

NSW GOVERNMENT SUBMISSION
TO
THE PRODUCTIVITY COMMISSION'S RESEARCH STUDY
INTO
THE REFORM OF BUILDING REGULATION

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NSW GOVERNMENT SUBMISSION TO THE PRODUCTIVITY COMMISSION'S RESEARCH STUDY INTO THE REFORM OF BUILDING REGULATION

INTRODUCTION

The building construction industry represents one of this nation's major industries, an industry with a significant annual turnover. The industry in NSW represents a large portion of the national total.

The primary document responsible for controlling the design and construction of buildings, is the Building Code of Australia (BCA).

An effective and efficient building regulatory system is therefore essential to the healthiness of the national and state and territory economies.

The comments within this submission are made for the purpose of providing constructive comment aimed at achieving a more effective and efficient national building regulatory system.

Following an introduction and background to building regulation and control in NSW, this Submission raises specific issues for consideration relative to the terms of reference of the Productivity Commission Research Study. It does not attempt to specifically answer all the questions posed by the Study.

ADMINISTRATION OF BUILDING REGULATION IN NSW

Building regulation for NSW is dealt with primarily under the Environmental Planning and Assessment Act (EP&A Act). The EP&A Act gives legal effect to the BCA for NSW.

This Act is administered by the Department of Infrastructure Planning and Natural Resources (DIPNR). DIPNR provides representation on the Australian Building Codes Board (ABCB), the Building Codes Committee and various other committees under the ABCB.

The EP&A Act was subject to major reforms in 1998 which resulted in an integrated planning and building system under that Act. Those reforms also introduced competition into building approvals in the form of private certification.

PARLIAMENTARY INQUIRY INTO BUILDING QUALITY

During 2002 a Parliamentary Inquiry (the Campbell Inquiry) was conducted in response to concerns regarding the quality of residential building construction in NSW. Issues raised included concerns regarding private certification and building regulation – including the BCA.

Following the release of the Inquiry's report, a joint Government taskforce was established to consider the recommendations. Overall, the majority of the Inquiry's recommendations were supported. In response to the Inquiry's report, a number of reforms have been actioned, or are in the process of being actioned.

Actions include:

- the establishment of the Home Building Service within the Office of Fair Trading, with core business units for compliance, licensing and industry standards, insurance services and consumer/trader advice and guidance. The Home Building Service commenced operations in February 2003.
- the establishment of the Building Professionals Board (BPB) within the Department of Infrastructure, Planning and Natural Resources. The BPB is being established on a staged basis. Stage 1 commenced on 1 January 2004 and stage 2 will commence on

1 January 2005. The BPB will eventually act as the sole accreditation body for all accredited certifiers, including council certifiers, and potentially other building professionals (eg design engineers, building designers etc).

- in order to assist in the co-ordination of building regulatory functions across government agencies in NSW, the establishment of the Building Co-ordination Committee comprising representatives of Department of Infrastructure, Planning and Natural Resources, Department of Commerce, Department of Local Government and Work Cover NSW. The Building Co-ordination Committee held its inaugural meeting in May 2003 and has continued to meet on a regular basis.
- the production of a "Standards and Tolerances Guide" for the NSW home building industry based on a similar Victorian publication which was made available to builders and consumers from 30 June 2003. This Guide is intended to among other things, assist consumers in determining reasonable standards and tolerances for building work where such are not controlled by other means.
- the introduction of new continuing professional development (CPD) requirements (from 1 March 2004) for licensed builders and trade contractors/supervisors. They must accumulate 100 points each three years. A minimum of 25 points is to be earned each year. At renewal the licence holders will be asked to certify that they have achieved the required points.

Under the CPD scheme there is an emphasis on developing knowledge of the BCA.

- legislative reforms under the EP&A Act which introduce a range of measures designed to improve building certification. Of particular importance are the:
 - o mandatory critical stage inspections for each class of building;
 - o clarification of the role and responsibilities of the Principal Certifying Authority (PCA);
 - o requirement that the PCA must be appointed by the person with the benefit of the approval, and only the builder if the builder is also the owner of the land;
 - o introduction of new offences and greater penalties for improper conduct;
 - o new powers to audit council's role as certifying authorities, by BPB auditors;
- in response to concerns regarding lack of consumer access to the BCA, the issue of a circular by the Department of Local Government to Councils encouraging access to the BCA through local Council libraries. Also, provision of a link from the Office of Fair Trading's home building website to that of the ABCB.
- amendments to the *Home Building Regulation 1997* which commenced on 16 February 2004 requiring all work done, and all building components supplied, under a contract to comply with:
 - o the BCA (to the extent required by the EP&A Act including any regulation or other instrument made under that Act); and
 - o all other relevant codes, standards and specifications the work is required to comply with under any law; and
 - o the conditions of any relevant development consent or complying development certificate.

This Government's responses to some of the issues regarding the BCA are described above. Other issues have been referred to the ABCB for consideration and action. The ABCB has already responded to some of these. In doing so, the ABCB have demonstrated their preparedness, willingness, and ability to respond to issues, and their close working relationship with this Government.

THE AUSTRALIAN BUILDING CODES BOARD (ABCB)

- New South Wales is very supportive of the ABCB and their work and are of the opinion that they have made a significant contribution to the development and ongoing reform of building regulation and a nationally consistent building code.
- This work has resulted in considerable positive benefits to government, industry and the community including:
 - Improved rigour, research, integrity, transparency, and accountability in the development and reform of building codes and standards;
 - Improved engagement and consultation with key stakeholders and interested parties in the development and reform processes;
 - Facilitating and encouraging new and emerging technology and the ability to develop specific and unique building solutions through the introduction of performance based building regulations;
 - Facilitating cost savings, economies of scale and the freer movement of goods, services, skills and competencies across jurisdictional boundaries through the presence of national codes and standards;
 - Greater access for Australia's building construction and manufacturing industries to international markets due to the international recognition of the work of the ABCB and the BCA.

The NSW government supports the ABCB's continuing efforts in these endeavours.

- To enable the ABCB to continue their work and achieve what needs to be achieved, it is imperative that the Australian Government also provide its continued support, and adequate funding.

FUTURE DIRECTIONS OF BUILDING REGULATORY REFORM

As indicated above, the ABCB have made a significant contribution to national building regulatory reform and there is a strong need for such work to continue. However, it is considered that there is room for improvement and for the need to address specific issues associated with the BCA and its associated reform processes, so as to enable the delivery of a more effective and efficient system of building control throughout Australia.

The following comments are provided for the consideration of the Commission and to assist in achieving this outcome:

1. Project prioritisation

The ABCB currently has an extensive work program which includes some significant reforms. All of these projects are very important however, they cannot all be attended to simultaneously and hence the ABCB has had to prioritise.

It is considered that there is a need to revisit the priority rankings in light of the following:

(a) *Alternative Solutions*

- There is current and growing concern regarding the matter of Alternative Solutions under the BCA. Particularly fire safety Alternative Solutions. These concerns were raised by NSW's Parliament's Joint Select Committee on the Quality of Buildings (Campbell Inquiry), and have been raised with the NSW Department of Infrastructure Planning and Natural Resources by several sources. They have also been raised with the NSW Independent Commission Against Corruption.

The Alternative Solution path is one of the two major compliance pathways under the performance based version of the BCA which was introduced some eight years ago.

- The performance based BCA has resulted in many positive benefits by introducing flexibility and choice and facilitating new and emerging technology. However, there are increasing concerns (many a result of hindsight, and being better informed 8 years down the track, from those involved in the industry, and others) that some Alternative Solutions under the BCA, particularly those relating to fire safety, are not delivering appropriate or consistent outcomes.

It has also been claimed that some are not meeting the expected levels of safety and some are setting public policy on an ad-hoc basis (a result of project specific interpretation of Performance Requirements).

- Of course, there are numerous factors that can contribute to such outcomes including, the competency and ethics of practitioners entitled to deal with these matters, and the checks and balances in the supporting administrative systems operating in each State and Territory.
- However, a major contributing factor identified by practitioners in this State is the lack of *quantified benchmarks* in the BCA against which to adjudge whether an Alternative Solution meets the relevant Performance Requirements. Also, the difficulty in identifying which Performance Requirements must be addressed by a particular Alternative Solution to demonstrate compliance.
- It is recognised that the ABCB have introduced recent amendments to the BCA designed to assist in overcoming the latter mentioned problem. These amendments are supported and are a *good first step*. However, to reduce the broad range of interpretations that are taking place in the industry, further work is required.
- In relation to the issue of lack of quantified benchmarks, it is understood that providing such may not always be possible, and when it is, may not be achievable in the short term. It is also understood and expected that delivering quantified benchmarks will be a component of the ABCB's future BCA project (BCA21), not scheduled for completion for some time to come.

Hence this State is currently examining whether it needs to increase the checks and balances (and information transfer mechanisms) in our approval system for matters involving fire safety Alternative Solutions. Also, as has already been mentioned, this State has introduced a range of measures to improve the NSW certification system.

- However, there is certainly a strong need for the identified BCA issues to be addressed as *soon as possible*, in order to ensure that buildings utilising the performance based pathway are delivering *acceptable levels of safety*.

It is therefore recommended that the addressing of these matters relevant to the BCA be given a *high priority* on the ABCB Work Program.

(b) Deemed-to-Satisfy Provisions

- Consultation with stakeholders has also revealed that practitioners are experiencing interpretation problems with the Deemed-to-Satisfy Provisions in the current BCA. A result of anomalies and lack of clarity in some areas. This can again result in inappropriate and inconsistent outcomes. It can also cause delays and costs in building design, assessment and certification.
- It appears that *ongoing 'maintenance'* of the current BCA is suffering to some degree at the expense of the *"bigger reform agenda"*. Whilst it is recognised that the major

reforms are of significant importance, so to is a clear, concise and practical BCA for end users.

- It is recommended that "*ongoing maintenance*" of the BCA be allocated dedicated resources so as to enable the addressing and resolution of various problems associated with the interpretation and application of the BCA Deemed-to-Satisfy provisions.

(c) Sustainability

- The NSW Government is challenged with making the planning and building system in this State work for greater *Sustainability* in the built environment. We are aware of the need to reduce energy, materials and water consumption, and to encourage more people to use public transport to reduce vehicle emissions.
- The NSW Government has introduced several initiatives in this regard and has others soon to be introduced. For example, in relation to reducing energy and water consumption, a Building Sustainability Index known as BASIX, which has been developed by DIPNR, will apply to the Sydney Metropolitan region from July 1, 2004, and to the rest of the State by July 2005. BASIX is an interactive web based planning tool that promotes sustainable design and construction for residential buildings.
- Sustainability is also being addressed in other areas by this Government (e.g. coastal protection, forestry agreements, catchment strategies, sustainable agriculture) and in various forms by other governments, other tiers of government and certain sectors of industry and the community.
- It is understood that the ABCB has sustainability listed as a matter for future consideration and as a subject for possible regulation under BCA21 and that the Board will consider this issue in more detail at a Planning Day in the near future.

The NSW Government sees the BCA playing a *key and effective role* in providing design and construction standards that deliver sustainable building solutions. For residential buildings in NSW, the BCA is a major supporting mechanism for BASIX in terms of energy efficiency. BASIX being the driver that sets the targets that must be met and the means by which this can be achieved. The BCA prescribes what standards must be met by some of those means (and this role may be enhanced in the future in NSW).

- Before determining what to regulate in the BCA, the ABCB needs to survey the actions in relation to sustainability that have and are happening around the nation. It then needs to determine the role and relationship of the BCA to the various planning and building systems. It is crucial that this role is *clearly articulated*, so as to avoid confusion, duplication, and conflicting requirements at both a state and national level.
- In order to avoid a plethora of fragmented and conflicting regulation and controls relative to sustainability and the built environment, the ABCB need to give *strong direction* in terms of the BCA's role, and this needs to be determined *as soon as practicably possible*.

(d) Emerging issues

- In addition to the foregoing, States and Territories have other emerging issues and needs; for example:
 - In NSW (and other States/Territories) the issue of *salinity* and its affects on the built environment is another matter requiring priority attention, and a matter that has been on the ABCB's work program for some time.
 - It is an important issue for numerous NSW councils which desire appropriate building solutions in the BCA. However, as this is yet to occur, and because they are subject to urban development pressure, they are having to act independently and

implementing their own controls and standards. This has the potential to result in differing standards applying across the State and hence problems of confusion and costs for industry and the community.

- o Another issue for this State (and others), is the matter of excessive energy consumption at peak periods (or energy demand). This is an issue which NSW have raised at the national level on a number of occasions in relation to the ABCB's energy efficiency project.

In response to this issue the NSW Government is investigating the scope of the issue and appropriate building related solutions. If a national response is not forthcoming, NSW may need to take independent action to address this important issue.

To assist in more efficient and effective project prioritisation, it is considered that greater consultation is required regarding the *prioritisation of the ABCB's projects and their delivery*, to ensure that the BCA is able to respond to the contemporary and emerging needs of State and Territory Governments, and the need for State and Territory governments (and local governments) to take action of a regulatory nature outside of the national process, is minimised.

2. Factors contributing to reducing BCA effectiveness

The NSW Government recognises that there are a range of factors contributing to reducing the effectiveness of the BCA, including:

(a) The differing charters of the Fire Brigades and building regulators.

The fire safety requirements of the BCA are necessarily concerned with the safety and protection of the building occupants and do not have a *primary* focus on *property protection*, other than to facilitate the life safety objectives, avoid spread of fire between buildings and protection of adjacent buildings, (where the concern is to minimise damage to adjacent buildings from the collapse of a building on fire). In comparison, the charter of the Brigades includes the protection of life and property.

This conflict in roles and legislative requirements is resulting in uncertainty and inconsistency regarding what needs to be achieved by buildings, and is causing concern for regulatory authorities and building practitioners. For example, it is not clear to what degree a building design involving a fire safety Alternative Solution should cater for the Brigades' fire fighting, search and rescue operations.

(b) Councils requiring more than the BCA via the development consent process.

This issue has been raised by a range of stakeholders in terms of undermining the integrity of the BCA and the national reform process and resulting in a platform of conflicting and inconsistent building controls outside the BCA, which are not being subject to the rigours of due process, impact assessment and transparency.

The appropriateness of local government authorities to set higher standards than the BCA on matters regulated by that Code, is a matter currently under consideration by DIPNR as part of the current legislative and State policy reform processes.

(c) Lack of commitment to national uniformity

A lack of commitment from some stakeholders, whether intentional or otherwise, to the BCA being the sole vehicle for technical building requirements, has the real potential to undermine the integrity and effectiveness of the Code.

Any new IGA needs to seek a stronger and renewed commitment from stakeholders to regulating technical building matters in the BCA and not in other vehicles, and to

achieving a truly national building code that reflects the expectations of all concerned relative to the built environment.

(d) Consolidation of building regulations

The reduced attention to consolidation of all building requirements in the BCA. There has been little activity regarding this important issue in recent years. Consolidation is a part of the IGA objectives on building regulatory reform, and should remain an objective of any future IGA.

Failure to promote and achieve consolidation will result in others continuing to develop in isolation their own building standards for matters that affect them, and continued confusion for industry as to what standards must be met by the built environment, and who is responsible for compliance.

3. Institutional arrangements, process and other matters

(a) Inter-government agreement and ABCB role

- It is considered that any future IGA or ABCB model should:
 - o not reduce the extent of involvement of industry in the various committees of the ABCB or preclude any particular industry representation;
 - o look to increase community representation and engagement (refer comments below regarding the meeting of community expectations);
 - o be cognisant of the need to have a close working relationship with the bodies and organisations responsible for *planning controls* and associated reforms, so as to be able to respond in a positive and proactive manner to planning matters, which have an impact on the way in which we design and construct buildings, and to ensure the compatibility of outcomes on the ground.
 - o recognise that the continued success of the IGA and the ABCB is dependent on the States and Territories having strong involvement in all aspects of the ABCB's work and ownership of any proposed reforms. Accordingly, they need to be embedded in the processes of reform development, not just reform delivery.

In this regard, the ABCB have no legislative power to administer or enforce the building law. These are key and fundamental roles for State and Territory governments.

- o as previously mentioned, seek a stronger commitment to regulating technical building matters in the BCA and not other legislation, regulatory controls or policies.

(b) Consultation and community expectations

(i) Consultation

- It is of considerable importance that States and Territories continue to review, and be given sufficient time to review and consult, regarding any proposed amendments and reforms to the building law so as to ensure (among other things) that:
 - o proposals are acceptable and relevant to the government, industry and community of the respective State or Territory, including the cost and benefit aspects of any proposal;
 - o such are compatible and consistent with building control legislation and other government policy objectives and initiatives relevant to building control.

- o variations to the codes and standards are minimised;
- Further to the above, it has already been mentioned that the ABCB currently have an extensive work program associated with the ongoing development and reform of the BCA. As a consequence, the ABCB and its staff are involved in numerous projects simultaneously.

This situation is often resulting in simultaneous timeframes and deadlines for review, consultation and comment on *major reform proposals*. This is causing major concerns and logistical problems for some stakeholders (including State and Territory administrations) who are involved in reviewing and commenting on the reforms and trying to program their implementation, yet have limited resources.

As a result the quality of responses from stakeholders is suffering, and sometimes, no responses are being provided at all. Stakeholders recognise that all of the ABCB reforms are important however, according to their resources and agendas, will prioritise themselves.

The ABCB therefore does not always get a true reflection of stakeholder opinions and will not always know whether they are truly meeting stakeholder and community expectations in the development and delivery of their reforms.

The ABCB must not only prioritise its projects according to level of importance, it needs to realise the limitations of stakeholder resources in terms of their ability to respond in a meaningful way, and schedule their programs accordingly.

- Timeframes to review, consult and comment on major reform proposals are in many instances regarded by stakeholders to be *insufficient* and are not considered to be facilitating *due process* and *proper and meaningful* stakeholder engagement and consultation.

In addition, a number of the current and proposed major reforms (e.g. energy, access, sustainability) have significant *social and environmental implications*, which impact on mainstream government policy consideration and necessitate a "*whole of government*" response, as well as broad industry and community consultation.

Timeframes to assess and consult on such reform proposals, need to provide for the processes of government and the need for sign off by various levels of government, including sign off by Cabinet. Current timeframes are not facilitating this need and outcome.

- Experience and feedback to date from stakeholders suggest that there is a need to better "co-ordinate" consultation relative to ABCB/BCA reforms, so as to avoid duplication and reduce the likelihood of key and relevant stakeholders being overlooked.
- The Building Codes Committee (BCC) is, under the IGA, the Board's peak technical advisory body who are responsible for, among other things, the ongoing development and reform of the BCA and providing advice to the Board on a range of issues.

On occasions, due to the tight time frames associated with various proposals, issues and recommendations are being presented to the Board without being considered by the BCC beforehand, or the Board being made fully aware of the BCC viewpoint and the reasons for such. This has the potential to result in the Board not making fully informed decisions and doesn't fully facilitate the consultation process, in which the BCC members play a major role at both state and national levels.

- Also, the ABCB establishes various subcommittees and working groups to address specific and complex issues which provide valuable and specialist information, input and feedback on various proposals. It is felt that there should be greater transparency and consultation

on the membership of such committees and working groups prior to their establishment, so as to ensure appropriate and balanced representation is achieved.

(ii) Community expectations

- The consultation process associated with ABCB is open to all to provide feedback including *the general community*. However, community feedback is generally not significant unless a particular sector has a direct interest in the outcomes.

It therefore could be questioned whether all BCA reforms actually reflect "*community expectations*".

- It could also be questioned whether the current BCA (that is, those parts of the BCA not reformed in recent years) meet community expectations. The current BCA is a mixture of new reforms and standards based on past legislation. The latter may have reflected community expectations when first introduced, however, they may not today.

A further complexity arises from the objective to deliver "*minimum least cost solutions*". These may not always equate to what the community expects.

- It is considered that there is room for improvement in relation to "*community engagement*" so as to ensure that the next generation BCA (BCA21) includes processes that are aimed at deriving the community's expectations of our built environment. This may require increased community representation in committees and working groups involved with reform development and delivery.

Failure to create a BCA that reflects, to the degree reasonable, community expectations, may result in others taking independent regulatory action which will undermine the BCA and the national reform processes.

(c) Funding

- Funding of the ABCB under the IGA requires the Federal and State and Territory governments to make financial contributions to the ABCB annually as outlined in the Issues Paper. These funding arrangements place the largest burden (other than the Australian Government) on the States with the most building activity.

For sometime now these funding arrangements have been under review with the intention of developing alternative non-government options for funding the work of the ABCB through its commercial activities, including the royalties gained from the sale of the BCA and other publications.

This issue needs to be given *priority status* so as to relieve where possible the burden on governments to continually fund the ABCB, who are now starting to attract considerable funding from their commercial activities, many of which the States and Territories are making a considerable contribution towards in terms of content and outcomes.

(d) Education and Training

- Adequate education and training of industry and other stakeholders on major amendments and reforms to the BCA is crucial to ensuring the successful implementation of such and the delivery of intended outcomes to the community.

Anecdotal feedback from stakeholders is suggesting that education and training on major amendments and reforms is not meeting the needs of industry and requires better co-ordination prior to proposals becoming law.

CONCLUSION

In summary:

- The NSW Government recognises the significant contribution that the ABCB have made to the development and reform of national building regulations and supports the continuation of the ABCB and its ongoing reform efforts. Furthermore, the Government welcomes the opportunity to discuss in further detail issues raised in this Submission and contribute to their resolution.
- The NSW Government considers that the Australian Government should continue to support the work of the ABCB.
- The ABCB need to revisit their work program and give a higher priority to:
 - providing measurable benchmarks for Alternative Solutions, and improving consistency in identification of related Performance Requirements;
 - the BCA21 project;
 - resolving interpretative and other issues with the current Deemed-to-Satisfy Provisions of the BCA.
 - defining and clearly articulating the role of the BCA in achieving *a sustainable* built environment.
 - the consolidation of all technical building requirements into the BCA.
- The NSW Government recognises that there are numerous factors that are contributing to reducing the effectiveness of the BCA. Some are matters for the ABCB to attend to. Others are for the attention of State and Territory governments.
- Any future IGA needs to:
 - maintain the current level of industry involvement, and in doing so not preclude any specific industry representation ;
 - look to improve community engagement in order to better establish community expectations of our built environment;
 - seek to establish a closer working relationship with planning authorities;
 - continue to embed State and Territory governments in the regulation development and reform processes to foster ownership and national acceptance of outcomes; and
 - seek a stronger and renewed commitment to the BCA as the sole vehicle for technical building requirements.
- There is a need to schedule delivery and issue of ABCB outputs according to a timetable which provides stakeholders with sufficient time to conduct meaningful consultation with their constituents, review the proposals, obtain sign off (including a "whole of government" response where necessary), and then respond. This "*due process*" is crucial to the ongoing success of the ABCB, maintaining stakeholder support and confidence and the delivery of a national uniform building code.
- Priority attention is required to developing more efficient and effective funding arrangements for the ABCB.