have been made for the BCA about population proportions, including that of persons with a disability. However, there is no indication in the BCA or the BCA Guide¹ that the proportions are other than national ones nor specifically that regional population characteristics are within the ambit of the BCA. In other words, the BCA is silent about regional population proportions and it is therefore unclear whether demographic difference is a legitimate basis for concessions.

Can a regional demographic variance be adequately established?

For the proposed development, the six fully accessible units required by the BCA represents just over 4% of all units (compared with the proposed proportion of 1.4%). A cursory review of the 2003 Australian population census indicates that less than 1% of the population uses a wheelchair or scooterⁱⁱ. However, there are other people with a disability who may not use a wheelchair or scooter but who require assistance in toileting and showering and for which adequate space for two people therefore needs to be provided in sanitary facilities.

The 2003 census figures indicate that approximately 2.4% of the population requires assistance in self care, which proportion does not necessarily include all people who use wheelchairs or scooters. In other words, if the number of wheelchair users who do not require assistance is added to the number of people who do require assistance (regardless of whether they are wheelchair users), the proportion could be higher. These figures include people aged 60 years and over. The published census data does not provide a correlation between occupational status, mobility aid use and need for assistance with self care. This data is probably be available, but the Australian Bureau of Statistics would need to be commissioned to provide it.

On the basis of the above figures, at least approximately 2% of the population, discounting persons aged sixty years or over, might require a large sanitary facility, considerably less than the 4% required for this development under the BCA, although more than the proportion of 2 in 144, or 1.4%, that is desired for this development. However, if labour market participation rates were also taken into account, as would be relevant to an exclusively mining employee occupancy, the proportion might be closer to 1.4 % than to 2%.

A factor that may have been considered by the BCA in setting a proportion for accessible units that appears greater than warranted by the demographic data is that larger than normal congregations of people in Cass 3 buildings may occur for occasions such as training courses and conferences and for which associated accommodation is required. This would therefore be applicable at least to hotels and the like that offer conference facilities. On the other hand, for accommodation such as this proposed hostel that apparently offers no meeting or conference facilities, the “inflated” proportion of accessible units would not be relevant².

The demographic data or other rationale for the proportions of accessible SOUs, and

² The hostel might not be currently intended as a training or conference venue. However, it is similar to university hostels and these are often used as the residential accompaniment of training courses and the like. The proposed hostel discussed here appears to lend itself readily to the same sort of role.

therefore accessible sanitary facilities, required by the BCA appears to be unavailable and it is possible that it is based on anecdotal evidence and argumentation rather than firm data. This does not necessarily render the proportions incorrect, but it does frustrate establishing the validity of different proportions such as those listed above³.

Without detailed information underpinning the BCA's assumptions and rationale and without more detailed census data, the demographic analysis presented here should be treated very tentatively.

Current, latent and future occupancy rates

An inherent problem in considering possible currently low rates of occupancy and use of buildings and facilities, and residency and visitation to townships, is that the rates might be depressed by the inaccessibility of facilities. The current town population and demand for accessible accommodation in it might not therefore match latent demand.

One reason why people with disabilities would tend to be under-represented in remote area town populations is lack of medical and hospital facilities. However, the township for this hostel has a well-established hospital with a broad range of associated health support services. Under-representation of people with disabilities might therefore not be as great in this township as in other remote townships that have no hospital and allied services.

Procedures for achieving dispensation under the BCA

Generally, four procedures for achieving concessions under the BCA can be identified:- adopting the concessionary part of a deemed-to-satisfy (DtS) clause, developing an alternative solution, lodging an objection and applying for clarification.

Clause concession

The relevant DtS clause in this matter is D3.4 and a concession is in Sub-clause (d). It excuses the provision of access by people with disabilities to areas if the purpose of the areas renders such access inappropriate. However, the distinction being made for the concession appears unrelated to demographic differences. That is, "purpose" refers to the kind of activity in the area, not the kind of occupant or, in other words, the purpose is personal hygiene, not personal hygiene for persons with a disability compared with persons without a disability. In any case, personal hygiene is not the activity relevant to D3.4 (d) according to the BCA Guide which describes the clause as being applicable to areas other than sanitary facilities.

Alternative solution

An alternative solution (AS) is satisfaction of a BCA performance requirement differently to its DtS exemplar¹.

The developer's building certifier believes that an AS is appropriate because sanitary accommodation that satisfies FP2.1 can be satisfactorily provided by a proportion different to the DtS proportion. The difference upon which the AS would be based is therefore not with respect to the form or method of achieving the form of the built solution but with respect to the demographic assumptions of the BCA⁴.

³ It also frustrates the very performance based approach that is the BCA's hallmark.

⁴ The demographic factor at issue here is the regional difference in the proportion of a class of the national population, not a difference in the proportion of occupants for whom sanitary facilities are required for the various BCA classes of occupancy

That demographic factors are legitimate bases of an AS is doubtful. The predominant wording of the BCA and the BCA Guide, and of numerous references that can be found to them typically allude to the form of or methods for achieving a built solution as being the basis of AS. Nevertheless, BCA Clause A0.9 states that a building design can be the basis of assessment of an alternative solution. The term “design” has a number of meanings including, in this context, the form or composition of a building, or the idea behind it. The BCA is not directed at the act of designing and so, presumably, the first two meanings are the intended ones. Hence, sanitary facilities must not only be constructed appropriately, they must also include certain features, and there must be sufficient of the sanitary facilities.

There is nothing in these interpretations that suggest that regional demographic variations are allowable bases for an AS.

Some confusion about the BCA intended meaning of “design” is caused by the explanation by the Australian Building Codes Board (ABCB) of the BCA’s performance hierarchy. The ABCB states that ‘design factors’ may be the basis of an ASⁱⁱⁱ. A regional demographic variation is a design factor and, on the basis of the ABCB’s explanation, it would therefore be a legitimate basis for an AS⁵. However, the ABCB’s explanation is part of a general commentary on the development of the BCA and does not have the same authority as the BCA Guide or the BCA itself.

Lodging an objection

Seeking a concession in the required number of accessible units might require lodging an objection to a BCA provision which, in this case, would be on the basis that the BCA requirement is too stringent and that relaxation of it is desired^{iv}. Such relaxation requires application under State Acts that empower the BCA.

The benefit of this procedure is that it removes doubt about the validity of an AS and risk for the building certifier in invalidly developing an AS.

There may be considerable disinclination on the part of State administrators of Building Acts to offer any concession, given the ongoing work over the past many years to have the BCA provide for greater accessibility for people with disabilities⁶. The Victorian Building Control Commission exemplifies this. The capital city hotel applicant referred-to above argued in a submission to the Commission for the provision of 3 instead of 16 accessible hotel rooms and provided detailed historical occupancy data in support of this, but the Commission rejected the argument and granted no concession. Disinclination to grant concessions would be further motivated by the fact that the *Disability (Access to Premises — Buildings) Standards 2009* would require 7 of the proposed hostel units to incorporate wheelchair accessible sanitary accommodation, not 6 as presently required by the BCA. Nevertheless, the Commission’s view might have been slightly different if it was asked to consider the issue of regional demographic variation and the matter of a remote-area hostel.

State administrators of Building Acts might also be reluctant to grant concessions because of their recognition of the need to invest in suitability of the national building

⁵ The lack of clarity about the meaning of “design” is further evidenced in the ABCB’s explanatory document: it uses the phrase ‘allowing designs to be tailored to a particular building’ⁱⁱⁱ

⁶ This work includes the development of the *Disability (Access to Premises — Buildings) Standards 2009*

stock over the long term, even exceeding twenty five years, because it is the inaccessibility of a very large proportion of the existing national building stock that reportedly continues to militate against equity for people with disabilities. If sufficient contribution to the future building stock that is sufficiently accessible is not currently made, inaccessibility of facilities will tend to be perpetuated.

The possible reluctance of State administrators of Building Acts to grant a concession might make an AS procedure more attractive to certifiers. On the other hand, the reasons for this predicted reluctance warrant consideration by building certifiers in deciding upon development of an AS.

Clarification

Given the uncertainty about whether regional demographic variations are a legitimate basis for concessions under the BCA, the most appropriate procedure appears to be applying for a determination to State administrators of Building Acts. Such a procedure would not establish a concession, but it would establish the legitimacy of a concession in the form of an AS.

A determination would also establish the validity of an objection; however, for that purpose, lodging the objection in the first instance would be the more efficient procedure.

Justification for concession

Unjustifiable hardship

The motivation of the developer of the hostel in seeking a concession is that compliance with the BCA DtS provisions will cause him hardship.

Whilst it is evident that a core goal of the BCA is facilitation of constructional efficiency and of efficient buildings, and whilst the non-provision of accessible sanitary facilities where there is no need for them, as contended by the hostel developer, is a form of efficiency, it is of a different type, namely supply efficiency – which, it is suggested here, is outside the scope of the BCA.

If an objection to the BCA provisions were lodged as discussed above, the Commission or other State entity considering the objection would be unlikely to consider unjustifiable hardship. This being the case, it would be consistent under the BCA for building certifiers considering the development of an alternative solution to also discount unjustifiable hardship.

In relation to unjustifiable hardship, the Draft Disability (Access to Premises - Buildings) Standards Guidelines 2009 states: 'There is...no mechanism in the DDA or the Premises Standards for anyone to give prior approval for non-compliance with any part of the Premises Standards on the grounds of unjustifiable hardship. Decisions about unjustifiable hardship can only be made by a Court following an actual complaint.' It adds: 'If a person responsible for a building chooses to not fully apply the Premises Standards they would make themselves vulnerable to complaints under the DDA'. This injunction would be clearly applicable to either an objection or an AS procedure⁷.

Unjustifiable hardship is much less likely to be sympathetically considered by a Court

⁷ The Disability (Access to Premises - Buildings) Standards 2009 contains the Access Code for Buildings whose provisions will be incorporated in the BCA.

for a new building than for an existing building. Even where construction has commenced, as is the case with the hostel of this discussion, a Court is unlikely to be sympathetic because they would probably consider that the hardship was of the developer's own making and that he had the opportunity of avoiding that hardship.

Concession as deferral, not avoidance

A strategy in support of concession is deferral, rather than avoidance, of the provision of four fully-accessible accessible units (the required six units less the two provided). The legitimacy of this strategy would be enhanced if four or more units were designed so as to be readily modified in the future to incorporate a wheelchair accessible sanitary facility and, in the meantime, were accessible to ambulant people with a disability (for example, by having grab rails at the toilet and in the shower). Additionally, the hostel operator would need to be able to create the extra accessible SOUs having wheelchair accessible sanitary facilities quickly enough for a prospective occupant, and possibly also have suitable interim accommodation available. This would also apply for existing residents who acquire a disability through illness or occupational injury.

The legitimacy of a deferral strategy would be greatest if the hostel were owned and operated exclusively for its employees. In this circumstance, the residents would tend to be medium-to-long term residents. However, the hostel is a commercial venture that will be available to the public generally including tourists, although mining employees are probably a primary target market. There is no certainty over the next twenty-five years therefore as to what proportion of residents would be mining employees, backpackers, or other visitors to or occupants of the township. In other words, there is no certainty as to how many residents would stay for a very short, short, medium or long term. An argument that relaxation of the required proportion of fully accessible units is justified on the grounds that there would be fewer mining employees with a disability than there are for the public generally is therefore weakened and more difficult to substantiate than if the accommodation were owned and operated by a mining company exclusively for its employees.

The legitimacy of deferral would also depend upon an opportunity for future review of the proportion of accessible accommodation provided. This would occur, for example, if the mining company owned the development and then later sold it. This would then trigger a review of the certificate of occupancy⁸ and therefore the opportunity of stipulating provision of a greater number of fully accessible units. Regardless of ownership, a condition of a building permit could be that occupancy of the accommodation is to be wholly of mining employees and that any change to such occupancy would require review of the certificate of occupancy, or that the occupancy is to be reviewed on a regular basis. However, there would be nothing that would automatically bring this to the attention of the certifying authority in a sufficiently effective way and therefore little or no opportunity for a review of occupancy.

If the development proceeded without satisfying the conditions suggested above, a complaint under the DDA or equivalent State Acts could be the outcome and possibly proceedings before a Court.

Given the resources and stamina required to lodge and follow-through with a complaint, the risk of one being is probably small. However, the hostel developer would be prudent to prepare for this eventuality, and the eventuality therefore of

⁸ The term varies between States. For example, in Queensland it is called certificate of classification

having to provide additional accessible SOUs with wheelchair accessible sanitary facilities. Such preparation would be equivalent to the deferral strategy described above.

Is a concession the end of the story?

Whether a concession is granted in the form of an AT by a building certifier, or a dispensation under a State Building Act, complaint under the DDA is still a possibility. It is a possibility with respect not only to the current BCA, but also its future version that will incorporate the provisions of the proposed DDA premises standard.

Avoidance by administrators of State Building Acts of a complaint under the DDA may be in the minds of those State administrators, further contributing to their possible reluctance on to grant a dispensation. It would seem to be prudent for building certifiers to also bear the prospect of a complaint in mind.

Design review

The most efficacious strategy might be to review the design of the hostel to see whether there is another way of achieving all or at least a substantially greater proportion of the required number of accessible SOUs. An alternative way of providing accessible sanitary facilities is clearly the legitimate basis of an AS if one is still required.

Summary

There is some objective support for the provision of 2 units rather than 6 accessible SOUs, although 3 appears to be more justifiable.

The legitimacy of only 2 or 3 accessible SOUs is enhanced if the balance of the required units can be readily made accessible and in the meantime are accessible to ambulant people with a disability; if suitable interim accommodation can be sufficiently expeditiously arranged if required and; if there is effective opportunity for regular review of the occupancy of the proposed hostel under the terms of the certificate of occupancy. However, the efficacy of review of occupancy is doubtful.

The most appropriate procedure for seeking a concession under the BCA to allow the above strategy is probably the lodgment of an objection to the BCA provisions relating to accessible sanitary accommodation. This is because regional demographic variation is the basis of the proposed AS but which under the BCA appears not to be a legitimate basis.

More detailed demographic analysis than that presented here would be required for a concession. Moreover, even with additional analysis, lodgment of an objection is unlikely to be successful.

If an AS were developed to allow the strategy, there is risk that the developer and the building certifier would be held responsible if action were brought under the DDA for the unavailability of accessible accommodation. As small as the risk might be, it would be prudent for the developer to prepare for it, and to do so as early as possible.

A redesign of the hostel is probably the best option, even if only to increase the number of accessible SOUs; to do so could be less onerous than at first anticipated.

References

- ⁱ *BCA Guide*. Australian Building Codes Board, Canberra, Australia
- ⁱⁱ *Disability, ageing and carers: summary of findings, Australia. Report 4430.0*. 2003. Australian Bureau of Statistics, Canberra, Australia.
- ⁱⁱⁱ *The performance building code of Australia: a study of its development*. Australian Building Codes Board, Canberra, Australia
<http://www.abcb.gov.au/index.cfm?objectid=E44F0778-E027-0BF7-C801076FCD30E42B>
Accessed 23rd July, 2009
- ^{iv} *BCA Awareness Resource Kit, Module Two: Understanding the BCA's performance requirements. Frequently asked questions*. 2005 Australian Building Codes Board, Canberra, Australia.