

8 October 2004

Mr. Tony Hinton  
Commissioner  
Productivity Commission  
P O Box 80  
BELCONNEN ACT 2616

Dear Mr Hinton

**Re: Reform of Building Regulation**

Thank you for the opportunity to consider the draft research report entitled "Reform of Building Regulation".

Council's submission, commenting on a number of the draft recommendations, is attached. The submission deals mainly with code content and coverage.

Further, in response to the draft finding 7.4 concerning private certifiers, I attach a submission Council made to Building Codes Queensland on the 25<sup>th</sup> August 2003. This submission outlines the need for fundamental reform in the way private certification is used in the assessment process.

Council recently (in the context of another national review) expressed the general concern that any attempt to establish an homogenous regulatory system in development or building fields eliminates local input. One possible result of negation of Councillor and community contribution is an undermining of public faith in the system.

I suggest that this perspective be taken into account in your assessment.

Yours sincerely

**Jude Munro**  
**Chief Executive Officer**

## COMMENTS on PRODUCTIVITY COMMISSION REVIEW REFORM OF BUILDING REGULATION

### Draft Recommendation 5.3

***The ABCB (or its replacement) should enhance efforts to ensure that all deemed-to-satisfy provisions in the BCA offer an equivalent level of building performance to that required by the performance requirements.***

Council strongly agrees with this recommendation as the deemed-to-satisfy provisions are more commonly taken up by certain segments of the industry.

### Draft Recommendation 6.2

***The ABCB (or its replacement) should continue its work on amending the BCA whereby the disabled access provisions would be linked to the Disability Discrimination Act 1992 so that compliance with the BCA would also ensure compliance with obligations under the Act.***

This is an important piece of regulatory work that is strongly supported by Council as this will alleviate confusion and complexity.

Further to this piece of work and the discussion on page 120 in the report regarding other work priorities, in particular adaptable housing standards, Council strongly supports the adoption of minimum adaptable housing design provisions in the BCA.

Adaptable housing is an important issue given our ageing population, and the greater number of young people surviving trauma, disabling conditions and illness. Ninety percent (90%) of people with a disability reside in private dwellings. It is important that residential dwellings are designed so people can remain in their homes for longer periods of time before having to move into alternative accommodation.

Minimum adaptable housing standards that encourage safe and independent mobility are needed urgently, as the window of opportunity for cost effective housing responses is narrowing. Building adaptable housing in the first instance is far more cost effective than retrofitting a house to incorporate adaptable housing features. Home modifications required to accommodate a severe or profound disability are estimated to average \$20,000. Whereas, the total cost of incorporating adaptable housing features when building or renovating a home is estimated as being \$0 - \$200.

The absence of minimum standards for adaptable housing will continue to place significant costs on the community and Government's health and social systems.

Council encourages the inclusion of adaptable housing in the future work program of the ABCB (or its replacement). Given the unprecedented increase in people aged over 60, (the number of older people in Queensland is increasing at nearly 20 000 per year) minimum standards are needed sooner rather than later.

## **Draft Finding 6.2**

***Incorporating the Plumbing Code of Australia (PCA) into the BCA would not seem to be warranted at this stage.***

Council has not yet reached a final opinion on this draft finding. However, if sustainability is taken up as a goal in the future building code, then greater alignment of the PCA and BCA is required.

If Queensland's experience with the Plumbing Regulation is typical of other States who are utilising the Plumbing Code, some of the plumbing provisions may in fact hamper the achievement of sustainable housing outcomes. For example, changing the type of hot water system installed is considered regulated work under the Regulation in Queensland. This requires a plumbing inspection (which costs approximately \$90). Therefore a householder wishing to change from an electric hot water system to a solar hot water system, a more sustainable option, will incur greater costs than the householder who replaces with an electric system.

## **Draft Recommendation 6.6**

***The ABCB (or its replacement) should set up a rigorous framework to assess whether it is appropriate to include any additional mandatory requirements in relation to environmental objectives in the BCA.***

The ABCB's decision to include sustainability as a goal of the BCA is welcomed. The possible areas for consideration as outlined on page 128 of the report - energy, water, materials and indoor environment quality - are also supported. The inclusion of water adds further weight to the better alignment of the PCA with the BCA.

Consideration should also be given to the operational performance of buildings, for example, waste management, operational energy and water use.

The possible approach as outlined on page 132, namely that the focus be on the problem, its size and whether it is appropriate to address via the BCA on initial consideration, would seem a good approach. The difficulty comes with the determination of whether it is consistently a national problem or whether, as with energy use in the home, the causal factors differ across the States or climatic regions. The source of the problem and case for intervention on issues such as greenhouse gas emissions for example can differ quite markedly.

Environmental factors, such as energy efficiency, should be examined with a focus on the problem. The question is at what level? The statement in the report that, "Energy-efficiency measures in houses will provide one of the largest single decreases in greenhouse gas emissions<sup>6</sup> (AGO 2001)", is one example of where national data and perspective need to be tempered with locally appropriate responses.

In South East Queensland, for instance, the highest energy use in the home is for hot water heating, not heating and cooling as is the case in the southern states. Further information and verification of operational energy use within homes in South East Queensland will hopefully shortly be available from energy monitoring in 500 existing homes by Energex.

While the energy efficiency provisions in the BCA aim to encourage better passive design and minimise energy consumption for heating and cooling, in South East Queensland it is possible that this is not addressing the biggest part of the problem. Similarly, the building service provisions included in the draft energy efficiency provisions for Class 2,3 and 4 buildings addresses the efficiency of services but not the efficiency of the service. This highlights the need to consider the energy efficiency of the main energy consuming plant and equipment (efficiency of heat and cooling plant), as well as the ancillary equipment and infrastructure (insulation of pipes).

The use of non-regulatory means where the matter is not of national benefit (as suggested in the report) is not entirely effective, as market leaders are more likely to be rewarded for something that they are already doing, rather than the smaller end of the market taking up something new. Small-scale contractors and developers are slower to adopt new technologies and other sorts of innovations; and regulation is the preferred method where the benefits (environmental, social and economic) can be shown to exceed the costs.

A framework as is recommended would be beneficial to assess whether it is appropriate to include any additional mandatory requirements in relation to environmental objectives in the BCA. This framework should not be used to preclude or limit at the State or local level additional measures. Adoption of a similar framework or access to the BCA framework once developed would be of benefit for States and local authorities considering building regulation matters.

#### **Draft Finding 6.3/**

#### **Draft Recommendation 6.7**

***The ABCB (or its replacement) should put in place a system for assessing mandatory standards for buildings for energy efficiency to ensure they are soundly based (with benefits greater than costs) and that they are applied consistently across jurisdictions.***

As stated previously, the application of consistent mandatory standards does not allow for regional variation. There is a significant difference between Queensland and Victoria in energy uses in the home. In Victoria heating and cooling contributes 32% of overall energy use whereas, it is only 5% in Queensland. Water heating in Queensland contributes 33% of the energy use of the home, and is the key energy issue.

Continuance of the current focus of the energy provisions in the BCA on the building envelope will not address the key energy issues for homes in Queensland. Any mandatory approach will need to ensure that hot water systems are the focus for energy efficiency in Queensland homes.

#### **Draft Recommendation 6.9**

***The future work agenda for the ABCB (or its replacement) should include an examination of ways to reduce the scope for the national consistency objective of building regulation to be eroded inappropriately by Local Governments through their planning approval processes. Avenues for this include:***

- ***the possibility of Local Governments being required to seek prior approval from the relevant State Government to apply building requirements that are inconsistent with the BCA;***
- ***these requirements should be assessed as to whether net benefits would accrue.***

***To assist the design of such a system, the ABCB (or its replacement), in consultation with key stakeholders, should examine the possibility of defining a clear delineation between those issues to be addressed by planning regulation and those issues to be addressed by building regulation.***

The issue that differing jurisdictions are eroding the national approach for building regulation is significant for both Local and State Government. As the building code enters into new territory with provisions addressing environmental factors, such as energy efficiency, the potential or need for state or local approaches increases. As previously mentioned, State and Local Government need to have the ability to respond to particular environmental or resource issues which are of community concern or impact.

In Queensland, local authorities do require State approval for planning and building regulations. Consequently, the only avenue for local authorities to address regionally specific matters due to climatic differences or resource issues is through non-regulatory means such as incentives whereby a higher level of performance rewarded. This may not be effective, and results in the wider community bearing the cost and tensions in the development approval process.

The BCA's role to establish minimum standards for national consistency is not challenged. However, as acknowledged on page 26 of the report, the BCA establishes **minimum** standards which do not preclude builders and designers from achieving a higher standard. This also should not preclude States and local authorities requiring a higher standard if a framework to assess proposed requirements and the benefits and costs to the community and industry are considered.

As commented on page 150 of the report, some local variations may be justified particularly where "the greatest knowledge and the greatest impact of the changes is at the local level".

Greater delineation of those issues and matters to be addressed by planning regulation and those to be addressed by building regulation is welcomed and will assist Local Government in the plan-making process. Use of outside and inside the building envelope as reported on page 153 and proposed by MBA is favoured. Delineation along 'macro' and 'micro' planning issue lines is not considered appropriate. The 'micro' issue example cited of siting on a block, is not a micro issue for many forms of development or communities.

**Draft Recommendation 11.1**

***The mission statement for the ABCB (or its replacement) should be amended to:***

***In addressing issues relating to health, safety, amenity and the environment, to provide for efficiency in the design, construction and use of buildings through the creation of nationally consistent building codes and standards and effective regulatory systems.***

**Draft Recommendation 11.2**

***The objectives of the ABCB (or its replacement) should be amended to:***

***Proposed Objective 1***

***Establish building codes and standards that are the minimum necessary to address efficiently relevant health, safety, amenity and environmental concerns.***

The ABCB is to be applauded for taking up the challenge to include environmental factors in its mission statement and objectives. The next challenge is to determine and agree the scope and level of standard that should be consistent at a national level.

25 August 2003

Mark Fallon  
Building Codes Queensland  
Department of Local Government and Planning  
P O Box 31  
BRISBANE ALBERT STREET QLD 4002

Dear Mr. Fallon,

**Re: Regulatory Impact Statement**

Thank you for the opportunity of commenting on the draft *Regulatory Impact Statement* (RIS) for the proposed *Building Legislation Amendment Regulation 2003*.

Council officers have prepared a commentary on the statement, which I have attached to this letter. This commentary deals with the detail of the RIS, proposed code of conduct, and draft legislation. Whilst Council officers support the direction of proposed changes, without adequate regulatory oversight such changes cannot address some of the fundamental issues which must be resolved if private regulation is to deliver benefits to the whole community.

The Queensland model of private building certification lacks structures and oversight to prevent regulatory capture. Certifiers are dependent on the building / development industry for their business survival. Conflict of interest is inevitable in this model. Unless properly resourced and independent regulatory control over certifiers is introduced, any changes will be ineffective. Laws alone have no deterrent value if it is known in the industry that there is little prospect of being caught and penalised. If this does not occur there is a significant risk that building standards and safety will be compromised.

Also, I have four specific areas of major concern about the proposals to add to my general concern about the degree of regulatory capture inherent in the Queensland private certification model. These issues are –

- continuing problems in the co-ordination of building approvals with other approvals and with planning scheme codes;
- the lack of capacity to rectify illegal structures;
- the lack of recognition of the function of local laws;
- non-lodgement of records.

These issues are either not resolved, or only partly resolved, by the proposed suite of regulations.

The problem of lack of co-ordination between building and other approvals has been apparent since the commencement of private certification. Section 5.3.5 of the *Integrated Planning Act 1997* seeks to ensure that private certifiers inform applicants of all applicable codes, and do not give building approvals before other approvals have been obtained. Not only is this an onerous obligation placed upon certifiers, it also difficult to reconcile with section 31 of the

*Building Act 1975* and section 11 of the *Standard Building Regulation 1993*, which both confine the jurisdiction of certifiers to the Building legislation alone. A number of local governments, including Brisbane, are now faced with buildings illegally constructed over sewers because private certifiers have ignored the requirement not to decide the application until other approvals had been obtained. This fact is evidence of the seriousness of this problem, which is not addressed in the proposed amendments.

Further, when this has occurred, neither the local authority nor the landowner are responsible for the resultant illegal structure, but they are the ones left to deal with it. There is a possibility that a local authority would not succeed in an action against an owner to demolish the structure because the owner innocently relied on the illegal building approval. It is unconscionable that both owner and local government are placed in this invidious position, and the proposed reforms do nothing to address this.

Council officers suggest that decision notices or approvals that are made in contravention of the statutory requirement should be able to be rescinded at the cost of the private certifier. Although this no doubt will ultimately result in the certifier's insurer meeting the claim, it is the only appropriate allocation of responsibility that protects both innocent parties.

A further matter of concern is the lack of recognition of the role of existing local laws requiring consideration prior to any approval being granted. Whilst there is some mention of the need to consider the application of local laws, this is hardly sufficient in the context of the totality of the proposed legislative tools.

Council does not wish to "turn back the clock" to a time prior to the *Integrated Planning Act 1997*, but given the importance of, say, 'vegetation management' local laws and their critical interplay with the development process, then there needs to be some more cogent recognition of such role in the proposed legislative drafts.

The final comment I wish to make deals with document lodgement. Provisions concerning the qualifications and independence of people carrying out inspections are welcomed, as are the provisions to require certifiers to lodge approvals and records of inspections. However, given the extent of non-compliance in this area, (I refer to the LGAQ review), and the structural *incentives for non-compliance* (for example, the requirement for certifiers to pay a fee on approvals lodged), the proposed legislative requirements alone will be ineffective.

If this situation is allowed to continue, the integrity of local government records cannot be maintained. Purchasers will not be able to discover information about approval and inspection of buildings, their safety, or compliance with building standards.

Some suggestions for possible solutions to these problems are contained in the attachment.

Yours faithfully,

Jude Munro  
CHIEF EXECUTIVE OFFICER



## DRAFT BUILDING LEGISLATION AMENDMENT REGULATION 2003

Clauses	Observations
<i>Proposed amendments to the Standard Building Regulation 1993</i>	
<p>Clause 12 (definition of "development information") and Clause 19 (new sections 14A, 14B and 1C)</p>	<p>Applications and accompanying information / documents should clearly include details about presence of any existing retaining structure along the boundary of the proposed building site. This requirement should commence upon making of the regulation to safeguard public interest and safety and facilitate site inspection for compliance purposes.</p> <p><u>Example:</u></p> <p>Where a building site in question is lower than an adjoining (neighbouring) block of developed land, there could be an existing retaining wall along the boundary between the building site and the adjoining land. Any proposed excavation on the building site plan for a house should therefore be required to clearly indicate a need for the excavated area to be promptly and adequately retained in order to ensure existing buildings or the footings of retaining walls on the adjoining land are not affected by the site (excavation) / building work in question.</p>
<p>Clause 27 (new section 28A) - related to Clause 34 (new section 87L)</p>	<p>The assessment manager or private certifier should be required to give the owner <u>certified</u> copies (not just photocopies) of the inspection certificates for all stages of the building work and the original final approval <u>before</u> practical completion of the building. This will protect the interests of owners because owners are often requested by builders to make the final payment of the building contract price before the buildings are actually completed. If the final payment of the building contract price is handed over before inspection / approval, there is little incentive for builders / private certifiers to speed up any remaining building work for inspection / approval purposes.</p> <p>Owners may not be aware of who is responsible for giving the relevant certificates and often expect local governments to be the custodians of all certificates and be in a position to provide these certificates effortlessly when demanded. Please clarify whether the BSA will enforce the requirement to give the certificates to owners and the level of penalty for non-compliance.</p> <p>Also, where a builder is contracted to carry out building work for an owner and a building certifier is engaged by the builder on the owner's behalf to assess / certify stages of the building work, the certifier should be required to notify the owner of the appointment and disclose any conflict of interest. In any event, the owner should be entitled to know who is certifying the building work.</p>
<p>Clause 33 (amending section 58)</p>	<p>The proposed offence should be extended to prohibit a building certifier from issuing any approval for the building work unless the approval is conditional upon the builder carrying out specific site work, such as the example given in the comment on Clause 12 above.</p>

<p>Clause 34 (new section 87C)</p>	<p>A building certifier must not accept a certificate of inspection from any competent person who works for the builder or contractor who carried out work in relation to the foundation, slab or frame of a building at the prescribed stages.</p> <p><u>Example:</u></p> <p>A slab design professional may actually be employed by a big concrete / foundation company which did the slab forming and concrete pouring work for the builder. It is clearly not in the interest of the owner for the building certifier to accept a certificate of inspection from the slab design professional or another engineer from the concrete / foundation company in relation to the slab forming and concrete work for a house no matter how "competent" the slab design professional or engineer is.</p>
<p>Clause 34 (new sections 87I) - related to Clause 55(3) (amending sch 8)</p>	<p>Site work inspection should take place at the foundation and excavation stage.</p> <p><u>Example:</u></p> <p>A building is proposed to be constructed within 1.5 metres from the boundary of the land. The land is of a sloping nature. Before a building slab can be constructed, site work may involve excavation close to the boundary. Excavation may de-stabilise the ground along the boundary of the adjoining block of sloping land (on which a house has already been erected with retaining structures). In this scenario, appropriate retaining walls should be required as part of the site work to prevent possible subsistence which could affect both the footings of the house on the adjoining block and the building site. Leaving site work inspection to final inspection would not be appropriate or in the public interest. This is foreseeable in hilly suburbs. Further, lot size is becoming smaller, so buildings are likely to be constructed closer to the boundaries of narrow blocks.</p> <p>It is considered that bringing forward site work inspection to foundation and excavation stage will better meet the following objective stated in paragraph 5.2.5 of the RIS:</p> <p>"These changes are intended to provided for more effective inspections, which in turn will protect consumers by ensuring that houses are inspected and the building work complies with relevant legislation prior to completion and therefore, safe to be occupied."</p> <p>and aim described in paragraph 11.5 of the RIS:</p> <p>"The proposed amendments aim to establish more effective checks and balances and improve the documentation of building processes so that potential problems during building works are minimised."</p>
<p>Clause 44 (new section 121B)</p>	<p>The proposed regulation provides for a transitional period during which building certifiers may acquire skills to meet the prescribed competencies to have their licences "endorsed" so that these certifiers may issue development permits for building work. However, the proposed regulation does not appear to fill the loophole during the transitional period where these certifiers may continue to issue development permits before their competencies are recognised in the form of "endorsement" on their licences. This is considered not to be in the public interest.</p>
<p>Clause 48 (amending section 128(2)(a)(iii))</p>	<p>The definition for "building work" under existing section 128(3) includes:</p> <p>"(a) the preparation of the design of the whole of part of a building or structure; or (b) carrying out all of part of the building work."</p> <p>The phrase "of part of" in both paragraphs appears to contain a typing error; it should be "or part of".</p> <p>The proposed regulation should clarify this as well.</p>

<p>Clause 58 (amending Sch 5 to the State Penalties Enforcement Regulation 2000)</p>	<p>Infringement notice penalties should be available for enforcing provisions (see comments above). Without realistic penalties, there is little incentive for builders or building certifiers to comply.</p> <p><u>Example:</u></p> <p>Although paragraph 5.1.3 of the RIS indicates that an on-the-spot fine will apply to the offence of failing to give the owner of building work a copy of the decision notice and approved plans for the building work, new section 28A (inserted by Clause 27) is not listed as an infringement notice offence in amended schedule 5 to the <i>State Penalties Enforcement Regulation</i> (inserted by Clause 58).</p>
<p>General</p>	<p><b><i>Transfer to Another Certifier</i></b></p> <p>There is no provision for transfer to another certifier if the certifier who gave the approval goes out of business or leaves the business before the building is completed.</p> <p><b><i>Forum Shopping</i></b></p> <p>The draft regulation envisages that interstate qualified certifiers may undertake assessment work. Different professional standards may result in "forum shopping".</p> <p><b><i>Resourcing</i></b></p> <p>While the draft regulation may result in frequent lodgement of documents with local governments, it does not appear to adequately provide for the lodgement of outstanding documents and the resourcing this lodgement may require.</p>