

STRATA REMEDIAL UPDATE: WHEN IS REMEDIAL BUILDING WORK EXEMPT DEVELOPMENT?

The Department of Planning and Environment has published a '*Remedial Building Work – State Environmental Planning Policy (Exempt and Complying Development Codes) 2008' Fact Sheet (Fact Sheet)* to provide guidance as to when remedial building work is considered exempt development under the Exempt and Complying Development (**Codes SEPP**):

<https://www.planning.nsw.gov.au/sites/default/files/2023-07/remedial-building-work-sepp-fact-sheet.pdf>

The classification of remedial works as either exempt or not exempt development clearly has massive consequences for owners corporations in the undertaking of remedial projects.

If remedial works are exempt development, those works can progress without having the delay of going through the approvals process and, if the works are also excluded from the *Design and Building Practitioners Act 2020 (DBP)* under clause 13 of the *Design and Building Practitioners Regulations 2021 (Regulations)*, then the works can progress without the preparation of a Regulated Design.


But, if the works cannot be carried out as exempt development, this means that not only must an owners corporation go down the approvals pathway but also comply with the DBP. Effectively having two levels of regulatory control for the same work which, whilst in the case of major works may be warranted, perhaps not with minor works.

It must be noted that for some older strata schemes, who were not required to have a fire safety certificate at the time of construction or where no fire safety measures are currently implemented, required or proposed for the building, clause 1.16(2) of the Codes SEPP applies to immediately classify these works as not exempt development requiring compliance through the approvals pathway.

The Remedial/Strata industry has been reeling since the introduction of the DBP. Two years on, numerous remedial projects in class 2 buildings are on hold, unintended consequences prevail, and confusion has reigned in the remedial building industry. Design and building practitioners, owners corporations and strata managers have been looking for guidance as to what remedial building works are actually 'exempt development' works.

Whilst the Government and Remedial/Strata consultation process continues with the intent of providing further clarity for the industry in the coming months, in the interim, the Fact Sheet provides general information and welcome guidance to the industry. This is an outstanding result in the consultation process and a positive outcome for the industry with significant input by ACRA¹ on behalf of the remedial industry.

¹ *Australasian Concrete Repair & Remedial Building Association*



Historically, remedial building works in multi-storey residential or mixed-use buildings, have generally been classed as 'repair and maintenance' works. Consequently, planning approval for numerous remedial projects, was considered unnecessary.

Whilst the Codes SEPP has not changed, the current focus on the DBP and what building works are classified as exempt and not exempt building works has brought the spotlight onto clause 1.16 of the Codes SEPP².

In *new* construction works, to comply with the Building Code of Australia (**BCA**) is simple (or should be). You are designing a new building. You are not restricted for the works you are performing, having to fit in with an existing and most probably, non-compliant space. There should be relevant Deemed to Satisfy (DTS) provisions applicable to the new building works or you should be able to comfortably prepare a Performance Solution to meet the performance requirements of the BCA.

If you are undertaking remedial building work in an existing class 2 building, sometimes more than 30 – 50 years old, a practitioner will find themselves having to 'fit a design', to either rectify a defect or renovate a dilapidating building, into a space which does not allow strict compliance with the current version of the BCA. These works, in considering the Codes SEPP, mean that where no Deemed to Satisfy provision is relevant, the works must be *structurally adequate* and not *contravene the BCA* to be exempt development.

Or, you may be performing remedial building works which do not 'neatly fit' into the Exempt Development Codes under the Codes SEPP applicable to Minor Building Alterations.³

Under the Codes SEPP, there is confusion around what remedial building works are exempt under the classification of 'Minor Building Alterations'. There is no reference to 'remedial' building works in the Codes SEPP nor a definition of 'minor.' Whilst there has been a gradual realisation by Government as to the clear distinction between 'remedial' building works and 'new' construction and the Government is stepping up to provide guidance working with the legislation in its current form, there is a hope of legislative change to come.

Clause 2.53 (Subdivision 27) of the Codes SEPP lists a number of minor external non-structural alterations which are classified as 'exempt'. Clause 2.53 contains the words '*such as the following*' so, the list of minor alterations listed is not, an exhaustive list.

² Extract only of clause 1.16 Codes SEPP

(1) *To be exempt development for the purposes of this Policy, the remedial building work—*

(a) *must meet the relevant deemed-to-satisfy provisions of the Building Code of Australia (DTS), or if there are no such relevant provisions, must be structurally adequate, and*


(b) *must not, if it relates to an existing building, cause the building to contravene the Building Code of Australia...*

(2) *Development that relates to an existing building that is classified under the Building Code of Australia as class 1b or class 2–9 is exempt development for the purposes of this Policy only if—*

(a) *the building has a current fire safety certificate or fire safety statement, or*

(b) *no fire safety measures are currently implemented, required or proposed for the building.*

³ Subdivision 26 Minor Building Alterations (internal) [clause 2.51] and Subdivision 27 Minor Building Alterations (external) [clause 2.53] of the Codes SEPP.



Despite this and noting the gross uncertainty and lack of clarification stemming from increased regulation, practitioners/certifiers/building consultants have been unwilling to classify some remedial building works as 'exempt'. This has led to multiple projects being put on hold, more development applications being lodged, and increased costs and delays for owners corporations.

The Fact Sheet aims to provide guidance for the remedial industry as to examples of what remedial building works are considered 'exempt' works and, whilst the DBP still applies for exempt works such as waterproofing or cladding, clarity is provided for remedial building works such as external window and door replacements, balustrade repair and replacement, cavity flashings, lintels, concrete repairs.

If you are performing remedial building works which:

- do not 'permanently alter' the load bearing elements or layout of the building
- re-instate a building element to its 'intended structural capacity' and do not reduce the structural adequacy of that building element
- do not change the original architecture or design intent of the building ie like-for-like
- pose minimal impact to the built environment

and comply with the development standards these are remedial building works which would be considered 'exempt development' under the Codes SEPP. The Fact Sheet contains some examples of typical remedial works to assist.

This means that regardless of undertaking remedial building on a structural element, provided the above is met and the Codes SEPP development standards followed, the remedial building work will be classified as exempt development but will, if not excluded under clause 13 of the Regulations, still need to comply with the DBP.

The Fact Sheet provides guidance and general information for the Remedial/Strata industry with the observation that logic should be applied. Where there is uncertainty about whether a remedial building project is exempt development or not, advice should be obtained from the relevant professionals.