



Enhanced building regulation through reform of the ABCB

A submission prepared by the
Property Council of Australia
for the Productivity Commission
Inquiry into Reform of Building Regulation
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The **Voice** of Leadership

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Executive Summary

The built environment is the nation's physical productivity platform.

Building control, through the Building Code of Australia (the Building Code), shapes the structures in which all Australians live and work.

Without the work of the ABCB, Australia's commercial and residential building sectors would today be characterised by uncertain and costly building control randomly spawned by three tiers of government.

It is to avoid this outcome and, specifically, to deal with the new challenges posed by rapidly evolving community and public policy expectations, that the current ABCB structure and the revised Inter Government Agreement 2001 (the IGA) require strengthening.

The Building Code is well regarded locally and internationally.

All mandatory building requirements in Australia should be part of the Building Code.

Consistency, affordability and elimination of poor practice will all be eroded if the Building Code loses its status as the agreed repository of mandatory building requirements.

This should be reflected in a strengthened IGA and more independent ABCB governance structure.

The Australian Government must strengthen its coordinating role in regulation reform.

State and territory government commitment to the paramount regulatory status of the ABCB and Building Code must also be reaffirmed.

Wherever new mandatory building requirements are proposed, the ABCB must first assess whether market failure exists before determining whether the benefits of regulation will substantially exceed the costs arising.

In particular, the ABCB must be empowered to deliver cost-effective building solutions that both eliminate poor practice and override the inconsistent and often poorly researched regulatory interventions of local governments across the nation.

The Property Council believes that there are five ABCB objectives that deserve the greatest share of the Productivity Commission's attention during this study.

They are objectives numbers 1,2,4,5, and 7.

These objectives can be summarized as:

1. consistent, cost effective, performance based codes, standards and systems;
2. minimum, least cost, health, safety and amenity solutions;
3. soundly based, innovative and low cost solutions
4. effective industry consultation; and,



5. integration of all agency reform activities and Building Code consolidation of all mandatory requirements affecting buildings.

In the Property Council's , the ABCB should concentrate on:

- national consistency of building design & construction;
- responding to appropriate community standards on safety and health;
- eliminating poor environmental & amenity-related practices;
- recognising the interaction between the voluntary & the prescriptive; and,
- recognising that while planning and building are distinct there is a relationship that must be clearly defined to avoid regulatory game playing.

Among other reforms, the Property Council of Australia proposes the following major improvements to building control in Australia:

1. the ABCB must be given a higher status by being made responsible to a COAG Ministerial Council;
2. all mandatory building regulations should made nationally consistent through consolidation into the Building Code (including future considerations of eco-efficiency, water, plumbing, security and electrical);
3. a model administrative framework must be implemented; and,
4. Regulatory Impact Statements should be independently checked by an expert Integrity Committee.



Introduction: Logic of Submission

The Property Council has responded to the Commission's Research Study by considering the changes necessary to ensure effective building regulation.

In broad terms, the Property Council of Australia submission:

- outlines the case for pursuing national consistency;
- discusses the relevance of minimum standards;
- reviews the scope and effect of the IGA and the ABCB with regard to effectiveness, productivity and efficiency;
- analyses the standards development and implementation processes;
- evaluates specific areas of interest for further reform; and,
- proposes a new framework that will greatly enhance the efficiency of Australian building regulations.

The submission focuses on solutions, rather than providing a detailed statistical examination of the marketplace.

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The Productivity Commission's terms of reference are set out below.

PRODUCTIVITY COMMISSION ACT 1998

The Productivity Commission is requested to undertake a research study examining the contribution that national building regulatory reform under the auspices of the Australian Building Codes Board (ABCB) has made to the productivity of the building and construction industry and its impact on economic efficiency in Australia as well as the potential that such reform has to make further gains.

The Commission is to:

1. Investigate progress in building regulatory reform in the building and construction sector since 1994 and the need and scope for further regulatory reform post 2005, including:
 - a. whether the Inter Government Agreement on building regulation reform of 1994, as revised, is achieving its objectives;
 - b. whether the Inter Government Agreement is producing gains for the industry and maximising net benefits for the Australian economy;
 - c. whether the Inter Government Agreement is providing efficiency and cost effectiveness in meeting community expectations for health, safety and amenity in the design, construction and use of buildings through nationally consistent building codes, standards and regulatory systems;
 - d. the need for on-going national co-ordination of the Building Code and related reforms; and
 - e. the effectiveness of the Australian Government's current role in building regulatory reform.
2. If it is found that further work in this area is appropriate post-2005, report on:
 - a. the Australian Government's role in future building regulatory reform;
 - b. whether the objectives of the Inter Government Agreement adequately address the need for future reform; and
 - c. whether the ABCB or alternative models would be more efficient and effective in delivering the reforms.
3. Make recommendations based on the findings.



Chapter One: The Property Council of Australia

The Property Council of Australia welcomes an opportunity to participate in this Productivity Commission Inquiry.

The Property Council comprises the leading developers, financiers, owners and managers of investment property in Australia. Our members currently own more than \$300 billion of domestic assets.

In addition, the Property Council's members include all the major construction, professional, and trade services suppliers working within the property sector.

The Property Council is convinced that nationally consistent and performance-based building regulation is crucial to the competitiveness, accessibility, safety, affordability, and amenity of commercial and residential property in Australia.



Chapter Two: Summary of Recommendations

1. That the ABCB's core goals continue to be to achieve:
 - national consistency of technical standards;
 - consistency of state and territory building regulation; and
 - consistency in the implementation of building controls across all tiers of government.
2. That the three spheres of government commit adequate resources to the creation and implementation of a model administrative framework to improve the efficiency and consistency of uptake of the Building Code.
3. That a key component of an administrative framework be the automatically referencing the Building Code in relevant state and territory legislation, with no ability to introduce variations.
4. That the Federal, state and territory governments adopt the DAF model for development assessment reform (following nation-wide consultation on the CDC model), to ensure that planning is not able to increase standards set by building control.
5. That 'minimum acceptable to the community' should be retained as the reasonable test for the full extent of mandatory building control requirements, balanced against realistic cost benchmarks.
6. That state and local governments not be able to vary building regulations.
7. That a strong case for the existence of market failure be proven before regulation can be pursued.
8. That government agree not to attempt to regulate for good design, but develop incentive packages to encourage stakeholders to pursue better practice.
9. That the IGA be amended to eliminate jurisdictional variations. Additionally:
 - that the 'as limited as possible' test for variations be replaced with a commitment to a nationally consistent administrative framework;
 - that there be a clearer definition of the relationship between planning and building regimes;
 - that state and local planning regimes only deal with land allocation, land use issues, and environmental and other issues beyond the building;
 - that it not be possible for local governments to regulate building work through planning schemes; and
 - that a revised IGA delineate a clear set of principles to be satisfied by any jurisdiction that seeks to avoid, vary or add to mandatory national requirements affecting buildings.



10. That, as a rule, the Building Code of Australia regulate:
 - health, safety and amenity issues within or affecting the building envelope; and
 - sustainability and eco-efficiency in construction.
11. That the ABCB's mission be updated to read as follows.

It is the mission of the ABCB to provide for the creation of nationally consistent performance-based building codes and regulatory systems that:

 - *set minimum, cost-effective mandatory building requirements;*
 - *meet appropriate community expectations for the elimination of poor practice in the health, safety, sustainability and amenity of the design, construction and use of buildings; and*
 - *only regulate where building control is proven necessary*
12. That the ABCB's objectives, as they relate to 'minimum acceptable' standards and 'least cost' solutions be deemed compatible with the test of 'maximising net benefits' and be retained unaltered.
13. That the revised IGA contain principles for the regular review and reform of state and territory building control schemes with a view to achieving national consistency by 2010.
14. That the Commonwealth reaffirm its strong leadership role in the work of the ABCB by:
 - placing greater emphasis on the need for national consistency; and
 - increasing its funding commitment, to be matched by the states and territories.
15. That the ABCB should undertake a review of its public consultation processes, with particular attention to engaging stakeholders and setting appropriate consultation timeframes.
16. That the ABCB continue its scrutiny of Australian standards for reference in the Building Code.
17. That the Productivity Commission suggest mechanisms for preventing legal action being taken based on unreferenced standards or applied retrospectively.
18. That all building construction-related regulation be incorporated into the Building Code, so that inconsistencies can be avoided.
19. That the Building Code be expanded in scope to address eco-efficiency, but should remain dedicated to regulation that prescribes minimum standards that are shown to be necessary.
20. That any minimum standards for eco-efficiency aim to remove poor industry practice, while attempts to introduce better performance be through incentives.



21. That water efficiency measures be incorporated into the Building Code, along with all the technical requirements for plumbing.
22. That the Building Access Policy Committee be reconstituted so that it better represents stakeholders in the disability access debate.
23. That the Administrative Protocol be reviewed extensively to increase certainty for stakeholders.
24. That the role of the Building Code be reviewed in relation to property protection from fires and that any subsequent amendments to the Code be aimed at minimum standards.
25. That manufacturers' specifications be the benchmark for maintenance regimes, rather than regulation.
26. That Building Appeals Boards be established in each state or territory to hear complaints or alternative solutions.
27. That the use of private certifiers for building compliance continue and that private operators also be available for planning certification purposes.
28. That the Productivity Commission adopt the Property Council's model framework for an improved ABCB:

Elements of a New Building Regulatory System

The key components of the revised structure would be as follows.

1.0 The Ministerial Council for Building

This would be made up of relevant Ministers from all Australian States and Territories, the Australian Government, local government, and possibly New Zealand.

The Commonwealth would chair the Council, which would meet once a year.

The role of the Council would be to develop the broad policy agenda and regulatory priorities for Building Australia.

2.0 The Board

2.1 The Chairman

The Chairman of the Board would be appointed by the Ministerial Council for a three year term and would be drawn from the industry representatives. No Chairman would be allowed to remain in the position for more than two terms.

2.2 Membership

Membership of the Board would comprise:

- *a representative of the Department of Prime Minister and Cabinet;*



- *a representative of the Department of Industry, Tourism, and resources;*
- *one senior representative of the eight State and Territory administrations;*
- *two representatives of the investment sector (one public and one private);*
- *one representative of the project delivery (construction) sector;*
- *one representative of the building design and services sector; and*
- *the chief executive officer of Building Australia.*

Industry membership of the Board would be selected by the relevant Australian Government Ministers on advice from the Australian Construction Industry Forum and would be selected every three years.

2.3 Responsibilities

The Board would meet four times a year. Its responsibilities would be:

- *to develop construction policy recommendations for consideration by the Ministerial Council;*
- *to manage and maintain the national administrative framework and resolve any inconsistencies;*
- *to consider the advice of the Regulatory Assessment Panel on whether regulation is needed or proposals are appropriate;*
- *to approve amendments to the Building Code of Australia;*
- *to decide upon the nature of relationships between Building Australia and other organisations; and*
- *to oversee the effective operation of Building Australia.*

2.4 The Chief Executive Officer

The CEO would be responsible for the day-to-day management of Building Australia, the Codes and Standards Committee, and the Regulatory Assessment Panel.

The CEO should be appointed for a five-year term, limited to two terms.



3.0 Building Australia

3.1 Function

This statutory organisation would carry out the role currently performed by the Australian Building Codes Board.

In short, the key roles of Building Australia would be:

- *to develop the Building Code of Australia and reference relevant standards;*
- *to identify and incorporate other aspects of construction into the Building Code that not currently covered, such as plumbing and electrical work;*
- *to investigate research into leading practices in the building industry and promote efficiency and innovation within the industry; and*
- *to finalise (and oversee the implementation of) a national administrative framework for building regulation.*

3.2 Codes and Standards Committee

As is currently the case with the Building Codes Committee, the Codes and Standards Committee would be responsible for deciding what technical provisions should be incorporated into the Building Code of Australia. These provisions would be provided to the Committee by expert panels.

The Committee would also provide advice to the Board on policy relating to building regulations.

The Committee would be constituted along its current lines, but absolute agreement would not be required. Once the national administrative framework is completed and implemented, decisions could be made by voting:

- *if two-thirds of the administrators and two-thirds of industry support a proposed regulation, it should be adopted;*
- *if there is support from two-thirds of the administrators, but not from two-thirds of the industry representatives (or vice versa), the regulation should not proceed; or*
- *if neither group has a two-thirds majority, the regulation should not be introduced.*



All regulatory proposals, except for minor editorial changes or very small recommendations should be subject to regulatory review:

- *if the proposal is considered to be a minor amendment to the Building Code, a business case should be prepared to support it; or*
- *for any other proposals, a Regulatory Impact Statement should be prepared.*

Decisions by Building Appeals Boards (which should be established in each jurisdiction) should be fed back to the Committee so that any regulatory inefficiency can be identified and so that acceptable alternative solutions can be freely shared within industry.

3.3 Expert Panels

These Panels would comprise experts in their respective fields called together on a need-be basis to develop draft building regulations for specific issues.

Experts could be drawn from private practice, public practice or specialist organisations.

Panels should be chaired by a representative of the administrations, so that public interest is served.

Where considered appropriate by Building Australia and the Codes and Standards Committee, issues can be referred to external expert panels, such as committees established by Standards Australia.

4.0 Regulatory Assessment Panel

4.1 Membership

This Panel would be comprised of:

- *two representatives of State and Territory bureaucracies responsible for the administration of building regulations;*
- *a representative of the Office of Regulatory Review;*
- *two representatives of industry;*
- *a legal practitioner experienced in building issues; and*
- *a representative of the Australian Government, who will chair the Panel.*

All Panel members would be appointed by the Board for a period of two years. No more than two of the Panel members can be participants in other Building Australia committees.



4.2 Responsibilities

The Panel would be responsible for:

- *considering areas proposed for inclusion in the Building Code of Australia and determining whether a sufficient case for regulation has been made;*
- *considering draft regulatory impact statements and approving their release for public consultation; and*
- *providing ongoing advice as to the degree to which regulation should be pursued in the building sector.*

See page 38 for a diagram of the relationship between the committees.



Chapter Three **ABCB Reviews**

The Productivity Commission Study

The Property Council believes the scope of this Study is sufficiently broad to result in effective solutions to the challenges facing Australia's built environment.

Previous Reviews

There have been three reviews of the Australian Building Codes Board conducted since 1994:

- an appraisal by building regulation Ministers in 1996;
- a technical review in 1999; and
- the Laver Mid-term Review in February 2000.

These studies have generally been positive about the work of the Board and the perceived value of maintaining a nationally accepted building code.

Following the Laver review, Ministers agreed to action being taken to:

- develop a model administrative framework;
- redesign the existing product certification scheme and accredit competent bodies to carry out national product certification;
- develop a national plumbing code;
- advance national consistency in the handling of electrical connection and metering of buildings;
- develop minimum mandatory energy efficiency provisions;
- develop a more robust marketing and education strategy;
- improve research; and
- increase industry membership of the Board from three to four.



These goals are worthy targets for the ABCB, but to date progress has been rather slow. This is particularly the case with the development of a national administrative framework and the incorporation of plumbing into the Building Code, both of which initiatives appear to have stalled.

Such delays are one of the most widely raised criticisms of the ABCB and should be a specific focus of the Productivity Commission review.

It is the Property Council's view that the time taken to improve regulation is increased by structural weaknesses in the administration of building regulation that are outside the control of the Board and staff of the ABCB.

The lack of state and territory Ministerial imprimatur for the ABCB means that some recommendations and Board proposals go unheeded by state and territory governments, despite stated commitment at the Council of Australian Governments to greater consistency.

The solution for this would be the development and implementation of a National Administrative Framework, together with a reformed governance structure for the ABCB.



Chapter Four National Consistency

While the Building Code of Australia is a nationally consistent, its implementation is far from it.

This means that the benefits of harmonisation are often lost through local political wrangling and empire-building.

The Allen Consulting Group's report *Harmonisation of Building Control Administration, Costs and Benefits of the National Administrative Framework*, December 2002 puts an undeniable economic case for national consistency underpinning the cost effective fulfilment of community expectations.

Such consistency would provide a per annum \$400 million saving to government, industry, and the community across Australia.

National consistency of technical standards, State and Territory regulation, and their implementation and enforcement would result in a least cost scenario where standard products and processes could be freely used across jurisdictions.

Progress in national consistency is a matter of political will.

Without it, the ABCB has no clout to ensure that state and territory governments implement their agreed recommendations or any Board proposals.

A National Administrative Framework

The Laver Mid-term Review of the Australian Building Codes Board (The Laver Report) made a number of recommendations for reform.

To date, the ABCB has made a reasonable attempt to implement those recommendations that fall directly to it.

Unfortunately, one of the most important recommendations is a long way from being fulfilled, namely:

'[that the ABCB create] a framework and guidelines specifically addressing nationwide uniform administration of building regulations, and [that] this be formally submitted to the Ministers responsible for Building Regulations with a request that all regulatory conduct within their administrations be consistent with this framework.'

If government, industry, and the community are to benefit from efficient building control, it is essential that a framework be developed as soon as possible.

This would ensure that the Building Code is automatically implemented through State and Territory legislation as it is developed, not 'improved' by state, territory, or local administrations.

The pursuit of a National Administrative Framework for Building Regulation is still a pipe-dream, but with some political will and appropriate resources it could become a reality.

National Consistency in Planning

A key element in building control is the planning system.



At present, councils are able to intervene in building control through their planning regimes.

This is often the result of policy on the run, and, as it is not subject to any consistency tests, regulatory impact statement or COAG guideline scrutiny, it is generally implemented with no regard to the implications.

For these reasons, local government should not be able to circumvent the Building Code, regardless of local policy.

Planning matters should only deal with land allocation, land use issues and issues that extend beyond the building.

The Building Code, on the other hand, should control all health, safety and amenity issues within or affecting the building envelope.

The Property Council strongly supports the Leading Principle and Practice development assessment consultations of the Development Assessment Forum (DAF), whose independent Chairman is Property Council CEO Peter Verwer.

DAF is guided by stakeholders from all levels of government, industry and the building professions.

Twelve leading practice principles form the basis of the draft proposed model prepared by the Centre for Developing Cities (CDC). They state that development assessment should:

- focus on achieving high quality sustainable outcomes;
- encourage innovation and variety in development;
- integrate all legislation, policies and assessments applying to a given site;
- encourage appropriate performance based approach to regulation;
- promote transparency and accountability in administration;
- promote a cost effective system;
- promote a model that is streamlined, simple and accessible;
- employ standard definitions and terminology;
- incorporate performance measurement and evaluation;
- promote continuous improvement;
- promote sharing of leading practice information; and,
- provide clear information about system operation.

As a member of DAF, the Property Council endorses the following CDC policy principles be adopted by all jurisdictions:

Separation of powers – the task of developing the policy that drives planning codes (based on community values and strategic goals) should be separated from the task of assessing development proposals against such codes.

In other words, the role of councils (acting as a parliament) should be separated from the role of assessors (acting as a judiciary).



Technically excellent policy criteria based on community engagement – the community values and strategies set by governments should be codified as objective tests and rules.

A single assessment authority – decisions on development applications should be made by the one authority, based on advice from referral agencies.

Expert assessment bodies at state/territory and local levels – each level of government should appoint an independent assessment panel to determine complex development applications. Relevant state/territory government ministers should retain call in powers. Assessment panels should contain expert representatives from relevant stakeholder groups and councillors should not comprise more than one third of any such panel.

Private certification – private certification of the basic tasks of the assessment process (validating conformance with planning codes) should be encouraged.

Appeals as a second expert assessment – appeals should be forwarded up the ladder within the council or to a specialised appeal authority and judged against the technically excellent policy criteria.

Third party appeals – no third party appeals should be allowable unless an error has been made in making the decision. This is because applications are to be assessed against technical criteria that enshrine policy developed after community consultation.

Streaming of development assessment into tracks – early in the process, a project application should be streamed into a specific assessment track based on the complexity of the project.

Each track will comprise a specific set of logical decision making steps relevant to the potential impact of the project on the built environment. Some projects will be exempt or self assessed, while others will require major examination. The aim is to agree on a development assessment logic that will reduce wasteful compliance costs and delays, while at the same time meeting community needs.

The Property Council believes that governments should commit to a reform timetable that will see the harmonisation of best practice development assessment systems by 2006 at the latest.

These reforms will reduce a large portion of the unnecessary building costs that arise from regulatory inefficiency.

Recommendations

1. That the ABCB's core goals continue to be to achieve:
 - national consistency of technical standards;
 - consistency of state and territory building regulation; and
 - consistency in the implementation of building controls across all tiers of government.



2. That the three spheres of government commit adequate resources to the creation and implementation of a model administrative framework to improve the efficiency and consistency of uptake of the Building Code.
3. That a key component of an administrative framework be the automatically referencing the Building Code in relevant state and territory legislation, with no ability to introduce variations.
4. That the Federal, state and territory governments adopt the DAF model for development assessment reform (following nation-wide consultation on the CDC model), to ensure that planning is not able to increase standards set by building control.



Chapter Five: Regulating for Minimum Standards

Australians expect to live and work in an affordable and high-quality built environment.

In general, the development industry has been effective in catering for those expectations, and most practitioners consistently deliver buildings that exceed minimum acceptable standards.

The Property Council applauds such initiative.

Minimum, Not Maximum Standards

It is important to recognise, however, that it should be the prerogative of the individual to build beyond the minimum.

The apparent desire by state, territory, and local governments to regulate for leading practice should be discouraged, as it will reduce innovation and limit market differentiation.

Instead, 'minimum acceptable to the community' should be retained as the reasonable test under the ABCB objectives for the parameters of mandatory building control requirements.

Such a concept could alternatively be described as the elimination of poor practice.

Leading practice is not something to be regulated arbitrarily, but rather pursued on the basis of innovative research.

Individuals will always be able to exceed the minimum acceptable standards deemed essential for the whole community.

The ABCB must therefore be empowered to deliver cost-effective minimum acceptable standards that cannot be amended by other jurisdictions.

Movement beyond minimum standards, on the other hand, should only ever be achieved through the use of incentives or through market forces.

This will deliver greater flexibility to the industry, encourage industry to innovate, and allow for better product to be developed.

Demonstrated Market Failure

In proposing new mandatory building requirements, the ABCB must first assess that market failure exists.

This is a requirement both of the Office of Regulatory Review and of the Council of Australian Governments document *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*.

This means that the ABCB should not be allowed to regulate just because it can, but should have to demonstrate that the community will be worse off without the introduction of a minimum standard.

This must occur before any consideration of whether the benefits of regulation will substantially exceed the costs arising from it.



Attempting to enforce good design through the Building Code is unrealistic and unreasonable.

Similarly, it is not the role of the Building Code of Australia to set standards for aesthetics.

Too much overly prescriptive regulation has been introduced in the past in contravention of the ORR guidelines, because of flawed government policy.

This has led to unnecessary costs and unreasonable restrictions for the development industry.

If government instead chose to work on incentive mechanisms with industry to encourage innovation, Australia's built environment would naturally exceed community expectations.

Cost-effectiveness

At present, when governments choose to set higher benchmarks than the Building Code, concerns about cost-effectiveness are generally ignored.

Thus, inefficient and inappropriate regulations are introduced, often as a result of poorly researched and reactive policy development.

This undermines the whole point of having national standards.

Only where the benefits of regulation will significantly exceed the costs arising from regulation should new mandatory requirements be created.

To assess this, community expectations must be broadly sampled and then consistently evaluated by expert practitioners and regulators.

If the benefits do not outweigh the cost of introducing a minimum standard, no regulation should be pursued.

Recommendations

1. That 'minimum acceptable to the community' should be retained as the reasonable test for the full extent of mandatory building control requirements, balanced against realistic cost benchmarks.
2. That state and local governments not be able to vary building regulations.
3. That a strong case for the existence of market failure be proven before regulation can be pursued.
4. That government agree not to attempt to regulate for good design, but develop incentive packages to encourage stakeholders to pursue better practice.



Chapter Six: The Scope of the IGA and the Role of the ABCB

IGA Objectives

The IGA objectives of the ABCB are basically sound.

However, in the Report of the Small Business Deregulation Task Force to the Australian Government, *Time For Business: Report of the Small Business Deregulation Task Force 1996*, it was recommended that no state or territory should approve local government requests for variations to technical building requirements unless agreed to by the ABCB.

This has not been translated appropriately into the current IGA, objective seven of which requires the ABCB to 'encourage' the consolidation of regulation relating to the design and construction of buildings into the Building Code.

With the agreement of the states and territories, the IGA must be amended to eliminate jurisdictional variations. This means:

- the 'as limited as possible' test for variations must be replaced with a commitment to a nationally consistent administrative framework;
- there should also be a clearer definition of the relationship between planning and building regimes;
- state and local planning regimes should only deal with land allocation, land use issues, and environmental and other issues beyond the building;
- it should not be possible for local governments to circumvent the Building Code and regulate building work in planning schemes by applying their requirements as conditions of development consent; and
- a revised IGA should delineate a clear set of principles that must be satisfied by any jurisdiction that seeks to avoid, vary or add to mandatory national requirements affecting buildings.

Such principles would soon come into their own as sustainability and planning/building issues are currently regulated in a nationally inconsistent manner and are thus directly affecting the efficiency and affordability of the built environment.

As a rule, the Building Code of Australia should regulate:

- health, safety and amenity issues within or affecting the building envelope; and
- sustainability and eco-efficiency in construction.

However, as observed previously, the need for regulation should always be established before standards are introduced.

The Commission identifies the second test for efficient intervention in the building regulation sector as being whether the ABCB has found the best ways to correct market imperfections.



We believe that, the current process is the best available, and that resolving regulatory inconsistency is just as important as influencing market forces.

ABCB Mission Statement

The ABCB's mission, as stated in the amended IGA of 27 July 2001, is to:

'provide for efficiency and cost effectiveness in meeting community expectations for health, safety and amenity in the design, construction and use of buildings through the creation of nationally consistent building codes, standards, regulatory requirements and regulatory systems.'

Ideally, the ABCB should concentrate on developing cost-effective minimum standards where necessary for:

- ensuring efficient building design and construction;
- delivering appropriate community standards on safety and health;
- eliminating poor environmental and amenity-related practices;
- recognising the interaction between voluntary and prescriptive measures and the importance of performance standards; and,
- recognising that while planning and building are distinct there is a relationship that must be clearly defined to avoid regulatory game playing.

The ABCB's new mission statement should clearly reflect at least some of these aims.

ABCB Objectives

The Building Code of Australia is intended to be a performance-based system that accepts alternative solutions to deemed-to-satisfy provisions.

This is the hallmark of deregulation.

Deregulation is further assisted by the pursuit of national practitioner accreditation with ANTA and privatised product certification in tandem with New Zealand authorities.

A firm commitment to develop a national administrative framework would complete the picture.

Once poor practice has been eliminated, market forces are best placed to determine maximum net benefit, as they will often lead to the exceeding of minimum standards.

If residential buildings are affordable and commercial buildings internationally competitive, the community will ultimately benefit.

Least cost solutions that meet minimum acceptable standards are thus compatible with maximising net benefits to the community.



Statutory Reform

There is a strong case for transforming the ABCB into a statutory entity that reports to a specific Ministerial Council.

One of the most compelling arguments for such a change is the current lack of a clear governmental responsibility for the ABCB.

Ostensibly part of the Department of Industry, Tourism, and Resources, the ABCB is in reality a servant of many masters.

As the Federal Government has limited statutory authority over building regulation, this further compounds the problem and often results in confusion as to the real reporting role of the ABCB.

At the very least, a revised IGA must formalise principles for the regular review of state and territory building control schemes with a view to achieving national consistency by 2010.

What is vital, however, is that the Commonwealth must retain its strong leadership role in the work of the ABCB.

This includes acknowledging that the ABCB needs further funding in order to more swiftly carry out its duties and pre-empt piecemeal building control changes in response to emerging issues at state and local government level.

The creation of a Ministerial Council and reformation of the ABCB as a statutory body is essential. A suggested framework can be found in Chapter Nine.

Industry Productivity

The Commission has identified labour, capital and multi-factor productivity as constituent elements of productivity in the building industry.

The latter, measured by determining whether increases in labour and capital inputs are reflected in gross value added, is the industry's key measure of productivity.

Technological improvements and industrial relations reform are two other non building regulation productivity drivers that have had a positive impact over the last decade.

Work commissioned from Econtech by the Department of Employment and Workplace Relations in 2003 identified that potential industrial relations-related productivity gains of 13% in the commercial building sector would lead to reduced construction costs of about 6%.

This represents a very substantial level of saving on construction costs.

We understand that the Commission is aware of the KPMG report, *Australian Building Codes Board: Impact Assessment of Major Reform Initiatives*, Feb 2000.

This identifies private certification, liability reform and national product certification as additional productivity boosters.

Most of these are not the concern of the ABCB, but should be considered in terms of wider industry reform.



Recommendations

1. That the IGA be amended to eliminate jurisdictional variations. Additionally:
 - that the 'as limited as possible' test for variations be replaced with a commitment to a nationally consistent administrative framework;
 - that there be a clearer definition of the relationship between planning and building regimes;
 - that state and local planning regimes only deal with land allocation, land use issues, and environmental and other issues beyond the building;
 - that it not be possible for local governments to regulate building work through planning schemes; and
 - a revised IGA delineate a clear set of principles to be satisfied by any jurisdiction that seeks to avoid, vary or add to mandatory national requirements affecting buildings.
2. That, as a rule, the Building Code of Australia regulate:
 - Health, safety and amenity issues within or affecting the building envelope; and
 - Sustainability and eco-efficiency in construction.
3. That the ABCB's mission be updated to read as follows.

It is the mission of the ABCB to provide for the creation of nationally consistent performance-based building codes and regulatory systems that:

 - *set minimum, cost-effective mandatory building requirements;*
 - *meet appropriate community expectations for the elimination of poor practice in the health, safety, sustainability and amenity of the design, construction and use of buildings; and*
 - *only regulate where building control is proven necessary*
4. That the ABCB's objectives, as they relate to 'minimum acceptable' standards and 'least cost' solutions be deemed compatible with the test of 'maximising net benefits' and be retained unaltered.
5. That the revised IGA contain principles for the regular review and reform of state and territory building control schemes with a view to achieving national consistency by 2010.
6. That the Commonwealth reaffirm its strong leadership role in the work of the ABCB by:
 - placing greater emphasis on the need for national consistency; and
 - increasing its funding commitment, to be matched by the states and territories.



Chapter Seven: The Standard of Standards Development

Public Consultation

The Property Council is concerned that the ABCB's approach to public consultation can tend to be narrow in its scope and of limited effectiveness.

While construction industry associations and informed practitioners are usually aware of proposed amendments, others do not appear to be as conversant with impending changes.

The ABCB's capacity to engage with core stakeholders is fairly good, but community representatives, practitioners, and stakeholders from other industries are often poorly engaged.

This is often due to cost and communication restrictions.

However, as non-response is considered by the ABCB to be tantamount to approval, this ultimately affects the potential for the Board to gather appropriate feedback.

This was particularly a problem with the draft Premises Standard, where large sections of industry and government were unaware of the impending changes and unable to become fully informed in time to respond to the proposals. For significant changes to the Building Code this is not appropriate, and in such situations longer consultation timeframes should be considered.

That said, without significant additional funding it is difficult to envisage a broader or swifter engagement with the community, and we would certainly support additional funding being made available.

Referenced Documents

The Property Council supports the 2003 Memorandum of Understanding between Standards Australia and the ABCB with some caveats.

Clearly demonstrated need is the only acceptable basis for the creation of new standards to be inserted into the Building Code.

To date, the ABCB has been successful in applying benchmarks for adoption of standards, and the Property Council supports the continuing ABCB work of aligning Building Code referenced standards with New Zealand.

In the past, Standards Australia committees have sometimes suffered from a variety of highly undesirable traits including:

- capture by commercial interests;
- crucial absences of regulatory impact statements; and
- a tendency toward best practice rather than 'minimum acceptable' standards, as appropriate to the Building Code.

Many of these standards should therefore not be referenced by the Building Code.



Furthermore, standards that are not formally referenced by the Building Code should not be the basis for legal action against the industry.

Cases such as *Enzo Cardone vs Trustees of the Christian Brothers (ACT)* have shown what can happen with the inappropriate use of Australian Standards in legal cases. While that case was subsequently overturned, there is still potential for standards to be misused in litigation.

Some thought needs to be given to mechanisms for preventing such abuse of standards.

Recommendations

1. That the ABCB should undertake a review of its public consultation processes, with particular attention to engaging stakeholders and setting appropriate consultation timeframes.
2. That the ABCB continue its scrutiny of Australian standards for reference in the Building Code.
3. That the Productivity Commission suggest mechanisms for preventing legal action being taken based on unreferenced standards or applied retrospectively.



Chapter Eight: What Should Be In the Building Code?

Building Regulation Only in the Building Code

The broader the consolidation of nationally consistent minimum acceptable practices is, the more efficient the industry will be.

There is currently a plethora of individual codes, standards, guidelines, advisory notes, and statutes covering aspects of building construction and design.

Many of these are introduced by government departments that are almost entirely unrelated to construction issues, such as health.

Others, such as emergency services, prescribe requirements to meet standards that are perceived to be higher than that set in building regulation.

This leads to confusion as to what needs to be achieved when constructing a building.

The Property Council believes that any regulation affecting building design and construction should be incorporated into the Building Code of Australia, so as to avoid inconsistencies.

It should be achievable to reduce regulatory differences and incorporate all construction related requirements into the Building Code of Australia, especially employing a performance based code.

Eco-efficiency, building security, plumbing and electrical standards should all form part of the Building Code in the near future.

Emergency services requirements could be introduced in a second tranche of reforms.

Eco-Efficiency and Sustainability

There is currently no community consensus over the appropriate definition of sustainability, nor as to what is a desirable level of sustainability for buildings.

The Australian Sustainable Building and Environment Council (ASBEC) is a multi-stakeholder body that has been formed to seek consensus on this issue.

However, it is clear that the Building Code should cover more than just energy efficiency, and include other eco-efficiency objectives.

Eco-efficiency can be defined as being achieved by the delivery of competitively priced buildings that satisfy human needs and improve quality of life, while progressively reducing ecological impacts and resource intensity throughout the life cycle of said buildings.

Energy and water efficiency, renewable energy use, greenhouse gas emissions, waste, air quality, embodied energy, and the reuse of materials could be covered when considering eco-efficiency, recognising that standards should only be introduced where market failure is deemed to have occurred.



Energy Efficiency

Energy efficiency is best pursued through performance based minimum standards in order to maximise the opportunity for innovation and to reduce a bare compliance mentality.

However, it is important to recognise that minimum standards should be just that.

Attempts to regulate for good or leading practice should be avoided at all costs, as this will introduce discrepancies between states and ultimately undermine the Building Code.

It will also stifle innovation in an industry which is becoming quite sophisticated with energy-efficient initiatives.

With a national administrative framework, a minimum standard will be set. Governments that choose to move beyond that benchmark should only be able to do so through the introduction of incentive measures, which have been underused to date.

Water Use

Efficient use of water is a high level sustainability consideration.

Yet, there is currently limited reference to anything dealing with water usage, particularly plumbing.

As this was a key plank of the Laver Report, there should be urgent negotiations with the plumbing community to develop grounds for incorporating requirements in the Building Code.

Minimum standards for water efficiency, with incentive measures for better performance, will help to reduce the pressure placed by the built environment on our natural resources.

Access for People with Disabilities

The Property Council supports the creation of a Premises Standard. We agree, in principle, that the development of the Standard and amendment of the Building Code should deliver greater certainty of compliance with the Disability Discrimination Act to the property sector.

However, the current draft of the Standard is costly and unreasonable, and we believe it sets an impossibly high benchmark for the property sector. The fact that there are only \$13 billion worth of benefits for a \$26 billion price tag demonstrates that the development process has been inequitable and unrepresentative.

The Property Council will be urging the ABCB and other relevant departments to reconstitute the Building Access Policy Committee so that it better represents stakeholders and their views and to consider reasonable changes to make the Premises Standard workable.

Although the Administrative Protocol was meant to improve certainty for existing buildings, limitations on the ability to claim unjustifiable hardship and a high benchmark in the draft Premises Standard is likely to result in significant delays.



Furthermore, the lack of legal recognition of decisions made under the Protocol means that there will always be the risk of complaints being successful in spite of an owner seeking the advice of Building Access Panels.

This does not mean that the Property Council opposes the Protocol per se. However, much more work needs to be done to improve the Protocol, if it is to provide any protection to property owners.

Fire Safety

Builders must comply with all legal requirements.

However, current regulatory practices make this difficult to achieve.

While life-safety is the objective of both the Building Code and fire regulations, the latter also covers such substantial property and environment protection policy that make it cost-prohibitive to implement.

Proposed additional codes for property protection, such as that being pushed by the insurance industry, add even more layers to an already overwhelming barrage of codes, standards, and regulations.

If the Building Code is to be effective, it (and only it) should be the benchmark for society's expectations from the built environment.

If it is deemed that property protection is a necessary consideration, reasonable cost-effective minimum standards should be developed for inclusion in the Building Code.

Maintenance

Manufacturer's specifications, rather than the Building Code should be the guide for general maintenance practice in buildings.

While there may be some benefits in introducing limited maintenance provisions for 'essential services' such as fire services, health, and safety features of buildings, until there is a clear explanation as to how these will be applied, such an approach should be discouraged.

Should Users Pay?

Although the Property Council has not adopted a formal position on these matters, industry has appeared to accept the need for some payment for the Building Code.

With many accessing the Code electronically, there may be some benefits from reviewing the purchasing price.

Dispute Resolution

Dispute resolution processes in the different jurisdictions defy easy generalisation.



However, the Property Council believes national reform would be assisted by the adoption in all states and territories of Building Appeals Boards, as they exist in Victoria.

These would have a role dealing with non-contractual dispute resolution, alternative solutions, and technical appeals.

Properly constituted and legally enforced through the *Disability Discrimination Act*, these Boards would also have a role in considering alternative solutions and unjustifiable hardship claims about disability access provisions.

Such Boards are likely to be needed regardless of the status of private certifiers, as there will always be a potential for disputes to arise over building certification.

Private Certification

The Property Council strongly supports private certification.

Competition among certification service providers has resulted in streamlining of the process of obtaining building approvals and inspections.

Such processes are under regular review by the states and territories to ensure their efficacy.

While some jurisdictions have raised concerns about the performance of certifiers, the Property Council believes that private certification has led to increased efficiencies in the building approvals process.

As local governments are facing increasingly limited resources, any moves to limit private participation in building certification will increase delays for the development industry.

The Property Council believes that private certifiers have been successful and encourages their extension to other areas of development, such as planning approvals.

Recommendations

1. That all building construction-related regulation be incorporated into the Building Code, so that inconsistencies can be avoided.
2. That the Building Code be expanded in scope to address eco-efficiency, but should remain dedicated to regulation that prescribes minimum standards that are shown to be necessary.
3. That any minimum standards for eco-efficiency aim to remove poor industry practice, while attempts to introduce better performance be through incentives.
4. That water efficiency measures be incorporated into the Building Code, along with all the technical requirements for plumbing.
5. That the Building Access Policy Committee be reconstituted so that it better represents stakeholders in the disability access debate.
6. That the Administrative Protocol be reviewed extensively to increase certainty for stakeholders.



7. That the role of the Building Code be reviewed in relation to property protection from fires and that any subsequent amendments to the Code be aimed at minimum standards.
8. That manufacturers' specifications be the benchmark for maintenance regimes, rather than regulation.
9. That Building Appeals Boards be established in each state to hear complaints or alternative solutions.
10. That the use private certifiers for building compliance continue and that private operators also be available for planning certification purposes.



Chapter Nine: A New Framework

The Need for a Statutory ABCB

The work of the ABCB is crucial to delivering an affordable, accessible and desirable built environment in which Australians can live and work.

Commonwealth leadership and financial participation are more necessary than ever.

The gains made to date must not be lost and government support for a nationally consistent Building Code needs to be renewed and intensified.

The Property Council therefore supports the establishment of a revamped ABCB.

This should be a statutory body with responsibility over a broad range of construction policy issues, with the notable exception of industrial relations policy.

The new body could be known as Building Australia and would report to a Ministerial Council established under the auspices of COAG.

While the current Board should remain during the transition period, it is envisaged that a newly composed Board would be established to guide the authority once it is created.

Recommendation

That the Productivity Commission adopt the Property Council's model framework for an improved ABCB:

Elements of a New Building Regulatory System

The key components of the revised structure would be as follows.

5.0 The Ministerial Council for Building

This would be made up of relevant Ministers from all Australian States and Territories, the Australian Government, local government, and possibly New Zealand.

The Commonwealth would chair the Council, which would meet once a year.

The role of the Council would be to develop the broad policy agenda and regulatory priorities for Building Australia.

6.0 The Board

6.1 The Chairman

The Chairman of the Board would be appointed by the Ministerial Council for a three year term and would be drawn from the industry representatives. No Chairman would be allowed to remain in the position for more than two terms.



6.2 Membership

Membership of the Board would comprise:

- a representative of the Department of Prime Minister and Cabinet;
- a representative of the Department of Industry, Tourism, and resources;
- one senior representative of the eight State and Territory administrations;
- two representatives of the investment sector (one public and one private);
- one representative of the project delivery (construction) sector;
- one representative of the building design and services sector; and
- the chief executive officer of Building Australia.

Industry membership of the Board would be selected by the relevant Australian Government Ministers on advice from the Australian Construction Industry Forum and would be selected every three years.

6.3 Responsibilities

The Board would meet four times a year. Its responsibilities would be:

- to develop construction policy recommendations for consideration by the Ministerial Council;
- to manage and maintain the national administrative framework and resolve any inconsistencies;
- to consider the advice of the Regulatory Assessment Panel on whether regulation is needed or proposals are appropriate;
- to approve amendments to the Building Code of Australia;
- to decide upon the nature of relationships between Building Australia and other organisations; and
- to oversee the effective operation of Building Australia.

6.4 The Chief Executive Officer

The CEO would be responsible for the day-to-day management of *Building Australia*, the Codes and Standards Committee, and the Regulatory Assessment Panel.

The CEO should be appointed for a five-year term, limited to two terms.



7.0 Building Australia

7.1 Function

This statutory organisation would carry out the role currently performed by the Australian Building Codes Board.

In short, the key roles of Building Australia would be:

- to develop the Building Code of Australia and reference relevant standards;
- to identify and incorporate other aspects of construction into the Building Code that not currently covered, such as plumbing and electrical work;
- to investigate research into leading practices in the building industry and promote efficiency and innovation within the industry; and
- to finalise (and oversee the implementation of) a national administrative framework for building regulation.

7.2 Codes and Standards Committee

As is currently the case with the Building Codes Committee, the Codes and Standards Committee would be responsible for deciding what technical provisions should be incorporated into the Building Code of Australia. These provisions would be provided to the Committee by expert panels.

The Committee would also provide advice to the Board on policy relating to building regulations.

The Committee would be constituted along its current lines, but absolute agreement would not be required. Once the national administrative framework is completed and implemented, decisions could be made by voting:

- if two-thirds of the administrators and two-thirds of industry support a proposed regulation, it should be adopted;
- if there is support from two-thirds of the administrators, but not from two-thirds of the industry representatives (or vice versa), the regulation should not proceed; or
- if neither group has a two-thirds majority, the regulation should not be introduced.

All regulatory proposals, except for minor editorial changes or very small recommendations should be subject to regulatory review:

- if the proposal is considered to be a minor amendment to the Building Code, a business case should be prepared to support it; or



- for any other proposals, a Regulatory Impact Statement should be prepared.

Decisions by Building Appeals Boards (which should be established in each jurisdiction) should be fed back to the Committee so that any regulatory inefficiency can be identified and so that acceptable alternative solutions can be freely shared within industry.

7.3 Expert Panels

These Panels would comprise experts in their respective fields called together on a need-be basis to develop draft building regulations for specific issues.

Experts could be drawn from private practice, public practice or specialist organisations.

Panels should be chaired by a representative of the administrations, so that public interest is served.

Where considered appropriate by Building Australia and the Codes and Standards Committee, issues can be referred to external expert panels, such as committees established by Standards Australia.

8.0 Regulatory Assessment Panel

8.1 Membership

This Panel would be comprised of:

- two representatives of State and Territory bureaucracies responsible for the administration of building regulations;
- a representative of the Office of Regulatory Review;
- two representatives of industry;
- a legal practitioner experienced in building issues; and
- a representative of the Australian Government, who will chair the Panel.

All Panel members would be appointed by the Board for a period of two years. No more than two of the Panel members can be participants in other *Building Australia* committees.

8.2 Responsibilities

The Panel would be responsible for:

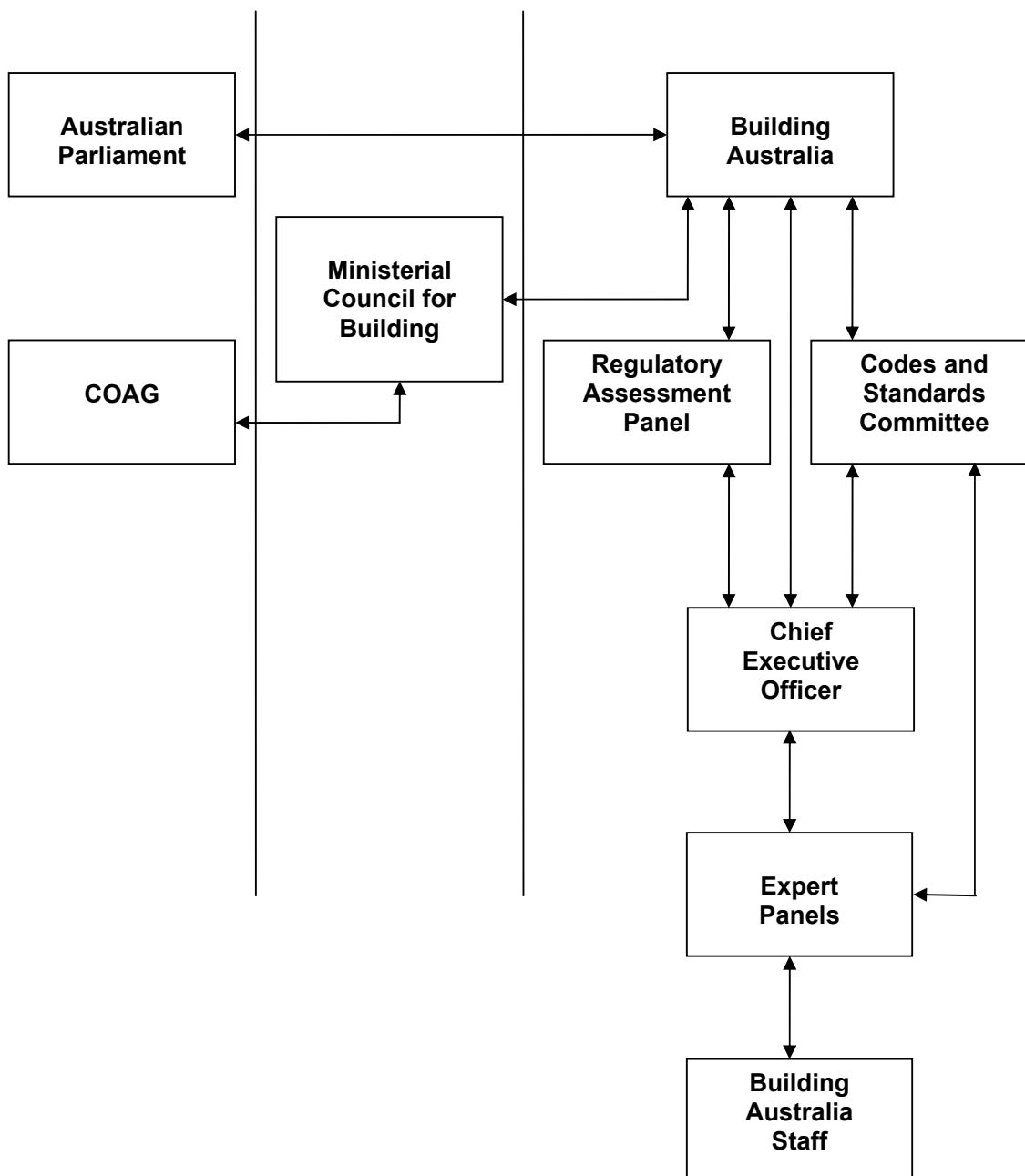
considering areas proposed for inclusion in the Building Code of Australia and determining whether a sufficient case for regulation has been made;



- considering draft regulatory impact statements and approving their release for public consultation; and
- providing ongoing advice as to the degree to which regulation should be pursued in the building sector.

A diagram of the relationship between the committees described above follows.

Figure 1: Proposed Structure for Revamped ABCB





Conclusion

For the purposes of efficiency, productivity and cost effectiveness, the Building Code will always need to be nationally coordinated.

The IGA is currently achieving most of its objectives and maximising net benefits for the economy in a number of areas but requires some structural adjustment to remain relevant in the future.

Reform will eventually stall and then unravel without a greater level of commitment to the ABCB from the states and territories, best signified through commitment to the creation of a Ministerial Council to oversight the work of a reformed statutory entity known as *Building Australia*.

It should be an agreed goal of the Ministerial Council that all mandatory building regulations in Australia, that are justified through rigorous regulatory impact statements, should be consolidated into the Building Code.

The Australian Government has a vital leadership role to play in the restructuring and proper financing of the ABCB.

It must also show leadership by insisting on the implementation of a model administrative framework.

The Property Council is happy to expand upon on any of the matters raised in this submission.