

8 October, 2004

Mr Tony Hinton
Commissioner
Study into Reform of Building Regulations
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Mr Hinton

Thank you for the opportunity to comment on the Productivity Commission's report on the Reform of Building Regulations.

This submission provides some general comments on what is considered to be the more significant issues raised in the Commission's report and comments are then provided on the report's recommendations.

The main thrust of the MAV's concerns relate to the emphasis the Commission places on the goal of efficiency and the criticism it has of councils which have introduced local planning controls to respond to significant emerging issues, such as sustainability.

It is hoped that the Commission will give serious consideration to the issues raised in this submission. We look forward to the release of the final report.

Yours sincerely

Rob Spence
Chief Executive Officer

Comments on Productivity Commission Report - Reform of Building Regulation

Introduction

MAV welcomes the opportunity to comment on the Productivity Commission's report on the Reform of Building Regulations. The opportunity to discuss the Commission's report at the roundtable in Melbourne on 17 September, 2004 was appreciated, as it helped clarify issues raised in the report. This submission provides some general comments on what is considered to be the more significant issues and comments are then provided on the report's recommendations.

General comments

MAV questions the statement in the report that "The pursuit of efficiency should be the prime objective of the standards adopted by the Board." It is considered that the statement needs to be turned on its head so that the primary objective relates to the health, safety, amenity and environment of buildings, with efficiency being a key criterion in the development of standards, regulations and processes.

It is further considered that the Commission's finding that local government is *inappropriately* eroding the national consistency of building regulation through their planning approval processes is an affront to the excellent work of some councils to pursue innovative solutions to emerging issues, particularly on environmental matters.

Comments on 6.10 local government requirements on building

It is of concern that the Productivity Commission considers local government's initiative to introduce new controls to address local needs as a "negative" that must be stamped out and replaced with a mechanism that will stifle a bottom up and sometimes innovative approach.

As acknowledged in the report, councils can sometimes be frustrated by lack of response from other tiers of government on introducing controls that better respond to local need or which address "big picture" issues like environmental sustainability.

Indeed government departments in Victoria have conceded they need to "catch up" to the innovations occurring at some councils at the local level.

Accordingly, it is considered that where councils believe they must respond to local need and pursue innovative outcomes that councils should be provided with a mechanism in order for the local controls to be introduced pending a further review for the need of statewide or nation-wide application. Such a mechanism is similar to the option outlined on page 152 of the Commission's report.

At the end of the day the overall goal of providing a national, consistent framework is supported. However, it should not come at the cost of prohibiting local needs.

As well as the issue concerning local need, it should be acknowledged in the report that some of the blurring of the planning and building processes has been the result not of local government decisions, but state government decisions. For example, in Victoria:

- The building regulations (ResCode) contain neighbourhood character and site amenity requirements for single dwellings;
- Approval for building demolition calls up processes that can be pursued through the planning scheme.

The purported reason for including some planning type requirements in the building approvals system, at least in Victoria, is because of the costs and delays often associated with the planning assessment system. The Victorian Government has been particularly concerned with subjecting single dwellings to the planning process. It is considered that despite the blurring of the planning and building requirements, including planning type requirements in the building approvals system has not caused any major concerns.

On a more theoretical level, it could be acknowledged in the Commission's report that it is sometimes difficult to maintain a 100% separation of planning and building requirements. For example, the siting issues of a building (or group of buildings on a site) may have an impact on the amenity of future occupants within that building(s). This is often best considered at the planning stage of assessment, not the building stage. If such matters are considered during the building stage it may result in concomitant changes being required to the original planning permit, resulting in further confusion and delay and potentially involving additional third party notification.

Comments on Chapter 7 regulatory systems: compliance and delivering outcomes

It is considered that the model Building Act, which introduced the option of private building surveyors, has been one of the most significant changes to the building assessment process and has been instrumental in reducing the turn around time of building applications. Indeed it is surprising that the Commission did not provide more detailed analysis on this matter in its report.

As acknowledged in the report, there have been a number of concerns with the certification model and the Commission recommends that more soundly based requirements for licensing, accreditation and audit of building practitioners are introduced.

Victoria has experienced many problems with private practitioners, particularly in the area of enforcement. Councils can cite many examples where applicants (who have engaged a private certifier) or third parties (such as neighbours) have been left dissatisfied with the performance of a private building surveyor. While the legislative framework clearly shows that responsibility for supervising building surveyors rests with the Building Commission and the Building Practitioners Board, Councils frequently receive complaints from members of the public regarding building work that is being or has been carried out, for which a private building surveyor has been appointed. The complaints may include situations in which there is a real risk of danger to persons or property or may be regarding administrative and compliance matters or matters relating to the siting of buildings and /or structures. The handling

of these complaints can sometimes represent a significant expenditure of Council resources.

Since the introduction of the private permit issuing system in July 1994 the Municipal Building Surveyor on a case- by- case basis has generally carried out the ongoing problems associated with handling such complaints. The Victorian Municipal Building Surveyors Group Inc. undertook to develop a system to classify and manage those complaints. The system has been titled Building Control Intervention Filter Criteria ('the Filter Criteria'), which utilises a risk assessment matrix, and identifies standardised responses to complaints from the public where a private building surveyor has been appointed.

The Filter Criteria recognises that Council has obligations to the public with regard to dangerous situations, which it can remedy or cause to be remedied. Where a danger exists and Council officers are aware of that danger, a lack of action on the part of Council could result in a claim against Council if innocent persons were to suffer loss or injury. This is regardless of whether a private building surveyor is or has been appointed. In those circumstances the Filter Criteria recommends Council staff taking action to manage or remove the danger.

The Filter Criteria also recognises that not all complaints received at Council relate to dangers and many relate to matters stemming from administrative neglect or error by private building surveyors. In those circumstances the Filter Criteria recommends that the matter be referred to the private building surveyor for remedial action failing which the matter be referred to the Building Commission or Building Practitioners Board (or both) as appropriate.

It is anticipated that the Filter Criteria will streamline the complaint handling processes and provide a level of uniformity. The referral of appropriate cases to the Building Practitioners Board and the Building Commission will also allow those bodies to more readily carry out their functions under the Act.

It is considered that the initiative of the Victorian Municipal Building Surveyors Group Inc to introduce a mechanism to address community concern with the conduct of private building surveyors will help provide community confidence in the administration of the building approvals system. However, it is considered that the ABCB should undertake more detailed analysis of the impact of privatisation in each jurisdiction and consider whether more independence of private building surveyors should be required. Examples to promote greater independence may include mandating the owner to make the application, or requiring disclosure of the relationship between builders and building surveyors.

In addition to the concern of greater independence, the competition between Council surveyors and private surveyors is impacting upon the cohesiveness of the building approvals system. Another area of concern that should be investigated is the apparent drop in the number of private building surveyors.

Comments on draft recommendations of the Report

DRAFT RECOMMENDATION 5.1

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

Agreed. It is considered that the four objectives reflect the priorities and philosophy underpinning further regulatory reform appropriately.

DRAFT RECOMMENDATION 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.

This is strongly agreed. In many instances the "deemed to satisfy" provisions do not meet the performance requirements. This makes it difficult to make performance based decisions when using the "deemed to satisfy" as the benchmark.

At this point in time, it is difficult to measure the performance criteria so this recommendation should be given high priority

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.

As noted above, having deemed to satisfy provision that clearly do not meet the performance criteria (even though the BCA says they do) increases the difficulty experienced by building practitioners in approving something that they know is substandard.

ABCB must rectify this situation in order for practitioners to adequately benchmark performance requirements when determining alternative solutions.

DRAFT RECOMMENDATION 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.

It could be argued that this is already in place in Victoria via the Building Regulations 1994 - Part 11. However, it is agreed that improvements could be made by addressing on-going maintenance as part of the design process and by better quality information.

DRAFT RECOMMENDATION 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.

Agreed. See above.

DRAFT RECOMMENDATION 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.

It is considered that the new formatting under the BCA 2004 has increased the difficulty in understanding the BCA.

The recommendation is strongly agreed. It is of concern to local government building practitioners that there is a general lack of understanding of the building regulations. Use of guidelines and illustrations would help address these concerns.

DRAFT RECOMMENDATION 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 (ie current objective 7).

It is understood that this recommendation is a cornerstone to the role of the BCA. It may need to be acknowledged that incorporating all mandatory requirements will impact on the size and complexity of the Code. An alternative may be to consider referencing other documents/regulation as it does with Australian Standards.

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.

It is understood that this process is already underway.

It is considered that this is long overdue as practitioners, particularly building surveyors, are exposed to legal action for failure to comply with the DDA (Federal legislation) even though the Building Act restricts building permits (s.24) to requiring no more or less than that required under the Regulations and BCA.

DRAFT RECOMMENDATION 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.

If as suggested in the Report, the plumbing associations are implementing differing minimum energy efficiency requirement, then in the interest of national uniformity, this aspect should be governed by one body such as the ABCB

DRAFT RECOMMENDATION 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.

Agreed. See above.

DRAFT RECOMMENDATION 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.

It is considered that this is only an issue where OH & S provisions directly relate to the BCA provisions. However, it is understood that OH & S issues are mainly concerned with the construction phases of a building which does not have an impact on the BCA.

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.

It is considered that this recommendation should be revised. There is no question that environmental objectives should be mandated in the BCA. Work should commence immediately on the nature of the environmental objectives that should be included in the BCA. It should be noted that a number of Councils in Victoria are leading the way to ensure environmentally sustainable development. Initiatives have included energy efficiency targets, providing incentives in the use of renewable materials and recycling water.

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.

This recommendation is strongly supported. See comments above.

DRAFT RECOMMENDATION 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 .

While consistency between the BCA and the fire brigade requirements may be laudable, it is considered that changing the focus of building regulation from life protection to asset protection will have very significant costs to the community. Extensive cost-benefit analysis is required on this before considered further.

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.

As noted above in the general comments in this submission, it is not necessarily local government that is introducing local controls in their planning approvals that impact upon the goal of national consistency. There are a number of examples where the Victorian state government has introduced planning-type controls in the building regulations, particularly in relation to urban character, amenity and solar orientation. However, as also noted above, there are justifiable reasons for the Victorian state government to pursue this approach.

As identified in the Commission's report, the Victorian Planning and Environment Act 1987 (s.62(4)) prohibits conditions on planning permits that are inconsistent with the Building Act and Building Regulations. This provision ensures consistency between planning and building regulations, and is a matter that could be taken up by other states and territories.

DRAFT RECOMMENDATION 7.1

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

This recommendation is supported.

DRAFT RECOMMENDATION 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.

There is some support for an increased level of consistency in the administration of building regulations across States and Territories.

This recommendation is supported. Maintenance requirements don't change simply because you have crossed a state border.

One area of concern is the potential profiteering from compulsory maintenance requirements. It would appear that there are not sufficient service providers in the market and many building owners have complained about the high cost of maintaining systems.

DRAFT RECOMMENDATION 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.

It is considered that, given the concerns expressed by a number of submitters to the Commission's report, that this recommendations needs to be much stronger. A best practice model will do little to achieve the identified problems.

Whilst acknowledging that private certification has significantly improved the turn around times for the approval of building permits, the system is also resulting in major concerns with compliance of building regulations. It is considered that lack of independence between the private building surveyor and the client is the heart of the problem. As noted above in the general comments in this submission, the community often demands local government to follow up on breaches of regulations by private certifiers. Whilst the Victorian Municipal Building Surveyors Association has attempted to address the concerns by developing a filtering system, it is considered that the Productivity Commission should be strongly recommending that each state and territory undertake an independent review of private certification and considers proposals that address the lack of independence (or conflict of interest) between private certifiers and their clients.

DRAFT RECOMMENDATION 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.

This recommendation is supported.

DRAFT RECOMMENDATION 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.

This recommendation is supported. It should be noted that some representatives on some Standards committees have vested interests in the requirements of the standards.

DRAFT RECOMMENDATION 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.

This recommendation is supported.

DRAFT RECOMMENDATION 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.

This recommendation is supported. It is considered that sound administrative practice compels the application of timeframes and priorities.

DRAFT RECOMMENDATION 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.

This recommendation is supported. Up-to-date and clear technical requirements are important to deliver the health, safety, amenity and environmental objectives.

DRAFT RECOMMENDATION 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.

This recommendation is supported. One-off or occasional users of the BCA find it prohibitive to purchase such a large document. Acts and Regulations can be accessed free of charge on the Internet - why not the BCA? The BCA could also be provided on CD-Rom, and accompanied with easy-to-understand guidelines.

DRAFT RECOMMENDATION 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.

This recommendation is strongly supported. In particular, it is considered that professional development is required for designers and building surveyors on administering a performance based regulatory system.

DRAFT RECOMMENDATION 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.

This is supported provided states and territories are not required to apply regulations which are considered to be inappropriate within their jurisdictions.

DRAFT RECOMMENDATION 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.

This recommendation is supported.

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.

This recommendation is supported.

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. 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 (ie 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.

As noted above, the revised objectives are supported. It is considered however that non-mandatory guidelines are generally unsuccessful in achieving outcomes.

DRAFT RECOMMENDATION 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.

It is considered that "regulation" is not necessarily a word that reflects the future work of the ABCB. The ABCB's future role will be to focus on building reform to address health, safety, amenity and environmental objectives in the most efficient way practicable. Accordingly, a title could be "Australian Buildings Reform Board".

DRAFT RECOMMENDATION 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.

This recommendation is supported subject to the comments above.