



**A MODEL PROCESS TO ADMINISTER
BUILDING ACCESS FOR PEOPLE WITH A
DISABILITY**

‘The Protocol’

2008

Australian Building Codes Board
(subject to final endorsement following consultation)

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A model process to administer building access for people with a disability. Material contained in the publication may be reproduced for educational purposes and for use as permitted under the Copyright Act 1968. Otherwise, no part may be reproduced without prior permission. Requests and inquiries concerning reproduction and rights should be directed in the first instance to:

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Preamble

The objective of this Protocol is to describe a model process that can be adopted by *Administrations* for determining access requirements for buildings. The process aims to ensure, as far as possible, that the application of the *BCA* results in the provision of an accessible environment consistent with the objectives of the *DDA* and the *Premises Standards* and, as a result, minimises the likelihood of a complaint against a building owner, occupier or practitioner.

The *Premises Standards* are a legislative instrument made under the *DDA*. Schedule 1 to the *Premises Standards* is the Access Code, which sets out *Performance Requirements* with which a building, owner, manager or developer is required to comply in order to satisfy the non-discrimination requirements of the *DDA*. The Access Code also contains detailed *Deemed-to-Satisfy Provisions*. The Access Code in the *Premises Standards* is designed to be mirrored in the access provisions in the *BCA*.

The early sections of the *Premises Standards* deal with the application of the provisions in the Access Code. The *Premises Standards* contain an exemption for unjustifiable hardship, which provides that it is not unlawful to fail to comply with a requirement of the *Premises Standards* (including the Access Code) to the extent that doing so would cause *unjustifiable hardship*. Whether or not a particular modification causes *unjustifiable hardship* is to be decided by a court, following a complaint of discrimination.

The *Premises Standards* are a Commonwealth law dealing with disability discrimination and are not building regulations. Each *Administration* has its own building regulations, which deal with the application of the *BCA* in the building approval process. Generally, these building laws do not contain an *unjustifiable hardship* exemption similar to that in the *Premises Standards*. This Protocol aims to set out a process which *Administrations* can use to incorporate *unjustifiable hardship* considerations into the existing building approval process. This will ensure that the application of the Access Code under the *Premises Standards* is consistent with the application of the *BCA* under building regulation.

The State and Territory Ministers responsible for the administration of building control within their jurisdictions, if adopting the model provisions in the Protocol, acknowledge that:

- the administration of building control, which is the responsibility of State and Territory Governments, should be consistent with the *Premises Standards* when dealing with building matters relating to accessibility; and
- the approach outlined in this Protocol and relevant annexures aims to result in consistent *Building Solutions* that provide access to the built environment by the community and is intended to satisfy the objectives of the *Premises Standards*; and
- if the approach described in this Protocol and relevant annexures is followed, it aims to provide consistency in defining the extent of discretion that the *Building Control Authority* may exercise.

Article 1: Protocol scope

1. This Protocol covers any access-related matter that is covered by building legislation as described below:
 - (a) where an *Alternative Solution* is proposed, or where there are appeals against an interpretation of *BCA* provisions; and
 - (b) where modifications or exceptions to the full application of the *BCA* are sought; and
 - (c) existing buildings where the *Building Control Authority* is vested with discretion to require the upgrading of a building. Examples of such instances may be when there is a *change of use* or classification, upgrade orders, or where the extent of the new work warrants the upgrading of access to areas beyond that proposed for the new work.
2. The Protocol is not intended to cover:
 - (a) a builder, owner or occupier who creates an *access barrier* outside of the building law; or
 - (b) a *Building Control Authority* which undertakes the approval of work without following the Protocol; or
 - (c) a *Building Control Authority* which grants an exception or modification or the approval of an *Alternative Solution* without reference to an *Access Panel*; or
 - (d) a service provider who chooses to occupy an inaccessible building.
3. The Protocol only covers parts of a building regulated under building law and not elements such as fixtures and fittings, street furniture and operational issues. A builder, owner or occupier that creates, or permits the creation of, *access barriers* in such elements would not be covered by the Protocol.

Article 2: Definitions

1. For the purpose of this Protocol:
 - (a) “Access barrier” means discrimination against another person on the ground of the other person’s disability, or a disability of any of that other person’s associates, by the restriction or the refusing of persons access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use;
 - (b) “Access Panel” means a body authorised by the *Administration* to advise the *Building Control Authority* on access related matters, including assessing and endorsing *Building Upgrade Plans*, *Alternative Solutions*, requests for modifications or exceptions to the full application of the *BCA* in relation to new work on existing buildings and, where required by the *Administration*, to hear appeals against decisions of the *Building Control Authority*;
 - (c) “Administration” means the State or Territory Government organisation responsible for the administration of building legislation in that jurisdiction;

- (d) “Alternative Solution” means a *Building Solution* that complies with the *BCA Performance Requirements*, other than by reason of satisfying the *Deemed-to-Satisfy Provisions*;
 - (e) “BCA” means the Building Code of Australia;
 - (f) “Building Control Authority” means the person or body in the jurisdiction responsible for *building approval of Building Solutions*;
 - (g) “Building approval” means granting of an approval, building licence, building permit, building rules, or other form of consent or certification by a *Building Control Authority*;
 - (h) “Building Solution” means a solution which complies with the *BCA Performance Requirements* and is-
 - (i) an *Alternative Solution*; or
 - (ii) a solution which complies with the *Deemed-to-Satisfy Provisions*; or
 - (iii) a combination of (i) and (ii);
 - (i) “Building Upgrade Plan” means a plan for upgrading the accessibility of an existing building over time;
 - (j) “Change of use” means a change of use of a building from a use that the *BCA* recognises as appropriate to one Class of building, to a use that the *BCA* recognises as appropriate to a different Class of building;
 - (k) “Deemed-to-Satisfy Provisions” means a provision that is deemed to satisfy the *BCA Performance Requirements*;
 - (l) “DDA” means the *Disability Discrimination Act 1992* (Cth);
 - (m) “Premises Standards” means the *Disability (Access to Premises – Buildings) Standards 2009*, formulated by the Commonwealth Attorney-General in accordance with Section 31 of the *DDA*;
 - (n) “Performance Requirement” means a requirement that states the level of performance which a *Building Solution* must meet under the *BCA*;
 - (o) “Person Competent in Access” means a person recognised by the *Administration* as having the necessary qualifications and experience in access matters appropriate to be part of, and provide advice to, an *Access Panel*;
 - (p) “Unjustifiable hardship” is to be considered by reference to the factors given in Section 4.1 of the *Premises Standards*;
2. Words or terms that are defined in this Article appear as italicised text, except in headings.

Article 3: Process outcomes

The outcome of the process of using this Protocol¹ is to:

1. provide for decisions to be made about access to premises in the course of the *building approval* process in an efficient and timely manner; and
2. give the building industry and its practitioners confidence that when an approval is made, the requirements of the *Premises Standards* are intended to also be satisfied; and
3. assist *Administrations* and *Building Control Authorities* to undertake an assessment of *Alternative Solutions* in a manner that is nationally consistent; and
4. give people with a disability confidence that the *building approval* systems of the States and Territories address the provision of access to and within buildings for people with disability; and
5. assist the Australian Government and the States and Territories in fostering an efficient and competitive building industry that is responsive to community needs and the objects of the *Premises Standards*.

Article 4: Establishment of Access Panel

1. An *Access Panel* is to be established by the *Administration* to make recommendations on access related matters as outlined in Article 5, below.
2. The *Access Panel's* operation is to be transparent and recommendations are to be made publicly available.
3. The membership of an *Access Panel* is to include a sufficient number of people with relevant expertise for the particular issues and is to include at least one (1) *Person Competent in Access* and where the *Access Panel* consists of more than 3 persons, at least one-third of the *Access Panel* must be represented by *Persons Competent in Access*.

Article 5: Scope of Access Panel's recommendations

1. An *Access Panel* is to be empowered to make recommendations on access related matters associated with the construction of new buildings, building work on existing buildings, and *change of use* to existing buildings where:
 - (a) an *Alternative Solution* is proposed; or
 - (b) a modification or exception from a requirement of the *BCA* is sought due to *unjustifiable hardship*.
2. An *Access Panel* is to be empowered to assess and endorse *Building Upgrade Plans*
3. An *Administration* may give an *Access Panel* additional powers or functions, including the function of hearing appeals against a decision of a *Building Control Authority*.

¹ (Refer to Appendix A for a diagrammatic overview of the process of using this Protocol)

4. An *Access Panel* is to ensure that the *BCA* is applied to the extent reasonable without causing *unjustifiable hardship*.
5. An *Access Panel* must not endorse a reduction in the overall level of access provided to and within an existing building.

Article 6: Building Upgrade Plan for existing buildings

1. Where an applicant considers that compliance with the *BCA* is not presently possible or where other interim measures, such as non-building measures, may provide an acceptable solution for a particular building, a proposal for a *Building Upgrade Plan* may be prepared and submitted to an *Access Panel* for assessment and endorsement.
2. A *Building Upgrade Plan* may also propose a solution that is outside the scope of the requirements of the *building approval* process instead of proposing a *Building Solution*. It may also provide for a reasonable program for progressive upgrade.
3. Once the *Access Panel* endorses a *Building Upgrade Plan*, compliance with the *building approval* process or any *building approval* is to be on the basis of that plan.
4. The *Administration* is to establish a process that provides for the *Building Upgrade Plan* to be achieved.
5. Where an endorsed *Building Upgrade Plan* is proposed to be modified, the proposed modifications must be submitted to the *Access Panel* for endorsement.

Article 7: Appropriate qualifications and indemnity

1. The *Administration* is to ensure that the qualifications and experience of members of an *Access Panel* are appropriate for the issues under consideration and sufficient to enable them to competently carry out the functions of the *Access Panel*.
2. The *Administration* is to ensure that all members of an *Access Panel* are appropriately indemnified.

Article 8: Complaints

1. Note: This Protocol, or a decision made by a *Building Control Authority* or recommendation of an *Access Panel* under this Protocol, cannot remove or otherwise affect the right to complain of discrimination under the *DDA*. As provided in the *Human Rights and Equal Opportunity Commission Act 1986*, complaints of discrimination under the *DDA* can be made to the Australian Human Rights Commission or, where conciliation is not successful, the Federal courts by or on behalf of one or more persons aggrieved by the degree of building access or use.
2. However, the Protocol is intended to provide as much certainty as possible both to building owners, occupiers and practitioners and to the general community that access solutions devised in accordance with this Protocol are not likely to result in a successful complaint. The *Premises Standards* provide that the decision of a 'State or Territory body established to make recommendations to building authorities about building access matters' can be

taken into account by a court as a relevant factor in determining whether *unjustifiable hardship* exists.

3. A successful complaint of discrimination resulting from a failure of the process established by an *Administration* is to result in a review of that process.
4. An *Administration* may also choose to allow a review of recommendations made by an *Access Panel*.

Article 9: Annex 1

1. Annex 1 provides guidance on administering this Protocol

Article 10: Compliance with this Protocol

1. An *Administration* is to take appropriate measures within its jurisdiction, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure effective application of this Protocol.
2. It is not mandatory under building control legislation or the *Premises Standards* to comply with this Protocol. However, the level of certainty afforded by following this Protocol would only be available to those abiding by it.
3. Each *Administration* is to draw the attention of all other *Administrations* to any activity, which in its opinion, affects the implementation of the objectives and principles of this Protocol.

Consultation Draft

Annex 1

TO THE PROTOCOL FOR ADMINISTERING BUILDING ACCESS GUIDANCE ADVICE

Clause 1.1: Intent

1. It is not possible to prescribe a formula for assessing applications that will cover all situations. Instead, the following is provided for guidance as to what should be considered when assessing individual situations.
2. The Protocol may be applied to new buildings and existing buildings undergoing building work to assist in assessing an *Alternative Solution*.
3. The Protocol may be applied to new buildings and existing buildings undergoing building work to assist in assessing applications for exceptions from, and modifications to, *Deemed-to-Satisfy Provisions*.
4. The Protocol does not apply to existing buildings where no work is being carried out other than where there is a *change of use* or classification.

Clause 1.2 Building work

1. The objective of the Protocol is to provide a level of access under State and Territory building law that is consistent with the requirements of the *Premises Standards*. Where it is not possible to comply fully due to *unjustifiable hardship*, the access solution should be to achieve the maximum level possible without causing *unjustifiable hardship*.

Clause 1.3: Access Panel

1. The body empowered under State or Territory law to rule on other building regulatory matters may also act as the *Access Panel* for access related matters, provided it is duly authorised and contains the appropriate expertise.
2. The more broad based the *Access Panel's* membership, the more likely it will be that access is achieved and less likely that any proposed building solution would result in a disability discrimination complaint being successful. Membership of an *Access Panel* should, as far as possible, include a minimum of three people. Members must have expertise relevant to the issues (eg lifts, sensory or mobility aspects of a building) and include a minimum of one person who is deemed or accredited to be a *Person Competent in Access* matters and where the panel is greater than three persons, at least one-third of the *Access Panel* must be represented by *Persons Competent in Access* matters. Where further expertise is needed, it is to be sought from advisers or the *Access Panel* enlarged.
3. The *Access Panel* will undertake a technical assessment of the proposals. In doing so, it would take into consideration factors relevant to the specific building. The *Access Panel* may need to consider *unjustifiable hardship* as part of an assessment.

Clause 1.4: Unjustifiable Hardship

1. When making recommendations regarding *unjustifiable hardship*, no hard and fast rules can be provided, as the outcome will depend upon individual

circumstances. Provision of access that is unjustifiably hard in one case may not be so in another situation. Reference to recent case law or other *Access Panel* recommendations may provide a useful source of guidance when making a recommendation on *unjustifiable hardship*, but each matter is to be treated on its own merits.

2. Recommendations about whether the provision of access would involve *unjustifiable hardship* should be made in the context of the objective set out in the *DDA* of eliminating discrimination, as far as possible. The factors for consideration listed below (which are those set out in section 4.1 of the *Premises Standards*) aim to assist in developing recommendations, however, none of the factors should be interpreted as leading automatically to *unjustifiable hardship* being accepted as applying.
3. All relevant factors should be considered and may include the following:
 - (a) any additional capital, operating or other costs, or loss of revenue, that would be directly incurred by, or reasonably likely to result from, compliance with the access requirement;
 - (b) any reductions in capital, operating or other costs, or increases in revenue, that would be directly achieved by, or reasonably likely to result from, compliance with the access requirement;
 - (c) the extent to which the building is provided by or on behalf of a public authority for public purposes;
 - (d) the financial position of a person or organisation required to comply with the *BCA*;
 - (e) any effect that compliance with the access requirement is reasonably likely to have on the financial viability of a person or organisation required to comply;
 - (f) any exceptional technical factors (such as the effect of load bearing elements on the structural integrity of the building) or geographic factors (such as gradient, topography or regional or remote location), affecting a person or organisation's ability to comply with the access requirement;
 - (g) financial, staffing, technical, information and other resources reasonably available to a person or organisation required to comply with the *BCA*, including any grants, tax concessions, subsidies or other external assistance provided or available;
 - (h) whether the cost of alterations to make a premises accessible is disproportionate to the value of the building, taking into consideration the improved value that would result from the alterations;
 - (i) benefits reasonably likely to accrue from compliance with the *BCA* including benefits to people with disabilities, to building users or to other affected persons, or detriment likely to result from non-compliance;
 - (j) detriment reasonably likely to be suffered by a building developer, building certifier or building manager, or a person with a disability or other building user, including in relation to means of access, comfort and convenience, if compliance with the *BCA* is required;
 - (k) if detriment under paragraph (j) involves loss of heritage values — the extent to which relevant heritage value or features of the building are essential, and to what extent incidental, to the building;

- (l) whether compliance with the access requirement may reasonably be achieved by less onerous means than those objected to by a person as imposing *unjustifiable hardship*;
 - (m) any evidence regarding efforts made in good faith by a person to comply with the *BCA*, including consulting access consultants or building certifiers;
 - (n) if a person has given an action plan to the Australian Human Rights Commission under section 64 of the *DDA* — the terms of the action plan and any evidence about its implementation;
 - (o) the nature and results of any processes of consultation, including at local, regional, State, national, international, industry or other level, involving, or on behalf of, a building developer, building manager or building certifier and people with a disability, about means of achieving compliance with the requirement, including in relation to the factors listed in this subsection;
4. If a substantial issue of *unjustifiable hardship* is raised having regard to the factors mentioned in paragraphs (3) (a) to (o), the following additional factors may be:
- (a) the extent to which substantially equal access to public premises is or may be provided otherwise than by compliance with the *BCA*;
 - (b) any measures undertaken, or to be undertaken by, on behalf of, or in association with, a person or organisation to ensure substantially equal access.
5. In some cases, specialist advice may be needed on technical factors, economic viability of an upgrade or heritage issues.
6. Another consideration would be that the provision of access must not contravene the other provisions of the *BCA* and building law.
7. Where the provision of full and equitable access in a building (including a heritage building) is considered to involve *unjustifiable hardship*, a total exception may not always be appropriate. For example, while enlarging a lift shaft may not be possible, improving access by upgrading lift controls and providing announcements in lifts may be possible. While it may be too difficult to provide access to a small heritage listed building through the front door, it may be possible to design easier access for all visitors through a rear or side door.
8. A *Building Upgrade Plan* to address access difficulties in existing buildings may also be considered. While the immediate elimination of all *access barriers* in an existing building may be seen to involve *unjustifiable hardship*, addressing them over a specified period of time may not.

Clause 1.5: Building Upgrade Plan

1. A *Building Upgrade Plan* may propose an interim solution that is outside the scope of building regulations. An example would be to provide alternative building entrance arrangements, with appropriate signage and staff to provide direction, as an interim measure until such time as all entrances required to be accessible can be provided. If such interim arrangements are not honoured, the recommendation made by the *Access Panel* using this Protocol would no longer be applicable and a subsequent complaint under the *DDA* may be successful.

2. A *Building Upgrade Plan* should identify the key components and/or time-frame(s) necessary for timely compliance and completion of the *Building Upgrade Plan* such as 'at expiry of current tenancy arrangements' or 'within five years'.
3. Once an *Access Panel* assesses and endorses a *Building Upgrade Plan* and the *Building approval* is given, a process that provides for the *Building Upgrade Plan* to be achieved should be established.
4. An existing *Building Upgrade Plan* must be taken into consideration by an *Access Panel* because it may affect the requirements due to a prior undertaking to improve access, or a prior acceptance that to require certain access features would be unjustifiable. For example, a building may be due for demolition or a major refurbishment in the near future and so an interim upgrade may be exempted.

Consultation Draft

DIAGRAM 1 - Building Access Regulatory Compliance Process

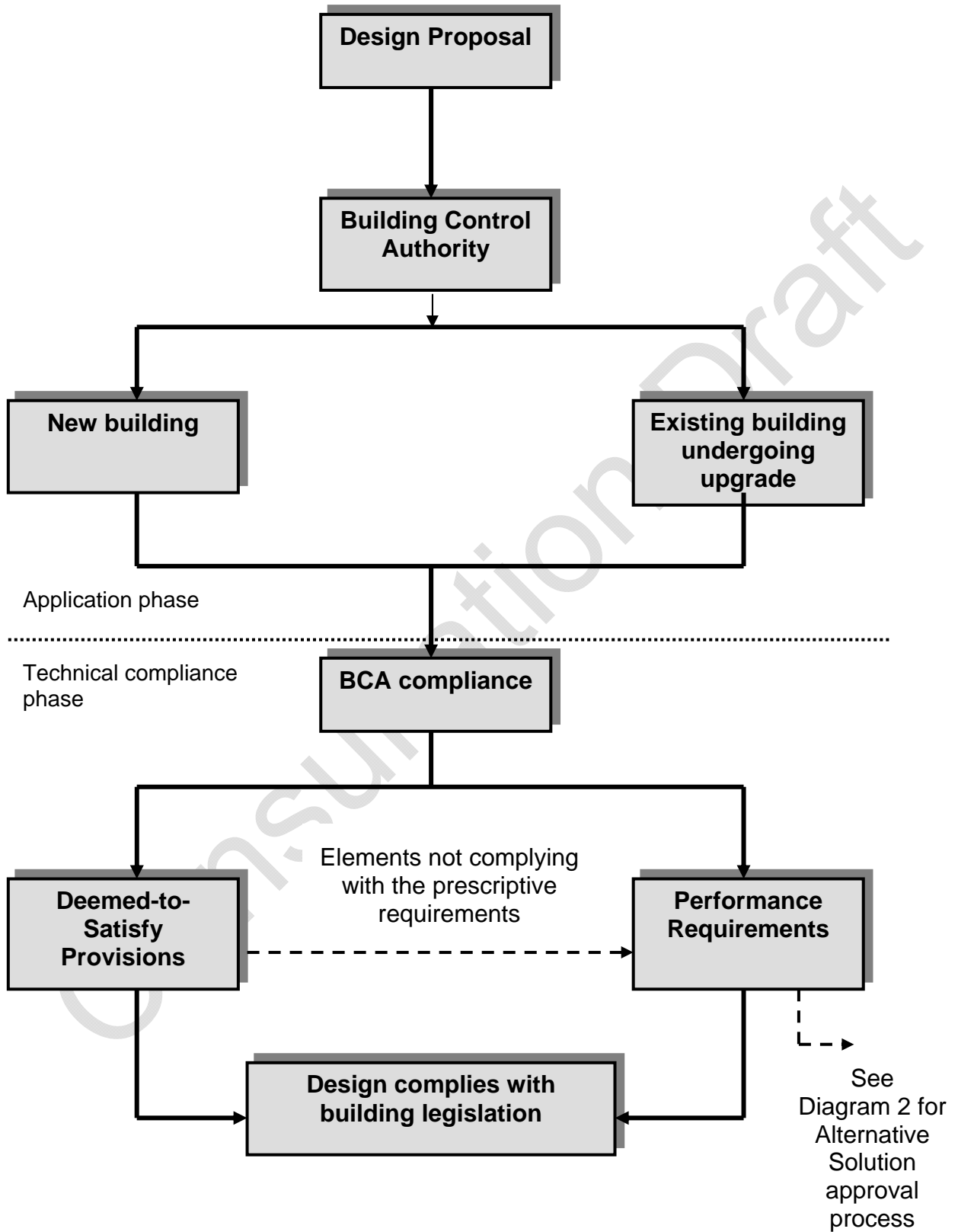


DIAGRAM 2 - Alternative Solution and Exception/Modification Approval Process

