

Superseded document

This document was superseded August 2023. We have kept it online for reference, but you should not use it for new projects from that date.

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Guideline for applying section 37 of the *Building Act 1975*

Guideline to support the transition of amended building requirements

May 2023



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Scope

The scope of this guideline is limited to the application of section 37 of the *Building Act 1975* (BA) which provides transitional arrangements for changes to building assessment provisions.

Purpose of this guideline

The purpose of this guideline is to provide building certifiers with guidance on how to meet their responsibilities when applying section 37 of the BA.

This guideline will also assist building industry practitioners to understand how transitional arrangements apply to amended building requirements.

Legal status of this guideline

This guideline is made under section 258 of the BA which provides for guidelines to be made to help achieve compliance with the BA.

Section 133A of the BA requires a building certifier, in performing a function under the BA, to have regard to the guidelines made under section 258 of the BA.

Section 136 of the BA creates an offence if a building certifier fails to always act in the public interest. Section 136(2)(e) specifically prescribes contravening the code of conduct as circumstances that would constitute a failure to act in the public interest.

Section 7 of the [Code of conduct for building certifiers](#) (effective 1 October 2020) states: A building certifier, must when performing building certifying functions:

- apply all relevant building laws, regulations, safety standards and guidelines reasonably and without favour
- perform the functions with honesty, integrity and impartially
- not knowingly enter into any conduct that could bring, or tend to bring, the profession of building certifiers into disrepute.

Evidence of regard to guidelines made under the BA may assist a building certifier in the event of a complaint about a building certifier when performing a building certification function.

Background

Generally, building assessment work in Queensland must comply with the building assessment provisions in force when a building development application is approved. However, section 37 of the BA enables a building certifier, in certain circumstances, to apply the previous building assessment provisions in force immediately before the amendment.

The release of the National Construction Code (NCC) 2022 has identified a need to provide guidance to industry about section 37 of the BA and its application.

Section 37 of the *Building Act 1975*

Under the BA, [section 37](#) provides for transitional arrangements that apply when building assessment provisions change.

Section 37(2) allows a building certifier to issue a building development approval under the building assessment provisions that were in place immediately prior to an amendment (i.e. under the previous building assessment provisions) where a condition in section 37(1) is met, being:

- (a) the lawful carrying out of the work starts before a building assessment provision is amended; or
- (b) the building development approval was given before a building assessment provision is amended, but the work does not start before the amendment commences; or

- (c) a building development application is made for the work before a building assessment provision is amended, but the application is not decided before the amendment commences; or
- (d) planning for carrying out the work started before a building assessment provision is amended and the building certifier for the building development approval certifies in writing that:
 - (i) substantial progress was made on the design of the building, or the design was completed before the amendment; and
 - (ii) the design would need to be changed to comply with the amended provision; and
 - (iii) the changes needed are not minor changes, having regard to the amendment and the nature of the building work.

Interpretation

The requirements of section 37(1) subsections (a), (b) and (c) are clear and unambiguous. Section 37(1) (a) and (b) confirms that if a building permit is issued prior to the change to the building assessment provisions the work can be completed under the issued permit in compliance with the previous assessment provisions. Section 37(1) (c) confirms that if the application is lodged with a certifier before the change occurs the work can be assessed against the previous assessment provisions. When the permit is issued it will allow work to comply with the previous assessment provisions.

Note section 37(1) subsections (a) to (c) are subject to the operation of section 81 of the BA (Building development approval for particular alterations may require existing building or structure to comply with building assessment provisions).

Section 37(1) (d) offers some flexibility for building certifiers to consider the specific situation of an applicant and how far along they are in planning for the carrying out of the work.

Planning for carrying out the work started before a building assessment provision is amended

If the building certifier is satisfied planning for carrying out the work started before the building assessment provision is amended, they must also certify in writing that **all three conditions** have been met:

- (i) substantial progress was made on the design of the building, or the design was completed, before the amendment; and
- (ii) the design would need to be changed to comply with the amended provision; and
- (iii) the changes needed are not minor changes, having regard to the amendment and nature of the building work.

Further details are provided below to assist with the interpretation of these three conditions.

(i) substantial progress was made on the design of the building, or the design was completed, before the amendment

Determining whether a design was 'completed' before an amendment to a building assessment provision occurs can be relatively straightforward. For example, a completed design might be signed and marked as 'final' and have evidence (i.e. a date) that it was marked as final prior to the amendment taking effect.

The completed design must also relate to a specific lot. For example, in the case of an individual 'one-off' (bespoke) design, the building certifier must be satisfied that the design relates to the proposed building to be constructed on that lot. In the case of 'stock' or 'standard' designs commonly offered by volume builders, the 'stock' or 'standard' design must relate to that lot on which the building is proposed to be constructed.

This may be evidenced by:

- a contract having been signed prior to the commencement of the amendment to have the building of that design to be constructed on the lot; or
- by a holding deposit having been paid pursuant to an expression of interest for the construction of a building of that design on the lot prior to the commencement of the amendment; or
- a preliminary agreement having been entered into for work to be carried out by a licensed builder in relation to the construction of a building of that design on the lot prior to commencement of the amendment.

‘Substantial progress’ may be evidenced by the following:

- building designs have progressed to a point which would enable a builder to provide a quote for the proposed building work
- the progress of the building is evidenced by designs, including the history of drawings over time such as the number of revisions
- a full re-design of the building is not undertaken after a building requirement amendment takes effect.

(ii) The design would need to be changed to comply with the amended provision

A change in building design encompasses any change that may be required to comply with the amended provision. This includes:

- a specification change, for example the design or type of windows to be used
- a change in building materials to be used, for example the type of external walls; or
- a change to the layout of the building’s design, for example the configuration of rooms or wider hallway widths.

As such, the building certifier will need to certify in writing that the building’s design would need to be changed to comply with the amended provision.

(iii) The changes needed are not minor changes, having regard to the amendment and the nature of the building work

What constitutes a minor change will depend on the particular facts of each case. Any change to the building design in order to comply with the amended building assessment provision that is believed to substantially increase the cost of the build will not generally be considered a minor change.

Building design changes that may appropriately be considered more than a ‘minor change’ include:

- substantial alterations to the building plans such as incorporating an outdoor living area to meet energy efficiency requirements or increasing the width of hallways
- changing the types and sizes of windows to a dwelling.

A minor change may include:

- using a lighter colour for the roof
- a change to a construction technique by an amendment to the building assessment provisions, where the change would not result in a significant change to the building’s overall design.

Common examples

Table 1 and Table 2 illustrate some of the common scenarios a building certifier may encounter when considering the application of section 37 of the BA.

Table 1 – Substantial progress or completed designs

Scenario	Description	Application of section 37
Building approvals		
1	A builder owns a standard house design and purchases a lot prior to an amendment, with the intention of building the standard house design on the lot. A building development approval for the building work was issued prior to the amendment.	<p>Section 37(1)(b) applies and the building assessment provisions in force when the building development approval was issued can be applied.</p> <p><i>A house design that had a building development approval issued prior to the commencement of the Modern Homes Standards (i.e. 1 October 2023) but work has not yet commenced does not need to comply with the Modern Homes Standards.</i></p>
2	A builder owns a standard house design and purchases a lot prior to an amendment, with the intention of building the standard house design on the lot. A building development application for the building work was lodged prior to the amendment.	<p>Section 37(1)(c) applies and the building assessment provisions in force when the building development application was received can be applied.</p> <p><i>A house design where a building development application was lodged prior to the commencement of the Modern Homes Standards (i.e. 1 October 2023) but is not yet decided does not need to comply with the Modern Homes Standards.</i></p>
3	A builder owns a standard house design and purchases a lot prior to an amendment, with the intention of building the standard house design on the lot. A building development approval for the building work has not been applied for and there is no evidence to demonstrate the builder's intention regarding building design for the building to be built on the lot prior to the amendment.	<p>Section 37 will not apply.</p> <p>While the builder may have intended the standard house design to be built on the lot, there needs to be clear evidence of that fact.</p>
4	A building contract is signed to construct a specific house design on a particular lot. The building contract is signed and dated prior to the building amendment taking effect.	<p>A signed building contract may be considered evidence that the building design of the house has been completed or substantially progressed.</p> <p>Section 37(1)(d) may apply subject to the building certifier being satisfied that a change is required to achieve compliance and that the change is not minor.</p> <p><i>A building contract for a house on a particular lot that was signed prior to the Modern Homes Standards commencing (i.e. 1 October 2023) may not comply with the Modern Homes Standards, subject to the discretion of the building certifier.</i></p>

Scenario	Description	Application of section 37
Building approvals		
5	A person has entered a contract with a building designer or architect to design a house to be constructed on a particular lot. The design for the house is completed prior to an amendment taking effect and is evidenced by plans dated and marked as 'final'.	<p>Plans of a house referring to a specific lot and marked final is evidence that the design of the house has been completed.</p> <p>Section 37(1)(d) may apply subject to the building certifier being satisfied that a change is required to achieve compliance and that the change is not minor.</p> <p><i>A house design for a particular lot completed prior to the commencement of the Modern Homes Standards (i.e. 1 October 2023) may not comply with the Modern Homes standards, subject to the discretion of the building certifier.</i></p>
6	A person has entered a contract with a building designer or architect to design a house to be constructed on a particular lot. The design for the house is only partially completed at the time of the amendment and does not provide sufficient detail for a builder to provide a quote.	<p>Section 37 will not apply.</p> <p>There has not been 'substantial progress' on the house design because there is not sufficient detail for a builder to provide a quote for the building work.</p>
Planning approvals		
7	A planning approval (i.e. a Material Change of Use) has been obtained for the use of a lot. However, the design of a building for that lot has not commenced.	<p>Section 37 will not apply.</p> <p>A planning approval does not provide evidence that substantial progress was made on the design of the building.</p>
8	A planning approval (i.e. for Reconfiguring a Lot) has been obtained to create a new lot/s. However, the design of a building for that lot has not commenced.	<p>Section 37 will not apply.</p> <p>A planning approval does not provide evidence that substantial progress was made on the design of the building.</p>

Table 2 – Minor changes versus Not minor changes

Minor changes	Not minor changes
<ul style="list-style-type: none"> Changing a roof to a lighter colour shade. Reinforcement of shower and toilet walls by fitting noggins to make it easier to install grabrails if needed in the future. 	<ul style="list-style-type: none"> Any change to the building design that substantially increases the cost of the build. Change to the type of floor (e.g. from a suspended timber floor to a concrete floor). Changes to the building's design to accommodate increased insulation requirements in the roof or walls. Changes to the building's design to accommodate increased corridor widths. Changing to a wider door. Changes to ensure that a shower screen door is capable of being removed without causing damage to adjoining parts of the shower enclosure. Changes to provide step-free access via a step-free entrance door. Changes to provide a toilet on ground level (or entry level) of a dwelling. Changes to provide a shower located on the entrance floor. Changes to provide extra space in the bathroom and toilet.