



15 October 2004

Mr T Hinton
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

building@pc.gov.au

Dear Mr Hinton

Comments on Draft Research Report Reform of Building Regulation

Thank you for the opportunity to provide comment on the draft research report. The draft recommendations of the Commission are generally supported with the following exception:

Draft Recommendation 6.8 states:

The ABCB (or replacement) [hereafter referred to as the ABCB] 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 providers.

The implementation of such a reform would be a major change to the building regulation landscape. This recommendation should not be advanced until an independent review in the form of a RIS has been undertaken and it has been demonstrated that such a reform results in a net benefit for the community.

Many of the elements of 'good regulatory governance' (p39) have not been advanced to date with respect to this draft recommendation. This submission concludes that:

1. An asset protection objective does not currently exist in the BCA and 'increasing' an asset protection objective has the effect of introducing (albeit unlawfully) that objective.
2. A new objective cannot be introduced to building control legislation without the imprimatur of the respective parliament based on a Regulatory Impact Statement (RIS) that establishes that the reform is in the community interest and that there is no alternative method available to address the perceived market failure.

- CONSULTING ENGINEERS
- PROJECT MANAGERS
- BUILDING SURVEYORS
- ENVIRONMENTAL SCIENTISTS

Email:
info@pittsh.com.au

Internet:
www.pittsh.com.au

Devonport

1st Floor
Commonwealth Building
35 Oldaker Street
DX 70368
PO Box 836
Devonport Tas 7310
Australia

Phone:
+61 (0) 3 6424 1641
Fax:
+61 (0) 3 6424 9215

Other offices at:-

- **Hobart**
- **Launceston**
- **Victoria**
- **Dili, East Timor**



3. There is uncertainty about what is meant by 'increasing the asset protection objective...to align with the requirements generally imposed by fire authorities and favoured by insurance providers'. The standard of asset protection arising from this draft recommendation is not understood.
4. The arguments offered in support of the draft recommendation are not soundly established.
5. If there is a market failure, there are other measures that do not entail regulatory reform which should be considered.

The remainder of this submission expands on each of the aforementioned conclusions.

1. **An asset protection objective does not exist in the BCA and 'increasing' an asset protection objective has the effect of introducing (albeit unlawfully) that objective**

The draft report (at p70) includes an excerpt from the BCA which states that the goals of the BCA are 'to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future.'¹ There is no suggestion that asset protection is an outcome sought to be achieved or promoted. It is generally accepted in industry that an asset protection objective does not currently exist in the BCA.²

Notwithstanding, it is apparent that there is an element of asset protection as a consequence of providing a safe built environment for the building occupants. This, however, is not the stated goal of these provisions and is an indirect consequence of the regulatory system. The draft report discussion is inconsistent with this understanding and appears to suggest that an asset protection objective exists for some buildings.

At p140-141 of the draft report it is suggested that, with respect to bush fire protection, 'the Code provides property protection to houses (Class 1 and 10) and residential-type buildings (Class 2 and 3) only.' However, this is again an example of where an asset protection outcome is achieved as an indirect consequence of protecting the safety of the building occupants. A relatively recent phenomenon is the tendency for fire brigades to encourage occupants to stay with, and defend, their asset. The impact of this incremental reform of the fire brigades is to elevate the importance of a dwelling as a defensible location for the protection of the building occupants. In this context it is apparent that bush fire protection in the BCA is a life safety matter; it does not establish an asset protection objective. Read in this way there is no ambiguity with the stated goals of the BCA referred to above.

¹ Please note that this extract is not correctly reproduced in the draft report.

² Reaching a conclusion to the contrary may have a major impact on the acceptability of many alternative solutions that have been prepared to date.

If there is no existing asset protection objective it is axiomatic that any ‘increase’ involving such an objective would serve to introduce (albeit unlawfully) an asset protection objective. The question then arises whether or it is possible to reform the building regulations by modifying the BCA?

2. A new objective cannot be introduced to building control legislation without the imprimatur of the respective parliament based on a RIS that establishes that the reform is in the community interest and that there is no alternative method available to address the perceived market failure.

As a preliminary matter there appears to be some linguistic uncertainty regarding ‘objectives’ that needs to be addressed. This arises because objectives reside in the relevant building control Act of the State and Territory as well as the BCA. These objectives are being interposed between the two without distinction resulting in some confusion in the use of the term.

Where objectives are not expressly provided in the relevant Act (which happens in some jurisdictions), the courts will ‘discover’ them based on the purpose of the legislation in accordance with the relevant interpretation legislation (*Acts Interpretation Act*) within the State or Territory.

At the same time there are ‘objectives’ which appear in the BCA. Inconsistency between statutory objectives and the objectives of the BCA presents an unacceptable situation which is likely to cause interpretation problems for both designers and regulators. The objectives of the BCA cannot differ from the enabling Act. The following excerpt from the *Subordinate Legislation Act (Tas)* sets out the requirements for establishing subordinate legislation in that State:

Before subordinate legislation is proposed to be made –

- (a) *the objectives sought to be achieved and the reasons for them must be clearly formulated; and*
- (b) *those objectives are to be checked to ensure that they –*
 - (i) *are reasonable and appropriate; and*
 - (ii) *accord with the objectives, principles, spirit and intent of the enabling Act; and*
 - (iii) *are not inconsistent with the objectives of other Acts, subordinate legislation and stated government policies³; and.... (Schedule 1 Subordinate Legislation Act (Tas))*

Similar provisions to those described above for the *Acts Interpretation Act* and *Subordinate Legislation Act* exist in other jurisdictions. At the same time there are

³ Inconsistency in this context means that the objectives of different Acts cannot be in conflict, not that different Acts can’t have different objectives. Clearly an Act that deals with (say) taxation will have different objectives to building control legislation.

obligations established for each jurisdiction pursuant to the Competition Principles Agreement (CPA)⁴.

The CPA requires the development of a RIS where substantive amendment is proposed to enabling legislation. This obligation also extends to other documents that do not form part of the statutory scheme. In a guideline produced by the Council of Australian Governments⁵ it states:

Development of voluntary codes and other advisory instruments should take account of these guidelines and principles where there is a reasonable expectation that their promotion and dissemination by standards-setting bodies or by government could be interpreted as requiring compliance.

Irrespective of the legal standing of the BCA it is clear that the reform of the BCA is captured by the CPA. The Agreement⁶ itself is also clear on the requirement for a review to ensure that no unnecessary regulation is introduced, particularly that which inhibits risk taking and enterprise by business.

S5(1) The guiding principle is that legislation... should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) the objectives of the legislation can only be achieved by restricting competition.*

The guideline also urges caution where the nature so the proposed reform addresses purported commercial market failure.

It is important to distinguish between commercial and physical risks. Commercial risks can, and probably should, be borne by the company or industry involved and resolved at that level.⁷⁸

In this submission it is suggested that The ABCB should not introduce new objectives to the Building Code of Australia (BCA) without the imprimatur of the respective State and Territory parliaments. It is suggested that to do so would

⁴ National Competition Council (1998) – Compendium of National Policy Agreements (Second Edition) – downloaded from <http://www.ncc.gov.au/activity.asp?activityID=39> on the 6th October 2004.

⁵ Council of Australian Governments (COAG) (2004) – Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies – downloaded from <http://www.coag.gov.au/meetings/250604/coagpg04.pdf> on the 6th October 2004.

⁶ National Competition Council (1998) – op. cit.

⁷ In this context, physical risk ranges ‘from a direct personal threat to life to environmental pollution’. It does not extend to asset protection.

⁸ Council of Australian Governments (COAG) (2004) – op. cit. p24.

render the new provisions *ultra vires* as there would be no authority for the regulation from the head of power.

Amendment to the enabling Act is necessary to introduce an asset protection objective. Prior to amending the legislation it is necessary to determine, through the RIS mechanism, whether or not the introduction of an asset protection objective results in a net benefit to the community (as a whole) and that there is no other approach available (other than regulatory reform) to address the perceived market failure.

If it is accepted that the draft recommendation can be implemented (which it is not), what is the standard of asset protection required and how much will it cost?

3. There is uncertainty about what is meant by 'increasing the asset protection objective...to align with the requirements generally imposed by fire authorities and favoured by insurance providers.' The standard of asset protection arising from this draft recommendation is not understood.

While it is premature to reach the conclusion that the inclusion of an asset protection objective is in the community interest (and that there is no other mechanism available to address the perceived market failure), it is felt that the definition of the extent of asset protection that may be invoked by the draft recommendation lacks clarity.

The following is a list of technical questions that remain unanswered and which require resolution in advance of the proposed draft recommendation. These matters require resolution in the first instance because without answers to these questions it is not possible to determine the cost to the community of the proposed reform.

1. Is it anticipated that the Deemed-to-Satisfy Provisions of the Building Code of Australia (BCA)⁹ will be expanded to include additional requirements to address asset protection?
2. If it is not proposed to increase the Deemed-to-Satisfy Provisions to accommodate asset protection, and it is merely a method of incorporating asset protection as a consideration for the development of an 'alternative solution':

⁹ Australian Building Codes Board (2004) – Building Code of Australia.



- a. What would be the evaluation criteria when undertaking an 'absolute' fire safety assessment? Would designers be required to demonstrate that a credible worst-case scenario fire results in a maximum loss of (say) 10% of the building (or some other amount)? What would be the requirement for the contents of the building? Should the loss be expressed in monetary terms? Are community accepted losses fixed for all buildings (other than Class 1a dwellings) or do they shift with reference to the importance of the building, the likelihood of the fire or the practicability of mitigating measures?
 - b. If a designer is preparing an alternative solution that is based on an 'equivalence' argument, what can be assumed from the Deemed-to-Satisfy Provisions of the BCA as the minimum level of asset protection on which to base a comparison? Is the evaluation criterion a comparison of the extent of the damage, the cost of damage or some other measure?
 - c. Is there sufficient data and are there validated models with sufficient accuracy that would allow the analysis of asset protection in a performance based alternative solution? Without an acceptable method, this draft recommendation may have the indirect effect of discouraging (and potentially prohibiting) the use of the performance based option. The consequence would be to encourage people to revert to the Deemed-to-Satisfy compliant building which could be more costly and in some circumstances potentially less safe.
3. What enforcement methods are appropriate for asset protection? Should a building surveyor be required to refuse a building permit where a developer has not taken sufficient measures to protect their commercial investment? Should a Council be required to initiate legal action (after due process has been exhausted) for non-compliance if appropriate measures are not implemented?
 4. Will it be necessary to understand the present and future financial impact to commercial operations as a consequence of various fires for a specific building application? What would be the extent of business interruption, both at the time of the proposed building work and in the future? What are the social impacts of business closure and how are these reduced to terms that may be evaluated in the analysis?
 5. The draft research report highlights the need for cradle to grave building regulation. Is it envisaged that the mandatory maintenance provisions would be expanded to include asset protection?
 6. What other issues are drawn into the regulations when an objective of asset protection is adopted? Should building security also be included?

Limited guidance is provided in the Fire Safety Engineering Guidelines¹⁰ with respect to asset protection though the questions raised above are not answered.

¹⁰ ABCB (2001) Fire Safety Engineering Guidelines



While these more technical matters have not been addressed in the draft report a number of other issues have been advanced in support of the draft recommendation.

4. The arguments offered in support of the draft recommendation are not soundly established

At p141 it is also noted by the Commission, on submission by the Fire Protection Association Australia, that ‘protection of property as a community objective is part of performance-based building codes and fire safety regulations being developed or implemented in the USA, Canada, Hong Kong and Singapore, and this appears to be a growing trend globally’. However, in that same submission to the Commission (at p6) it is stated that in the UK, to resolve conflict between fire brigade and building control legislation, ‘there is a statutory bar on the fire brigade affecting the levels of building fire safety design’. The requirement for property protection in the UK (at least) is not clear.¹¹

The Building Act (1984) (UK) states (in part):

The Secretary of State may, for any of the purposes of-

- (a) *securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings,*
- (b) *furthering the conservation of fuel and power, and*
- (c) *preventing waste, undue consumption, misuse or contamination of water,*

make regulations with respect to the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings.

There is no provision in the UK for the building regulations or other standard or code to make regulations with respect to asset protection of the building.

Notwithstanding, the British Standard BSI 7974:2001¹² states that:

The protection of life is the main objective of fire safety legislation; however, the effects of fire and its products on the ongoing operations of a business and the direct property losses should also be considered.

¹¹ No attempt has been made to examine the requirements of other jurisdictions identified.

¹² British Standards Institute (2001) – BS 7974:2001 Application of fire safety engineering principles to the design of buildings – Code of practice – p14.



This excerpt illustrates the point that often there are codes of practice and standards which to a degree address additional (non-mandatory) objectives such as asset protection even though there is no statutory requirement for it to occur. This is because the developer may elect, at their discretion, to provide asset protection. These provisions assist the designer with meeting these non-mandatory goals set by the client.

Many of the other international fire engineering design guides (including those developed by ISO, SFPE, etc.) also provide some guidance for addressing asset protection. This however, does not translate to asset protection being a statutory requirement in the relevant head of power. These are guideline documents only.

Caution is urged in reaching the conclusion that there is a global trend toward the introduction of asset protection as the documents relied upon in reaching this conclusion may not be mandatory requirements.

Having established that there are numerous technical questions that require answers and that there is a doubt over the veracity of the claim that there is a global trend toward asset protection, some attention whether or not there are other alternative measures to regulatory reform that could be considered.

5. If there is a market failure, there are other measures that may be appropriate to address the market failure that do not entail regulatory reform.

To date there has been no comparison of the costs or benefits to be derived and there is no evidence that the general requirements of either the fire brigades or insurance providers to address asset protection is in the best interest of the community.

In fact there is still a doubt whether or not there is a market failure that needs to be rectified by regulation. At law, if the fire brigade is required to comment on an application for a building permit in accordance with building legislation, the fire brigade needs to respond in accordance with the considerations which are embodied in the building legislation, not other objectives imported from fire service legislation. A legal opinion may be warranted on this point.

If at law this is not the case, then it is possible (and probably desirable) for parliament to intervene and to limit the response of fire brigades to the exclusion of asset protection. This action would remove any present ambiguity.¹³

¹³ This appears to be the approach adopted in the UK and outlined by FPA Australia in their submission.

In developing this discussion, it is also apparent that it is not reasonable to suggest that the fire brigades modify their head of power to remove asset protection as an objective within that legislation. This arises because of the pragmatic consequence that, if that were the case, a State or Territory fire brigade would not be authorised to intervene in fires unless they believed that there was a risk to life safety. If a building was on fire and there were no occupants, the fire brigade, in the absence of an asset protection objective, would not be empowered to act.

This arrangement would be an unacceptable solution for the community. This observation also provides some explanation why an asset protection objective exists within Fire Services legislation.

It is noted that the draft recommendation to include asset protection is supported by insurance companies. If there is any market failure identified to date, it is derived from observations (or concerns) of insurance companies that the building regulations are not protecting their commercial interests and that they are having to undergo their own assessment to understand their exposure with respect to asset protection. It is suggested that increased premiums are being levied where an alternative fire engineered solution has not had sufficient regard to asset protection.

In this submission it is suggested that regulatory intervention may not be an appropriate method of addressing this perceived market failure. A more cost effective option may be for insurance companies to require developers to consult with the insurance provider on the development of alternative solutions through the insurance policy mechanism. This would involve no regulatory intervention. There may be other options that operate more efficiently that may be identified via a RIS.

In this regard it should be noted that the Guideline¹⁴ urges caution about focusing on the vested interests of a particular group such as insurance providers and states that ‘decisions about the overall effectiveness of regulatory action should not be made on the basis only of its effect on particular groups in society’.

¹⁴ Council of Australian Governments (COAG) (2004) – op. cit. p27.



In summary, draft recommendation 6.8 is opposed on the grounds that there is insufficient evidence to allow any positive commitment to expand the objectives of building regulations to include asset protection. Statutory amendment is necessary and this should not be undertaken without a RIS involving: a clear description of the market failure, options identified to address the perceived market failure, and cost estimates to implement these options.

More appropriate wording may be to recommend an independent review be undertaken to explore the merit of expanding the objectives of building regulations to include asset protection.

Yours sincerely

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Ross Murphy

FIRE SAFETY ENGINEER / BUILDING SURVEYOR