

# **Productivity Commission**

## **Draft Research Report, Reform of Building Regulation in Australia**

### **ABCB Board Member, Tasmania, Response:**

#### *General comments:*

Throughout the document reference is made to “certifier”. However, the name used throughout Australia by the profession to describe a member doing this work is “building surveyor”. The majority of State and Territory legislation, including Tasmania’s, refers to “building surveyor”.

In contrast, the document uses the professional name of “architect” and “engineer” rather than just “designer” to describe the specific design professional. The proper terminology is “building surveyor” and to be consistent should be used to describe the profession.

#### **The following comments are provided on the DRAFT RECOMMENDATIONS**

*5.1 The objectives of the ABCB (or its replacement) should be clarified in order to remove unnecessary conflict, overlap and imprecision.*

Supported to the extent that the objectives are shown by further analysis to be conflicting, overlapping or imprecise. Further comment provided at 11.2.

*5.2 The ABCB (or its replacement) should enhance efforts to make the performance-based requirements in the BCA more effective. This should include providing measurable criteria to aid in judging compliance and clarifying the assessment process to be used. This should be given a high priority.*

Supported. However, this task is not simple and may limit opportunities for innovation. It assumes that the measurable criterion is the only method of achieving the performance requirement. A simple example of this is to consider emergency lighting levels required at the floor compared with way-finding light strips used in aeroplanes.

*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.*

Supported. In some cases as well the performance requirements may need to be modified to reflect the Deemed to Satisfy. The “bottom up” approach reflects current standards.

*5.4 The BCA and related regulations should require that buildings continue to meet the health and safety requirements of the BCA throughout their life, irrespective of whether they were constructed using alternative solutions or deemed-to-satisfy provisions.*

Supported. Buildings should continue to meet the BCA requirements in force at the time a building was constructed. Except where special licensing requirements apply buildings should not be required to be upgraded when the BCA changes.

*5.5 Where a building solution imposes maintenance requirements throughout the life of a building, these should be required by regulation to be documented and prospective owners and occupiers should be informed of these requirements.*

Supported. This is a requirement of the *Building Act 2000* in Tasmania.

*5.6 The ABCB (or its replacement) should continue to examine ways for the BCA to be expressed more clearly and simply, to articulate building requirements better and to enable access by all levels of building practitioners.*

Supported. However a side effect may be an expansion of the size of the BCA. Perhaps further work needs to be done on the Guide to Volume 1.

The need to enable access by all levels of building practitioner to the BCA is somewhat simplistic. The BCA is primarily a design document for design professionals and building surveyors to use. It refers to many Australian Standards. Designers prepare construction drawing and specifications etc. on the basis of the BCA provisions and these are then passed to builders to build the buildings. A good set of construction documents and specifications generally should not require a builder to refer to the BCA. All the outcomes of the BCA provisions should be included in the documents to enable the builder to construct in accordance with the BCA.

The BCA is a technical design code not a construction manual. Perhaps there is scope for the ABCB or industry to develop a construction manual for domestic construction for use by domestic builders with varying backgrounds.

*6.1 The ABCB (or its replacement) should continue to work on incorporating into the BCA, as far as practicable, all mandatory requirements affecting building (i.e. current objective 7).*

**This recommendation is not strong enough.** By having “as far as is practical” in the recommendation National and State bodies and Departments will be able to use all sorts of excuses to the ABCB to continue to regulate the building construction requirements of Premises when these provisions should be in the BCA. In recommendation 6.2, 6.3, 6.4 and 6.5 “as far as is practical” is not used. Why use it here?

In the discussion on this recommendation the Commission found (page 115 - Draft Finding 6.1) that *there are various mandatory requirements impacting on building that have not been incorporated into the BCA*. The Commission also endorsed the Tasmanian approach that, in the short term, all extra requirements outside the BCA (in other legislation) should be included in an appendix to the BCA. It is submitted that this should be a recommendation?

There also needs to be a renewed commitment by State, Territory and the Federal Governments to the consolidation of all mandatory requirements impacting on building to be included in the BCA. With no commitment there is no driver to consolidation. It is suggested that a new recommendation be included to cover the commitment.. This commitment should also be included in the new IGA.

*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.*

Supported. This issue indicates that there is a role for the ABCB and the BCA which is beyond net-benefit regulation. It is a role to facilitate social change, which has an effect on building construction, where that social change is an outcome of other government legislation. A similar issue was the development of provisions for the Class 9c Aged Care buildings brought about by the “Ageing in Place “ policy of the Federal Government.

*6.3 The ABCB (or its replacement) should continue to work with the eight plumbing associations to identify and resolve differences between the BCA and the PCA and on-site gas requirements.*

The ABCB should continue to work with the National Plumbing Regulators Forum (not eight plumbing associations) to ensure the compatibility of the PCA with the BCA. There has been significant progress and co-operation in this area. There are necessarily some differences and overlaps because there are two distinct and separate administrative systems.

*6.4 The ABCB (or its replacement) should continue its work to identify and resolve differences between the BCA and on-site electrical installation and telecommunications requirements.*

Supported. The requirements should be compatible.

*6.5 The ABCB (or its replacement) should continue its work on removing inconsistencies between occupational health and safety (OH&S) legislation and the BCA and incorporating relevant OH&S requirements that impact on building into the BCA.*

Supported. Same comments apply in relation to commitment as included in comments on 6.1.

*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.*

Supported. However the Board has determined that sustainability is a more appropriate objective.

*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.*

Supported. . This again is an issue of commitment to consolidation as included in comments on 6.1.

*6.8 The ABCB (or its replacement) should pursue, in consultation with interested parties (especially fire authorities), increasing the asset protection objective of the BCA in relation to building categories other than stand alone residential housing, to align with the requirements generally imposed by fire authorities and favoured by insurance companies .*

Supported. Again this is a consolidation issue. If some jurisdictions allow Fire Authorities to increase requirements above the BCA standard there needs to be resolution. Like planning influence, untested (in terms of an RIS or Public Benefits Test) de-facto or de-jure fire regulation can have an enormous influence on the cost of building. There needs to be an open and transparent debate on the issue with all parties, especially in relation to the community expectations. If changes are proposed, there must be some acceptance by insurance companies of the reduction of the risks, and a reduction in the cost of insurance.

This matter should be approached as a risk management exercise. Buildings that are community assets or essential to the community should have greater degrees of property protection.

*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.*

**Fully supported.** The inclusion of building related matters in planning permits is causing substantial costs to industry without any examination by the RIS process. This again needs commitment in the IGA to the need for delineation between the two processes.

*7.1 The ABCB (or its replacement) should work to facilitate a national template for home building contracts.*

This is **not supported** as it is not core ABCB business. It is a licensing or fair trading issue. This recommendation should be deleted from the final report.

*7.2 The ABCB (or its replacement) should work towards reaching agreement across jurisdictions as to the most appropriate and efficient administrative provisions for maintenance requirements.*

Supported.

*7.3 The ABCB (or its replacement) should work at identifying and communicating best practices that improve compliance and enforcement of the BCA. The development of a best practice model, for use by States and Territories, is one option for achieving this.*

Supported. Tasmania has just introduced a new *Building Act 2000* based on the Model Building Act but updated to suit Tasmania.

The development by the ABCB of a “General Performance Assessment Methodology” to give guidance to designers and building surveyors would be a very useful tool. The “International Fire Engineering Guidelines” deliver the sorts of outcomes needed for more general performance assessment – guidance, process, traceability, documentation etc.

*8.1 The ABCB (or its replacement) should continue to pursue improvement in its use of Regulation Impact Analysis, drawing on the advice of the Office of Regulation Review.*

The process of Regulatory Impact Analysis has been extremely rigorous to date and no comment has been forthcoming which would indicate substantial concern for the current process. Of course, continually pursuing improvements to a process can be productive but is also time and resource consuming.

*8.2 The Australian Government should examine the appropriateness of a private company (Standards Australia International) being the sole Australian representative in international standards forums and consider the merits of having the ABCB (or its replacement) also perform this role for building and construction matters, perhaps in conjunction with SAI.*

Supported. Will provide for more input and ownership of ISO standards, that to date seem to come from a process that has limited involvement of the building regulators from Australia.

8.3 *The Memorandum of Understanding between Standards Australia International (SAI) and the ABCB and the Referenced Documents Protocol should be re-negotiated to provide for a clear requirement for RIS-type analysis to be undertaken by SAI (perhaps in conjunction with ABCB, or its replacement) at an early stage in the development of standards that are expected to be referenced in the BCA, and are likely to have non-minor effects.*

Fully support the requirement that SAI should undertake the RIS. The MOU between SAI and the Australian Government includes this requirement where Standards are to be used for regulatory purposes. No need to negotiate the requirement as the ABCB/SAI MOU also refers to the Australian Government MOU. Need to insist that SAI comply with the MOU's.

The Referenced Document Protocol is a generic document which may need revision in response to outcomes from the Commission Study.

8.4 *The ABCB (or its replacement) should continue its efforts to expedite BCA reforms. Governments could consider incorporating into a revised IGA explicit target timeframes for different stages of the consultation and decision-making process. However, any such timeframes must appropriately reflect the need for comprehensive consultation and rigorous impact analysis.*

Do not see how target time frames can be included in a new IGA. Restrictive time frames could have the effect of reducing the consultation undertaken and thereby effect the quality of the outcomes.

8.5 *The ABCB (or its replacement), as a high priority, should continue to work towards maintaining and updating the core technical requirements in the BCA.*

Supported.

8.6 *The ABCB's cost recovery arrangements should be amended to be made consistent with the Australian Government's cost recovery guidelines. The revised IGA, when presenting future funding for building regulation reform, should be structured so as to provide sufficient funding for the reform agenda and to enable a minimum level of access to the BCA, free of charge.*

Provision of the BCA free of charge is **not supported**. There is no evidence that the cost of the document is having an effect on compliance. In many regulated industries the support documents to the legislation (which the BCA is) are not provided free. For instance the accounting standards and tax supporting documents have to be purchased. Similarly a lot of legislation refers to Australian Standards, which have to be purchased. The purchase of the BCA by business is also tax deductible and therefore the actual cost is substantially reduced. The BCA is also a major "tool" for many building practitioners. We do not provide "tools" free of charge to builders. The cost of the BCA after taking into account the tax deductibility would have no effect on the cost of an individual house. Cost is more of an excuse rather than a reality.

The ABCB has provided the Commission with substantial information in relation to this issue.

Substantial loss of revenue for the ABCB will also result if the BCA is made free of charge> Governments are most unlikely to increase their contributions to the ABCB. The result would be a significant reduction in the work program and rate of reform. The major research program undertaken will also have to be reduced.

An issue that has been forgotten here is that the ABCB is a highly effective partnership between the nine governments and the building industry. The governments currently contribute \$2m and industry contributes through the sale of BCA products and services. This is equitable.

*9.1 The ABCB (or its replacement) should enhance its BCA awareness campaign, including investigating opportunities for further partnerships with industry in the provision of training.*

Supported. The ABCB should work with Education Authorities and providers as well as industry in matters related to the BCA or BCA related administrative issues.

*10.1 There should be a recommitment by governments, in a revised IGA, to the objective of consistency across jurisdictions for building regulation. State and Territory Governments should ensure that BCA amendments determined by the ABCB (or its replacement) are automatically referenced in State and Territory legislation and that jurisdictional variations and additions are minimised.*

**Strongly Supported.** A strong consolidation objective and commitment to having all mandatory matters impacting on building in the BCA will reduce the variations and additions. Refer to comments on 6.1.

*10.2 The ABCB Chairman should be an additional Board member, rather than being chosen from amongst the Government and industry members. The appointment should be independent from sectional interests and based on a demonstrated capacity to advance the work of the Board.*

Supported. The current Chairman was an independent appointment. Industry appointments should continue to represent the whole industry and be nominated by the peak building industry council industry.

*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.*

Prefer to retain reference to **sustainability**. The ABCB has facilitated a substantial research study by the CRC for Construction Innovation into sustainability applicable to building construction and use. It has general industry support. The ABCB Board has further refined the scope of issues relating to buildings for inclusion in the BCA. Likewise, the Board has concerns about the use of “efficiency in the design, construction and use” rather than the more appropriate “cost effective”. Efficient design and construction are not necessarily cost effective in regulatory terms. Efficient design and construction can transfer costs to other sectors such as users, emergency services etc.

The Tasmanian *Building Act 2000* includes sustainability and cost effectiveness as objectives of the Act. Sustainability, as a principal, is wider than environment protection but at the same time is limited to those aspects related to the design, construction, occupation, use and maintenance of buildings.

The *Building Act 2000* Objectives are:

- (a) *to establish, maintain and improve standards for the construction and maintenance of **sustainably designed buildings**;*
- (b) *to facilitate-*
  - (i) *the adoption and efficient application of national uniform building and plumbing standards;*
  - (ii) *national accreditation of building and plumbing products, construction methods, building designs, building components and building and plumbing systems;*
  - (iii) *the adoption and efficient use of performance-based technical standards;*
- (c) *to enhance the amenity of buildings, to meet the social needs of people who use buildings, and to protect the safety and health of people who use buildings;*
- (d) *to facilitate and promote **the cost effective construction of buildings and the construction of environmentally and energy efficient buildings**;*
- (e) *to provide an efficient and effective system for issuing building, plumbing and occupancy permits and administering and enforcing related building, plumbing and safety matters and resolving disputes;*
- (f) *to protect consumers who use building practitioners;*
- (g) *to reform aspects of the law relating to legal liability in relation to building and plumbing matters;*
- (h) *to aid the achievement of an efficient, innovative, competitive and **sustainable building and plumbing industry**.*
- (i) *to promote the consolidation of building legislation;*
- (j) *to promote **the sustainable development of existing buildings and their maintenance**;*
- (k) *to provide for the fair, orderly and **sustainable use of buildings**.*

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.*

*In determining the area of regulation and the level of the requirements, the Board should ensure that:*

- *there is a rigorously tested rationale for the regulation;*
- *the regulation would generate benefits to the community greater than the costs (i.e. net benefits);*
- *there is no regulatory or non-regulatory alternative (whether available to the Board or not) that would generate higher net benefits.*

### *Proposed Objective 2*

*Ensure that, to the extent practicable, mandatory requirements are:*

- *consistent across the States and Territories*
- *performance based*
- *based on international standards*
- *expressed in plain language.*

### *Proposed Objective 3*

*Identify and seek implementation of improvements to compliance and enforcement systems for building regulation.*

### *Proposed Objective 4*

*Identify and seek to implement ways to reduce reliance on regulation by exploring alternative mechanisms for delivering outcomes, including:*

- *non-mandatory guidelines*
- *training to increase skill levels of building practitioners and certifiers.*

Amending the Objectives of the IGA to better reflect the Objectives of the ABCB in 2005 is supported. However, it is submitted that in terms of the building industry, the term **cost-effective** is more appropriate than “efficient”. Perhaps the term “net public benefit” is even more appropriate. It is easier for the industry and the public to understand that a regulation is **cost-effective and demonstrates a net public benefit** than to say it is “efficient”.

Community expectations should be a direct input to public policy decisions. The existing Objective may have been misinterpreted (not by the ABCB) to indicate that the community gets what it wants. Community expectations influence the development of appropriate risk criteria (– for example the 1% AEP flood level) where there are no absolutes. There are very few absolutes in building design and construction.

*11.3 The ABCB’s name should be changed to the Australian Building Regulation Board (ABRB), to better reflect its proposed wider responsibilities and future work agenda.*

**Not supported** A change is not necessary.

The ABCB is now a brand of some National and International value. Although I considered the name deficient (given the scope of the ABCB) when the ABCB was established, and argued that the name should indicate a wider involvement in building regulatory matters, I now consider the value of the brand outweighs these issues.

*11.4 A new Intergovernmental Agreement should be negotiated by all nine governments, so as to implement many of this study’s recommendations:*

- *establish the Australian Building Regulation Board (ABRB) in place of the ABCB*
- *clarify the ABRB’s mission statement and objectives*
- *agree to shared funding and removal of charges for the BCA*
- *re-confirm the commitment to national consistency*
- *strengthen the use of regulatory impact statements to enhance rigour for mandatory regulations*
- *outline the future work program, as proposed.*

**Not supported.** The existing IGA should be amended. This would be far more administratively efficient and less likely to be undermined.



The revised IGA could clarify the mission statement and objectives, agreed to shared funding (but not removal of charges for the BCA), and strongly re-affirm the commitment to national consistency and consolidation. The future work program should **not be included** in the IGA. The work program needs to be flexible. Indications of the direction of the work program could be given.

## **The following comments are made in relation to the comments sought.**

Page 190

*The Commission invites comments on whether the current education and training arrangements in the building and construction industry are adequate and whether there would be a future role for the ABCB (or its replacement) in relation to training.*

The ABCB has a role but not as an education body. There are other organizations and procedures set up to undertake this role.

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*The Commission invites comment on the appropriate role of the ABCB in regard to insurance sector issues with respect to building regulation.*

Insurance is a vital component of an holistic approach to building regulation where public risk has been transferred to private risk. Instead of governments underwriting the work of building practitioners as they may have tended to in the past (insurer of last resort) building control acts are now based on an expectation of competent and insured building practitioners. The ABCB needs to be a player in the insurance issues although licensing authorities have a closer role.

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*The Commission seeks further input from interested parties on the desirability of an MOU between the ABCB and the Department of Industry, Tourism and Resources and whether such a mechanism would adequately address concerns about the independence of the Office.*

An MOU, or explicit provisions in the revised IGA are essential to clarify that the ABCB Office serves the Board and is not a tool of the Commonwealth. Although the current relationship is entirely satisfactory that is due in large part to the personalities of the relevant office holders.

## **Suggested Corrections**

It is suggested the following correction be made to the document –

*Figure 21*

The licensing of premises provisions under State and Federal legislation (such as places of assembly) also has a vital role in the use phase of the process and supports the building regulatory activity. The flow chart should be amended to include licensing in the last right hand box of the flow chart.

*Page 88 – paragraph 1*

Standards Australia Handbook, SAA HB50 – 19994, *Glossary of Building Terms*, includes a definition of amenity as –

*Those qualities, characteristics or features associated with a site or locality that are conducive to better enjoyment for any permitted use.*

This Handbook has been specifically developed to cover building terms and at least should be noted in any discussion on the definition of amenity.

*Page 171 – paragraph 1*

Private certification was introduced in an interim form in Tasmania in 1999. The term “private certification” has different meanings in various States and Territories. In some it is certification of compliance with technical standards and in others it is private permit issue. This is not reflected in the Draft Report.

*Page 195 – paragraph 3*

Proportionate liability was introduced into Tasmania by the *Building Act 2000* on 1 July 2004. This should be included in this paragraph.

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12/10/04