



Department of
Building and Housing
Te Tari Kaupapa Whare



Building Act 2004

New safety measures for premises intended for public use

Section 363



- 01 **INTRODUCTION**
- 02 **WHEN DOES 363 APPLY?**
- 03 WHAT ARE PREMISES INTENDED FOR PUBLIC USE?
- 04 WHAT DOES 'AFFECTED BY BUILDING
WORK' MEAN?
- 05 **RESPONDING TO 363**
- 05 ADMINISTRATION OF SECTION 363
- 05 WHAT SHOULD PEOPLE WHO CONTROL
PREMISES DO?
- 05 PLANNING A NEW PROJECT
- 06 CERTIFICATE FOR PUBLIC USE
- 06 EXISTING PREMISES INTENDED FOR PUBLIC USE
- 08 **SECTION 363 (AMENDED)**

Introduction

The Building Act 2004 was introduced to strengthen building controls and increase protection for the public.

It contains a new measure, known as section 363, which relates to owners, occupiers and people who control premises intended for public use.

Section 363 makes it an offence to permit people to use parts of premises intended for public use that are affected by building work, unless the council confirms it is safe to do so.

Section 363 is about ensuring people are safe in premises intended for public use affected by building work.

Failure to do this could result in a fine of up to \$200,000, and a further fine of up to \$20,000 for every day or part of a day the offence has continued.

Information in this leaflet incorporates amendments to the Building Act 2004 that took effect on 14 April 2005.

When does 363 apply?

In premises intended for public use affected by building work, section 363 applies in either of the following situations:

1. A building consent has been issued to undertake the building work, but a code compliance certificate or certificate for public use has not yet been issued (or the conditions on the certificate for public use are not being complied with); or
2. A building consent was never issued for the building work that has been undertaken, even though a consent was required.

In these circumstances, an offence under section 363 will be committed if members of the public use the affected part of the premises from the time the physical work starts until documentation is issued confirming it is safe to do so.

People in control of premises affected by building work consented or begun before 31 March 2005 have until 31 March 2010 to obtain a CCC or a certificate of acceptance for that work and comply with the requirements of section 363.

Important

- Building work for which no building consent is required, such as a non-structural fit out of a shop or office, is not affected by section 363.
- Building consents and code compliance certificates were introduced on 1 July 1992. Section 363 does not apply to work done before this date that affects premises intended for public use.

WHAT ARE PREMISES INTENDED FOR PUBLIC USE?

Section 363 defines premises intended for public use as premises intended to be open to members of the public, or being used by members of the public, whether free of charge or for payment.

Premises can be all or part of a building.

Premises with free and open access will typically be classified as premises intended for public use. Examples include shopping centres as well as premises where the public can enter on payment of a fee, such as a sports stadium, swimming pool or zoo.

Premises with restricted access (for example, where access is blocked and entry gained via a key pad or coded swipe card) are unlikely to be considered premises intended for public use.

Premises intended for public use as defined by section 363 are likely to include, *but are not limited to*, the following:

- schools and childcare centres
- hospitals and rest homes
- premises providing public accommodation, such as hostels and guest houses
- places of assembly, including churches, cinemas and conference facilities
- clubrooms and recreation centres with public access
- restaurants and bars
- public foyers in office and apartment buildings
- public structures.

WHAT DOES 'AFFECTED BY BUILDING WORK' MEAN?

How much of the premises will be considered affected will depend on the project.

'Affected by building work' can mean work occurring on the premises, or work being done elsewhere in the building if it poses a threat to public safety on the premises. In many cases the areas affected will vary at different times during the project.

Under section 363, access to the affected part of the premises needs to be restricted.

Many of the safety precautions you could take would be similar to those undertaken under the Health and Safety in Employment Act 1992.

The following is an example of how a business could remain open, but in a limited capacity while building work is under way.

Adding an outside extension/smoking area to a public bar

The public must be able to enter without passing by or through the building work. The site and any tools or materials must not be accessible to the public. The public must not be able to access any part of the premises where the structural integrity is compromised by the work, or where the public's safety is jeopardised.

Responding to 363

ADMINISTRATION OF SECTION 363

District and city councils will be largely responsible for implementing section 363. They will establish policies and processes for its enforcement at a local level.

WHAT SHOULD PEOPLE WHO CONTROL PREMISES DO?

People who control premises are responsible for ensuring building work on their premises is done safely, and in accordance with the law. This responsibility includes ensuring all necessary building consents and code compliance certificates have been granted.

People who control premises are also responsible for ensuring members of the public can use their premises safely. If premises are affected by building work, this could include ensuring barriers are put up to restrict access, or in some cases it could involve closing premises.

PLANNING A NEW PROJECT

People proposing to construct new premises intended for public use will need to factor the need to comply with section 363 before members of the public can use the premises into their timeframe and planning.

If people want to start using premises before a code compliance certificate is issued, they can apply for a certificate for public use. This certificate enables members of the public to use the premises until a code compliance certificate is granted.

CERTIFICATE FOR PUBLIC USE

A council will issue a certificate for public use where it is satisfied it is safe for members of the public to use the premises. Councils can take into account any safety precautions that have been put in place. Certificates for public use can be for all or part of the premises.

Once all the building work is complete, a code compliance certificate must be obtained.

EXISTING PREMISES INTENDED FOR PUBLIC USE

People in control of premises affected by building work consented or started before 31 March 2005 have until 31 March 2010 to comply with section 363. This gives people who control premises five years to resolve any issues with building work affecting their premises.

People who control premises should check their building records to ensure all building work affecting the premises has received a building consent and code compliance certificate.

If there are no outstanding building consents or code compliance certificates for building work affecting the premises, no further action is required. However, it may be worth checking with the council to ensure that its records confirm this.

If work has been consented, but no code compliance certificate issued, the person in control of the premises should contact the local council to see if a code compliance certificate can be issued for that work.

If a local council cannot grant a code compliance certificate, or if work has been done without a building consent, it may be possible to get a certificate of acceptance. Section 363 will not apply to building work affecting premises that has a certificate of acceptance.

If a building consent has been issued but no building work was ever done, no offence has been committed under section 363.

Section 363

362A Premises in respect of which duty arises under section 363

- (1) This section applies to premises that—
 - (a) are intended to be open to members of the public or are being used by members of the public; and
 - (b) comprise all or part of a building.
- (2) For the purposes of subsection (1), premises may be intended to be open to members of the public—
 - (a) whether or not members of the public are charged for their use (or, as the case may be, whether or not it is intended that members of the public are to be charged for their use); and
 - (b) whether or not members of the public will, regularly or from time to time, be excluded from them.

363 Protecting safety of members of public using premises open to public or intended for public use

- (1) A person who owns, occupies, or controls premises to which section 362A applies must not use, or permit the use of, any part of the premises that is affected by building work—
 - (a) if—
 - (i) a building consent is required for the work; but
 - (ii) no building consent has been granted for it; or
 - (b) if a building consent has been granted for the work, but—
 - (i) no code compliance certificate has been issued for the work; and
 - (ii) no certificate for public use has been issued under section 363A for the part; or

- (c) if a building consent has been granted for the work, and a certificate for public use has been issued under section 363A for the part, but—
 - (i) no code compliance certificate has been issued for the work; and
 - (ii) the certificate for public use has been issued for the part subject to conditions that have not been complied with.
- (2) For the purposes of subsection (1), a part of premises may be affected by building work—
 - (a) whether or not the work has been completed; and
 - (b) whether the work is being or has been done to or in, or involves or involved the building of,—
 - (i) the part itself; or
 - (ii) some other part of the building that the premises comprise or form part of.
- (3) A person who fails to comply with subsection (1) commits an offence.
- (4) A person who commits an offence under this section is liable to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.

363A Public use of premises may be allowed before issue of code compliance certificate in some circumstances

- (1) A person who owns, occupies, or controls premises to which section 362A applies may apply in the prescribed form to the territorial authority for a certificate for public use for the premises or a part of the premises if—
 - (a) a building consent has been granted for the building work affecting the premises or part; and
 - (b) no code compliance certificate has been issued for the work.
- (2) The territorial authority may issue a certificate for public use for the premises or part if, and only if, satisfied on reasonable grounds that members of the public can use the premises or part (as the case may be) safely.
- (3) A certificate for public use—
 - (a) must be in the prescribed form; and
 - (b) may be issued subject to conditions.
- (4) The territorial authority must decide whether to issue the certificate—
 - (a) within 20 working days after the authority receives an application for it; or
 - (b) within any further period agreed between the applicant and the authority.

- (5) Within the period stated in subsection (4), the territorial authority may require the applicant to give it further reasonable information in respect of the application; and if it does so, the period is suspended until it receives the information.
- (6) Nothing in this section relieves the owner of a building from the obligation imposed by section 92(1) to apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to the owner is completed.

363B Application of section 363 to building work where consent granted, or work begun, before 31 March 2005

- (1) This section applies to building work if it affects premises to which section 362A applies, and—
- (a) a building consent was granted for it before 31 March 2005; or
 - (b) it began before 31 March 2005.
- (2) Before 31 March 2010, section 363(1) does not apply to building work to which this section applies if a certificate of acceptance has been issued for it under section 96(1) before 31 March 2010.

363C Section 363 does not apply to building work commenced before commencement of Building Act 1991

- (1) Section 363(1) does not apply to building work commenced before 1 July 1992.
- (2) Subsection (1) applies whether the work was completed before, on, or after 1 July 1992.



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Disclaimer:

While we have tried to make this educational information as accurate as possible, it does not cover every situation and should not be regarded as legal advice.

This document is also available on the Department's website: www.dbh.govt.nz

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