

Australian Capital Territory

Construction Occupations (Licensing) Unit Title Unit Fitness Assessment Code of Practice 2016

Notifiable instrument DI2016–245

Made under the

Construction Occupations (Licensing) Act 2004, section 126A (Codes of practice)

1 Name of instrument

This instrument is the *Construction Occupations (Licensing) Unit Title Unit Fitness Assessment Code of Practice 2016*.

2 Commencement

This instrument commences on the day after notification.

3 Code of practice

I approve the Unit Title Unit Fitness Assessment Code of Practice in the Schedule.

4 Disapplication of Legislation Act, s47 (5) and 47 (6)

The *Legislation Act 2001*, sections 47 (5) and 47 (6) do not apply in relation to an instrument applied, adopted or incorporated under this instrument.

Mick Gentleman
Minister for Planning and Land Management

23 August 2016



Australian Capital Territory

Unit title unit fitness assessment code of practice

made under the

Construction Occupations (Licensing) Act 2004

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Schedule
(see section 3)

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Part 1 Preliminary

1 Name of code

This code is the *Unit title unit fitness assessment code of practice*.

2 Offences and other consequences of contravening this code

The *Construction Occupations (Licensing) Act 2004*, provides offence and other enforcement mechanisms that can result from a contravention of this code.

Note A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations (see Legislation Act, s 104).

Part 2 Important concepts

3 Part includes whole of a building

In this code:

part in relation to a building includes the whole of the building if the reference to the part of the building can apply to the whole building, unless a provision provides to the contrary.

4 What is an *applicable law*?

In this code:

applicable law for a whole building that has not been altered after its erection, or for a portion of a building that was erected or altered after the erection or alteration of a previous portion, means the law that—

- (a) regulated the most recent erection or alteration done to the building; and
- (b) is the *Building Act 2004*, or its predecessor in purpose, as the case requires.

Examples

Building Act 2004

Building Act 1972

Building Ordinance 1972 (Commonwealth)

Building Ordinance 1964-1970 (Commonwealth)

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

5 What is a *certificate of occupancy*?

In this code:

certificate of occupancy means the most recent certificate or permit issued under the applicable law that permits ongoing occupation or use of part of a building.

Examples

For a building built under the *Building Act 2004*, a **certificate of occupancy** for the building is the latest respective certificate of occupancy issued under that Act, section 69 (Certificates of occupancy).

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

6 What is a **contemporary** part of a building?

In this code:

contemporary in relation to part of a building means—

- (a) if the part can be occupied or used without a certificate under the *Building Act 2004* permitting the occupancy or use, or if no such certificate has been issued, erecting or altering the part was completed 10 years or less before the part is assessed; or
- (b) the latest certificate of occupancy for the part was issued 10 years or less before the part is assessed.

7 What is a **new** part of building?

In this code:

new in relation to part of a building means—

- (a) if the part can be occupied or used without a certificate under the *Building Act 2004* permitting the occupancy or use, or if no such certificate has been issued, erecting or altering the part was completed 3 months or less before the part is assessed; or
- (b) the latest certificate of occupancy for the part was issued 3 months or less before the part is assessed.

8 What is an older part of a building?

In this code:

older in relation to part of a building means—

- (a) if the part can be occupied or used without a certificate under the *Building Act 2004* permitting the occupancy or, if no such certificate has been issued, erecting or altering the part was last completed 10 years or more before the part is assessed; or
- (b) the latest certificate of occupancy for the part was issued 10 years or more before the part is assessed.

9 Application to building surveyors

In this code a reference to a *building surveyor* includes a reference to an entity who, under the *Construction Occupations (Licensing) Act 2004*, holds a licence that authorises the holder to provide a building certification service, in circumstances where the assessment may only be done by the licence holder.

10 Object of code

An object of this code is to prescribe requirements for assessing certain key aspects of buildings to help determine their fitness for separate occupancy as units, and in some cases to provide assessment methodologies.

Fitness for separate occupancy requires examination of 2 main aspects—

- fitness for occupancy of the proposed units generally
- fitness for occupancy of each proposed unit if the respective subdivision takes place, creating unit title for each proposed unit.

11 Meaning of certain terms—correlation with *Unit Titles Act 2001* and *Building Act 2004*

A term used in this code has the same meaning as the term has in the *Unit Titles Act 2001*, and the *Building Act 2004*, unless this code provides a different meaning for the term. However, where a term, such as the term *building* has a meaning in one of those Acts, and a different meaning under the other Act, both meanings apply in combination, unless the context of the use of the term could only relate to 1 applicable meaning.

Note A term used in this code has the same meaning as the term has in the *Construction (Occupations) Licensing Act 2004*, (see the *Legislation Act*, s 148).

Part 3 Unit fitness assessment

12 Parcel and documents to be assessed

The building surveyor must determine if the parcel and relevant documents comply with the relevant provisions of this code.

13 Proposed units to be fit for separate occupancy—general requirements

A building surveyor must not take a parcel to comply with this section if the surveyor believes on reasonable grounds that a proposed unit for the parcel is not fit for separate occupancy, considering the relevant considerations prescribed in this code and anything else the building surveyor believes is relevant considering the objectives of the relevant law.

14 Unit fitness general considerations

- (1) A building surveyor may take a proposed unit as fit for occupation if—
 - (a) the proposed unit is shown as a sole occupancy unit in the relevant plans to which a current certificate of occupancy relates (the **BA plans**); and
 - (b) the BA plans, the building use (if any), including a building classification under the building code, shown in the BA plans, and the use permitted by the certificate of occupancy, however described, correlate with the building as erected or altered, as the case requires, and with the proposed use of the proposed unit; and
 - (c) the use is or will be consistent with the lease for the parcel; and
 - (d) the proposed boundaries of the proposed unit that are proposed to be within a building or along the perimeter of a building, are proposed to align with respective sole occupancy unit boundary locations deduced from the BA plans, (**BA aligned unit boundaries**) or where they fail to align, subsection (2) is satisfied; and
 - (e) the building surveyor has considered all of the relevant provisions of this code and anything else the building surveyor believes is relevant considering the objectives of the relevant law and believes on reasonable grounds that nothing makes the proposed unit unfit for separate occupation.

Examples for (c)

1. The BA plans show 2 residential flats with a masonry common wall separating the flats. It can be deduced from the BA plans that each flat is a sole occupancy unit with a shared boundary along the centre of the common wall. A proposed boundary of a proposed unit aligns with the centre of the common wall. The proposed boundary complies with paragraph (c), and is a BA aligned proposed unit boundary.
2. The BA plans show a single house and therefore the location of a sole occupancy unit boundary cannot be deduced from the plan, because a single house is not a sole occupancy unit under the building code. A proposed unit's proposed boundary bisects the floor plan of the house, to convert the house to 2 apartment flats. The proposed unit boundary does not align with the boundary of a sole occupancy unit location deduced from the BA plans. The proposed boundary fails to comply with paragraph (c). The building surveyor may not take the proposed unit as being fit for separate occupancy unless subsection (2) is complied with.
3. The house is the subject of a new BA that shows the house separated into 2 attached apartment flats with a new fire resistant common wall constructed down the alignment of the proposed unit boundary between each flat. It can be deduced from the new BA plan that it no longer shows a house but shows 2 sole occupancy units with a common boundary along the new common wall. The proposed unit boundary complies with paragraph (c), and is a BA aligned proposed unit boundary.

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) This subsection prescribes an alternative to a BA aligned unit boundary mentioned in subsection (1). The building surveyor must be satisfied on reasonable grounds that had the building been constructed or altered with a proposed unit boundary located so it would not be a BA aligned unit boundary, the resultant building would, if used as proposed, comply with the relevant lease and the *Planning and Development Act 2007*; and—
- (a) the applicable law; or
 - (b) the *Building Act 2004* if the applicable law is not complied with and is not the *Building Act 2004*.

Examples

- 1 The BA plans show a shopping mall, including fire hose reels, and public unisex toilet for people with disabilities, which were both required by the applicable law. The BA plans show the hose reels and unisex toilet located in publically accessible passage ways. It can therefore be deduced from the BA plans that the hose reels and unisex toilet will not be located in a sole occupancy unit. However, plans showing proposed unit boundaries show that a fire hose reel will be located within proposed unit 3, which has a boundary intersecting a public passage way, thus incorporating part of the passageway and the hose reel into proposed unit 3. That boundary was not shown in the BA, and is therefore not a BA aligned unit boundary.

Under paragraph (1) (c) and subsection (2), the building surveyor must be satisfied that the building with the unaligned boundary complies with subsection (2). A

reason that the hose reel might not comply with subsection (2) is that hose reel will not be in a public passage or common property if the building is subdivided according to the proposed unit boundaries, and could therefore be only taken as servicing the sole occupancy unit that is unit 3 rather than a larger area of the building.

- 2 A similar scenario to example 1 could result if the unisex toilet mentioned in example 1 is, or is proposed to be, isolated within a sole occupancy unit because of a proposed unit boundary not being a BA aligned unit boundary.

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

15 Unit fitness considerations—statutory approval defects general requirements

- (1) A building surveyor must consider the extent that all buildings for the parcel, and any relevant documentary evidence, indicate that the erection, alteration or demolition (*work*) of buildings at the parcel complies with the applicable building law.
- (2) A building surveyor must consider if anything (a *defect*) has occurred since the work was done that materially affects a building to the extent that the building surveyor believes on reasonable grounds that—
- (a) the building would be unlikely to comply with the applicable law if it was still in force, because of the defect, if the applicable law applied to the re-erecting or re-altering of the building in a way that resulted in the building suffering the defect; or
 - (b) the defect would be likely to prevent the issuing of a certificate of occupancy, if the building had just been built or altered incorporating the defect and no such certificate had been previously issued for the building.

Examples—potential defects

- foundation settlement, erosion or excavation
- structural inadequacy, instability, unsoundness, deformation, movement failure or cracking
- broken or cracked glazing
- storm damage, lightning damage, water damage or flooding
- fire, heat or smoke damage
- impact or explosive damage
- deterioration, decomposition, decay or corrosion
- disrepair or lack of maintenance
- blockage or obstruction
- overloading or overuse
- contamination or infestation
- termite or other animal damage
- tree or root damage or other damage by a plant or overgrowth
- modification, addition or demolition of a part
- dysfunction or lack of serviceability
- vandalism, theft or a missing component
- pollution or unpleasant odour
- leak, spillage or discharge
- danger to health, danger of injury or unsafety
- inaccessibility or access or egress restriction
- lack of amenity or lack of facilities
- lack of an effective barrier to prevent a fall, or to restrict young children's unsupervised access to a swimming pool
- a slip, trip or fall hazard
- vehicle damage or lack of an adequate traffic control safety device
- lack of adequate pavement, road or path; or excessive mud
- lack of adequate hoardings, barricades or signage
- an action or proceeding under a law such as a prohibition order or rectification order

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

16 Unit fitness considerations—statutory approval defects— detection in new or contemporary parts of buildings

- (1) This section applies to a new part of a building or a contemporary part of a building.
- (2) Nothing in this part requires a building surveyor to make onsite tests to conclusively detect defects, but this section requires a building surveyor to inspect the site to visually detect defects, or what may be potential defects, to the extent that such defects, or their effects, are visually detectable from walking around the usually trafficable areas of the parcel, and to examine relevant documents.
- (3) For subsection (2), the site can be taken to not include the interior of a proposed class 2 unit, unless the assessor has a reasonable suspicion

that a defect, or evidence of the effect of a defect, is likely to be inside the unit.

Examples—defect or non-defect detection

- 1 To detect structural cracking in plasterboard, cement sheet, concrete or masonry walls, floors, slabs, or ceilings, they must be examined by eye from a distance of 2m or less with appropriate lighting, unless a ladder or other temporary access device would be required to do so, in which case the distance must be as close as possible without a ladder or other temporary access device. A crack so detected and estimated, without necessarily measuring the crack width etc, to be of damage category 3 or 4, under Australian Standard *AS 2870 Residential slabs and footings—Construction*, is a defect likely to make a respective proposed unit unfit for occupation, whereas a crack of damage category 1 or 2 under that standard is not a defect unless it contributes to making a proposed unit unfit for occupation.
- 2 The components of fire sprinkler system that are visible by walking through the sprinkled areas of the building do not show signs that suggest the system is dysfunctional. Without evidence to the contrary at hand, the system can be taken to not suffer or constitute a defect that makes a proposed unit unfit for separate occupation. However, under subsection (3) the building surveyor need not look at any fire sprinkler system items inside a class 2 unit if the building surveyor does not have a reasonable suspicion that a defect, or evidence of the effect of a defect, is likely to be inside the unit.

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

17 Unit fitness considerations—statutory approval defects— detection in older parts of buildings

- (1) This section applies to an older part of a building.
- (2) Nothing in this part requires a building surveyor to make onsite tests to conclusively detect defects, but this section requires a building surveyor to inspect the site to visually detect defects, or what may be potential defects, to the extent that such defects, or their effects, are visually detectable from walking around the usually trafficable areas of the parcel, and to examine relevant documents.
- (3) However, the building surveyor must obtain and consider the written results of adequate tests by a suitably qualified technician of the operation of all *vital equipment* (mechanical systems, heating systems, ventilation systems, air conditioning systems, cooling systems, lighting, appliances, fire, heat or smoke control, detection or alarms systems, and automatic devices). For this section, the testing of the vital equipment must—

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- (a) take account of how the system should operate and perform in respect of the proposed units, and the relevant requirements of the applicable law as it would have applied to the building if it was to be constructed with sole occupancy units for each proposed unit; and
 - (b) be done not more than 3 months before the test results are considered by the building surveyor.
- (4) To remove all doubt, for subsection (2), the parcel includes the exterior and interior of all buildings including proposed class 2 units.
 - (5) Section 16 (Unit fitness considerations—statutory approval defects—detection in new or contemporary parts of buildings), example 1 is also relevant to this section, however, because of subsection (3) of this section, section 16, example 2, is not relevant to this section because example 2 does not relate to consideration of the written test results mentioned in subsection (3) of this section, and example 2 relates to a lack of inspection inside a class 2 unit.
 - (6) In this section:

a *suitably qualified technician* means 1 of, or a combination of, an authority, person, or body mentioned in the building code, vol 1, clause 1.2.2 (Evidence of suitability).

18 Unit fitness considerations—effects of unit title subdivision

- (1) A building surveyor must consider the requirements of the applicable law (*codified requirements*) and determine if the building has been erected or altered to meet the relevant codified requirements, as they would apply to erecting or altering the building as if the parcel is subdivided according to the proposed unit title subdivision.
- (2) A building surveyor must not take a parcel to comply with this section if the building surveyor believes on reasonable grounds that if the building was to be erected or altered, thus producing the building as it is (including any defects), but subdivided as per the proposed units, the erection or alteration would have contravened the relevant law because of the building's design, construction or a defect.

Example

A shopping mall was constructed in 1990, and has only a single bank of toilets, accessible to all occupants of the mall. It is now proposed to subdivide the mall into units. A proposed unit, unit 7, incorporates the bank of toilets and the adjacent department store. In 1990 the relevant law required all occupants of the mall to have access to a prescribed minimum number of toilets. The mall if built now, subject to the boundaries of unit 7, will fail to comply with the 1990 toilet requirements because the bank of toilets will be included in unit 7 and therefore will not be available to all occupants of the mall.

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

19 Unit fitness considerations—additional requirements for all parcels—physical defects onsite

A building surveyor must not take a parcel to contain a building that is suitable for separate occupancy if the parcel contains a building that suffers a defect of a nature prescribed in schedule 1, column 2, and the defect is not resolved as respectively prescribed in schedule 1, column 3.

Examples

1. A retaining wall has cracked and partly rotated out of vertical. That is a defect with a nature of a kind of defect prescribed in schedule 1, item 1, column 2, being ‘structural deformation or cracking’. Because of this section, a building surveyor must not take the relevant parcel to contain a building that is suitable for separate occupancy because the parcel contains the retaining wall, which has a relevant defect that is not resolved in accordance with schedule 1, item 1, column 3, which is about a lack of a structural engineer’s certificate.
2. A practicing structural engineer certifies that the retaining wall mentioned in example 1 is structurally adequate, sound and stable, to the satisfaction of the building surveyor. The building surveyor is no longer prevented from taking the parcel to contain a building that is suitable for separate occupancy because of this section or schedule 1, item 1 or the crack and rotation of the retaining wall.

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

20 Unit fitness considerations—fundamental life safety components

This section applies to part of a building that was built or altered when the applicable law did not require a fundamental life safety component (the *component*) to be provided for the part, but a newer law would have required the component (a *required component*) to be provided for the part if the building or part was to be rebuilt under the newer law.

A building surveyor must not take a parcel to contain a building that is suitable for separate occupancy if the parcel contains a part of a building that does not have a required component.

Examples

1. A block of flats was built in the early 1900s before smoke alarms were required, and so the flats have no smoke alarms. In the late 1900s law X commenced, requiring smoke alarms to be provided as part of constructing such a block of flats. Because of this section, the commencement of law X makes the smoke alarms a required compliant fundamental life safety component for the flats despite the flats not being rebuilt or altered. Under this section, a building surveyor must not take the parcel to contain a building that is suitable for separate occupancy because the parcel contains the block of flats, which does not have a required compliant fundamental life safety component (smoke alarms required because of the commencement of law X).
2. Subsequently, on 1 October 2010 (the *installation date*), smoke alarms were installed in the block of flats mentioned in example 1, compliant with law X as if the flats were being rebuilt, although they were not rebuilt. The smoke alarms can be taken as providing the respective required compliant fundamental life safety component of the flats, provided the flats and the alarms and their inter-relationship do not materially change with respect to how this section applies to the requirements of law X.
3. If law Y commences after the installation date mentioned in example 2, and increases the number of smoke alarms that would be required under law X to be provided for the flats if they were rebuilt under law Y, all things being equal, the outcome illustrated by example 2 does not necessarily change only because of the commencement of relevant provisions of law Y.

Note An example is part of the code, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

In this section:

fundamental life safety component means—

- a fire, heat or smoke detector or warning device or system
- a floor, wall, door, window, ceiling, or roof that achieves a required minimum level of fire resistance
- emergency lighting or exit signage to assist way finding during evacuation.

Schedule 1 Defects making proposed units unsuitable for separate occupancy

(see section 19)

column 1 item	column 2 potential defect	column 3 unsuitable if
1	structural inadequacy, instability, unsoundness, deformation, movement, failure or cracking (other than cracking that is not a defect under of section 16, example 1); or detrimental foundation settlement, erosion or excavation; or tree or root damage or other damage by a plant or overgrowth	a practicing structural engineer has not certified that the affected thing is structurally adequate, sound and stable
2	broken or cracked glazing or roofing	the glazing or roofing has not been replaced with unbroken uncracked glazing or roofing respectively
3	storm damage, lightning damage, water damage or flooding; or fire, heat or smoke damage; or impact or explosive damage; or damage from overloading or overuse	the damage has not been rectified
4	deterioration, decomposition, decay or corrosion; or disrepair or lack of maintenance; or modification, addition or demolition of a part	(a) had the defect existed as the building was completed it would have constituted non-compliance with a relevant development approval or building approval; or (b) the defect is evidence of a failure to comply with a lease or license under the <i>Planning and Development Act 2007</i> .
5	blockage or obstruction; or inaccessibility or access or egress restriction	the cause of the defect has not been cleared
6	contamination or infestation; or termite or other animal damage	if the defect has, or is likely to cause property damage, nuisance or injury to a person, the defect has not been not removed
7	danger to human health or safety; or danger of damage to property	The danger has not been removed or appropriately mitigated