

Building and Other Legislation Amendment Bill (No. 2) 2010

Explanatory Notes for amendments to be moved during consideration in detail by the Honourable Stirling Hinchliffe MP

Short Title

The short title of the Bill is the Building and Other Legislation Amendment Act (No.2) 2010.

Objectives of the Amendments

The objectives of the amendments to be moved during consideration in detail are set out below.

Enforcement of the sale / lease provisions

- The amendments will transfer part of the responsibility for enforcement from the Department administering the Act to local governments who are best placed to conduct physical inspections. The Department will continue to share with local governments the enforcement of activities that do not involve physical inspection and compliance assessing expertise (certificates and immersion incident reporting). Local governments will assume sole responsibility for enforcing compliance likely to involve actual physical attendance and inspection at regulated properties.

Impracticability exemption applications

- The amendments will transfer the responsibility for assessing these applications from the Department administering the *Building Act 1975* (BA) to local governments who are best placed to conduct physical inspections. In this way, the model for assessing impracticability exemptions will be consistent with the existing disability exemption model.

Access to regulated pools to be kept secure

- The amendments will incorporate and clarify the existing offence provision in section 245 of the BA dealing with the requirement to keep swimming pool gates securely closed when a pool is not in use. The new provision will apply to all ‘regulated pools’, which includes pools associated with hotels, motels, other residential buildings, caretaker residences, caravan parks and indoor pools. Also, the amendment will clarify how the newly incorporated provision will apply to pools in a multiple residential building. The new section will retain the current section 245T in the Bill as subsection (1) with minor amendment.

Allocation of funds

- The intention of this amendment in the Bill as drafted was to expand the range of matters for which the pool safety fund could be used. However, the scope currently provided in the BA is now considered adequate for the pool safety purposes for which the fund was established.

Notification to prospective purchasers

- During consultation on the Bill stakeholders raised concerns that prospective purchasers could find themselves bound to a contract of sale, before becoming aware of their obligations regarding compliance. To address this risk this amendment introduces a narrow regulation-making power to require pre-contractual disclosure notices to be provided to any purchasers. This provision will be available in the event that stakeholder concerns are not addressed by non-legislative practices, for example inclusion of appropriate clauses in industry standard documentation.

Display of pool safety certificates

- The Bill, as drafted, obliges individual lot owners in multiple residential buildings with a shared pool to cause any pool safety certificate in existence to be conspicuously displayed near the main entrance to the premises or near each pool gate before entering into an accommodation agreement. This amendment imposes the obligation instead on the body corporate, which is best placed to display notices in the ‘common area’ of a building. Also, to reduce the burden on pool owners, the requirement may be satisfied by displaying the certificate near one pool gate rather than every gate.

Pool safety management plans

- The Bill as drafted requires pool safety management plans (which apply only to exempted tourist resort pools) to include details of measures the owner intends to implement to ‘stop’ access to pools by young children unless supervised by an adult. The requirement to ‘stop’ access is considered to be impractical. For this reason it is proposed to amend the Bill to allow approval of pool safety management plans that demonstrate an appropriate level of safety for young children.

Building certifiers

- Section 289 of the BA (to be introduced into the BA by section 18 of *Building and Other Legislation Amendment Act 2010* - which section is yet to be commenced) provides that existing licensed building certifiers are taken to be licensed to perform inspections for the first year after commencement. The amendments clarify that building certifiers will not have to undergo further training and examinations in order to renew their licence following expiry of the first year.

Definition of ‘member’ of a family

- The existing definition of a ‘member’ of a person’s family is relevant to the definitions of ‘accommodation agreement’, ‘homestay’ and ‘assisted accommodation agreement’. The amendment clarifies the definition by including spouses of parents and grandparents.

Indoor swimming pool

- This amendment clarifies that a pool enclosed on all sides by the walls of a building, one or more of which may contain an external door, is an ‘indoor swimming pool’.

How objectives are achieved

Passage of the Bill including the amendments to be moved during consideration in detail will achieve the Government’s policy objectives.

Alternative method of achieving the policy objectives

There are no alternatives to the passage of the Bill including the amendments to be moved during consideration in detail that would achieve the Government’s policy objectives.

Estimated cost for implementation

There are no additional anticipated financial costs for Government arising from the amendments including the amendments to be moved during consideration in detail. Implementation costs will be absorbed within existing departmental budgets.

Consistency with Fundamental Legislative Principles

The new section 246ATM could potentially raise a concern as to whether the Bill has sufficient regard to the institution of Parliament in that the section may not sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly. It is submitted that the delegated legislative power in this case is closely confined by the terms of the subsection (3) and further that the provision is justified as a significant consumer protection measure.

The remaining amendments to be moved during consideration in detail are consistent with Fundamental Legislative Principles.

Consultation

The amendments to be moved during consideration in detail are based upon ongoing consultation with industry including Hannah's Foundation, the Local Government Association of Queensland (LGAQ), the Real Estate Institute of Queensland (REIQ) and the Queensland Law Society (QLS), the Department of the Premier and Cabinet, the Department of Justice and Attorney-General and the Department of Employment, Economic Development and Innovation since the Bill was introduced into the House.

Notes on Provisions

1. Clause 12 (Amendment of s231A (Definitions for ch 8))

Amendment 1 amends clause 12 definition of '*member*' to change paragraph (f) to widen the definition to include the spouse of anyone mentioned in paragraph (b), (c), (d) or (e). As currently drafted the spouse of a parent or grandparent would not to be included.

2 – 24. Clause 14 (Replacement of Chapter 8, pt 2)

Amendments 2 to 24 amend clause 14 to remove the words “chief executive” and replace them with the words “local government”.

This reflects the fact that applications for impracticality exemptions will now be made to the relevant local government instead of the chief executive. These types of applications require consideration of site specific issues which local governments are best placed to consider.

Related consequential amendments involve:

- Amendment of section 245(2) which reflects the fact that a prescribed form will not be required and that local government can recover the reasonable cost of undertaking functions under the BA.
- Inserting a note into section 245C and 245E to clarify that there is a right of appeal from local government decisions to the building and development dispute resolution committees.
- Inserting new sections 245F and 245FA to provide that the chief executive of the Department administering the BA must be given details of any impracticality exemptions and for local governments to keep a copy of exemptions granted.

25 – 27. Clause 14 (Replacement of ch 8, pt 2)

Amendments 25 to 27 amend clause 14 to ensure that pool safety management plans can be approved by the chief executive of the Department administering the BA in appropriate circumstances.

This involves removing words from sections 245M, 245O and 245Q that reflect stopping a young child accessing the pool unless the child is supervised by an adult and replacing them with words that reflect the policy objective of only approving a pool safety management plan where it will appropriately provide for the safety of young children in and around the pool.

28 – 30. Clause 14 (Replacement of ch 8, pt 2)

Amendments 28 to 30 of section 245T incorporate and clarify the existing offence provision in section 245 of the BA dealing with the requirement to keep swimming pool gates securely closed when a pool is not in use.

The existing section 245 of the BA applies only to outdoor swimming pools on residential land, however, the new provision will apply to all ‘regulated pools’, which includes pools associated with hotels, motels, other residential buildings, caretaker residences, caravan parks and indoor pools.

Also, the amendment will clarify how the newly incorporated provision will apply to pools in a multiple residential building. In such cases the obligation will fall on the body corporate rather than the ‘occupier’ of the property.

The new section 245T will retain the current section 245T in the Bill as subsection (1) with an amendment to include a ‘reasonable excuse’ defence. This will be consistent with the other two subsections in the new section 245T.

31. Clause 14 (Replacement of ch 8, pt 2)

Amendment 31 inserts a new section 245UA, where the chief executive of the Department administering the BA may by notice inform local government if it comes to the Department’s attention that a regulated pool may be unsafe.

This information may be derived from the pool register or from matters brought before the PSC and must include information about the location of the regulated pool.

32 - 33. Clause 16 (Insertion of new s246ADA)

Amendments 32 and 33 amend s246ADA to clarify which notices require the local government to undertake an inspection of a regulated pool including the notice provided for under the newly inserted s245UA and any necessary enforcement action. The amendments also clarify that a fee can not be charged to inspect a regulated pool after the local government receives a pool immersion or pool safety complaint notice.

34 - 35. Clause 21 (Insertion of new ch 8, pt 4, divs 3-5)

Amendment 34 amends new section 246ATH. That section, as drafted, obliges individual lot owners in multiple residential building with a shared pool to cause any pool safety certificate in existence to be conspicuously displayed near the main entrance to the premises or near each pool gate before entering into an accommodation agreement. The amendment

imposes the obligation instead on the body corporate, which is best placed to display notices in the ‘common area’ of a building. Also, to reduce the burden on pool owners, the amendment makes it clear that the requirement may be satisfied by displaying the certificate near one pool gate rather than every gate

Amendment 35 also makes minor editorial amendment to section 246ATL.

It also inserts new section 246ATM (Prescribed notification requirements).

This section applies to a proposed sale of a regulated property and gives a head of power for a regulation to be made to prescribe requirements for notification by the owner.

A regulation may prescribe that the owner of a regulated property is required to notify prospective purchasers before the sale that a pool safety certificate will not be in effect prior to settlement and the purchaser will be required to obtain one within 90 days of settlement.

This will help avoid the potential concern that purchasers may enter into a contract of sale unaware until they receive a notice from the seller that a pool safety certificate will not be provided prior to the settlement of the contract and the pool may not comply with the pool safety standard.

It is envisaged that the notice could be contained in the contract of sale or other suitable document, as this should be drawn to the purchaser’s attention before the contract is signed.

36. After clause 22

Amendment 36 amends section 246BH (Who may apply) and section 246BI (Requirements for application) to allow a building certifier to apply to become a pool safety inspector without having to undergo further training and examinations in order to obtain a licence.

Building certifiers are deemed already qualified and licensed to perform inspections for the first year.

37. Clause 25 (Amendment of s246FD (Payment from fund))

Amendment 37 omits clause 25 so that the current s.246FD in the BA will remain unchanged.

The intention of this amendment was to expand the range of matters for which the pool safety fund could be used. However, the scope currently

provided in the BA is considered adequate for the pool safety purposes for which the fund was established.

38. Clause 27 (Amendment of s256 (Prosecution of offences))

Amendment 38 amends section 256 to clarify that the Department administering the BA will continue to share with local governments the enforcement of activities that do not involve physical inspection and compliance assessing expertise (e.g. certificates and immersion incident reporting). Also, the Department administering the BA will share enforcement of activities relating to pool safety management plans with local governments.

Local governments will assume sole responsibility for enforcing compliance likely to involve actual physical attendance and inspection at regulated properties.

39 - 40. Clause 32 (Amendment of sch 2 (Dictionary))

Amendments 39 and 40 amend clause 32, definition of an 'indoor swimming pool'. This amendment will remove an ambiguity in the current definition. The ambiguity arises because the phrase 'if the pool is, under usual ways of entering or leaving the building, only accessible from the inside of the building' could potentially apply both to pools within a building and those located on a deck or roof of the building. The intent is that those words only apply to pools located on a deck or roof of the building.

This amendment will make it clear that a pool enclosed by walls (for example three external and one internal wall) and having doors in an external wall would be regarded as an indoor pool.