

11 June 2004

Mr T Hinton  
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Dear Mr Hinton

### Reform of Building Regulation

The following comments are provided in response to the Issues Paper prepared by the Productivity Commission on the Reform of Building Regulations.

#### Objectives

Significant assistance would be afforded to those that use and develop building regulations and referenced standards where objectives are provided that clearly describe the intent of parliament. Most jurisdictions do not provide express objectives leaving it to practitioners (and ultimately the courts) to discover the purpose for the legislation when there is uncertainty and ambiguity in Code provisions. This may lead to inconsistencies in the application of regulations by certifiers and other practitioners.

Some objectives are obvious. To provide a reasonable level of life safety for the occupants of the building can be expressed in qualitative terms in building regulations allowing performance requirements to be formulated within the Building Code of Australia (BCA) that are appropriate for the various assessment methods and allow verification of the solution. Other objectives that deal with process may be more difficult to formulate. It is suggested that the first and most important step to establishing a national administrative framework and to allow consistent advancement of the BCA is for the development of a national objectives.

This is not a simple task. At this fundamental level of establishing uniform objectives it is apparent that there are significant difference between jurisdictions (eg. Tasmania has an objective of property and environmental protection that do not exist elsewhere in Australia). Within jurisdictions Departmental divisions and responsibilities may also impact on the scope of building regulations not to mention the differences (in relation to approach and resourcing) each State and Territory has applied in administering the building regulation system in its jurisdiction.



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It is not recommended that the objectives identified in the Model Act be adopted as they are more akin to terms of reference for the development of regulations and do not assist in the interpretation of the statutory provision. Objectives need to be formulated in a way that adds value to implementation. The following Table discusses the objectives appearing in the Model Act.

**Table 1 Model Building Act Objectives and Comments**

Objects of the Model Act:	Comments
To establish, maintain and improve building standards.	Outcomes are not identified. This purported objective is a means to achieving an objective though the end is not apparent.
To facilitate the adoption and efficient application of national uniform building standards.	As above.
To facilitate national uniform accreditation of building products, construction methods, building designs, building components and building systems.	As above.
To maintain, enhance and improve the safety, health and amenity of people using buildings.	This objective is stated in general terms and does not make reference to the protection of adjoining property. An expansion of the elements of this objective may be appropriate.
To promote the consolidation of building legislation.	This is an objective of the Inter-Governmental Agreement (IGA) though it does not assist practitioners in the application of building legislation and should not be included.
To promote and provide for the construction of environmentally efficient buildings.	While this is an objective it appears to be inconsistent with the minimalist philosophy historically applied to building legislation and may be more appropriate for land use planning legislation.
To provide an efficient and effective system for giving building approvals and administering related building matters and resolving related disputes.	Again this is not an objective but a means to achieving some other desirable outcome, presumably the health, safety and amenity of building occupants. Other outcomes such as transparency and accountability will be achieved though it is not clear that this is what is sought.
To reform aspects of the law relating to the legal liability of regulatory agencies and building practitioners.	Again, it is unclear how the inclusion has a substantive benefit on the implementation of an Act. It is more an introductory briefing note to assist parliament in understanding the development of the law rather than assisting practitioners in the application of the law.

There are also a number of references in the Issues Paper to 'cost effectiveness' and other economic utility outcomes. These are objectives for the development of building regulations but not necessarily objectives for the implementation of building regulations. The distinction needs to be made. A developer may elect to erect a monument to inefficiency. This is their prerogative and should not be a consideration for building regulations or the building approval process. Clearly though cost-effectiveness, international competitiveness etc are primary considerations for the Australian Building Code Board (ABCB).

### **Fire Brigade Involvement**

The fact that there are different objectives between building regulations and fire service regulations as identified in the Issues Paper is not a significant impediment. If the fire services are providing a function that is established under the building regulation head of power the fire service need to give effect to the objectives to that head of power and that head of power only. The amount of attention being paid to having different objectives appears disproportionate to the complexity of the problem.

However, a further issue arises with respect to the building approval (including occupancy) process and referral to fire services. Under the Model Act it was proposed that a referral to the Fire Service would occur where the building application involved operational fire fighting matters. This is what is embodied in some of the existing regulations. However, this demarcation has been substantially lost with the advent of performance based fire safety solutions.

Performance requirements of the BCA must be examined in a holistic manner because of the interactive nature of the various fire-related systems and subsystems. This has (anecdotally) led to the broadening of the matters considered by the relevant fire services and a shift in the way that fire safety systems serving buildings have been approved in the past. It is suggested that the full ramifications of this development have not yet fully matured and a rational approach needs to be developed in advance.

The broadening of the involvement of the fire service has the potential to undermined one of the recent major reforms being the introduction of private certification for building approvals. One of the motivations for this reform was the perception that local government monopolies were not sufficiently responsive to the commercial agenda and allegedly stymied development. What may happen as a consequence of expansion of the role of the fire brigade is the mere swapping of one past approval monopoly (local government) with an alternate approval monopoly (fire service). It is reasonably foreseeable that the criticisms that were once levelled at local government approval authorities may be directed towards fire services in the future.

With the expansion of the role of the fire brigades in the approval process there is also a potential for the clarity about the responsibility for the approval process to be eroded. An aim should be to ensure that there is a single chain of command that ensures that a transparent and accountable process is achieved. Having two approval authorities dealing with a single application has the potential for internal conflict, particularly where both elements have on site supervision functions. Proportionate liability and statutory immunities are also important considerations. The clear delineation of a single approval authority both on the ground and administratively is essential. Further research is necessary to determine the best approach that is in the community interest and which furthers agreed national objectives.

### **Building Surveyor Categories**

One criticism of the ABCB arises from the National Framework for Building Certifiers. The outcome is the creation of two levels of certifier being the building surveyor and assistant building surveyor (ABS). The ABS may approve all classes of building up to three storeys and 2000m<sup>2</sup> in floor area (including performancebased designs). The ABS is required to have an advanced diploma and 2 years experience.

The BCA is presently divided into class 2 - 9 buildings (volume 1) and houses and outbuildings (volume 2). Other practitioner and industry bodies have aligned themselves along this division (ie. domestic and commercial builders) and this would appear *a priori* a natural division of responsibility for building surveyors. However this approach was not adopted by the ABCB and there is limited evidence of the justification for this action.

Many assistant building surveyors deal solely with domestic construction and are needlessly burdened with the task of additional training to approve class 2-9 buildings. The approval of a three-storey hospital that relies on an alternative fire safety solution may be an extremely complex task. From a pragmatic perspective the ABS will need to develop essentially all of the skills and competencies of an unlimited building surveyor, as the distinction between the two tasks is minor. As a consequence the demarcation becomes illusory and pointless.

This is also seen as a significant and unnecessary impediment to the entry of assistant building surveyors into the profession. It is foreseeable that there will be an undersupply of certifiers for the domestic end of the market in the future (the majority of the building work) because they are forced to undertake highly technical training with limited application to their market sector.

The delivery of building surveying services in regional parts of Australia would not be adversely affected by reducing the scope of work of the assistant building surveyor to the approval of dwellings and outbuildings (volume 2 BCA). Intermittent commercial development may be approved remotely and the same local resources may facilitate the inspection process. Grandfathering provisions may have ensured that there is no significant loss of service in the short term. However, the result of this reform is a long term undervaluing of the complexity of the approval process to a para professional qualification while it is being acknowledged that the task of building approval has never been more difficult.

### **Consolidation**

Some attention to the consolidation of building matters in building regulations has been provided in the Issues Paper. Importantly it should be noted that the consolidation of regulations from other heads of power also involves a merging of the objectives of these other sources. For example, in Tasmania there has been a consolidation of building related matters into the BCA that were previously contained in the head of power that dealt with matters such as the storage or handling of dangerous goods. The storage or handling of dangerous goods head of power has an objective of providing property protection giving rise to a potential constriction of outcome as a consequence of the consolidation if property protection were not a consideration of the building regulations. In Tasmania there is a head of power for property protection in the building regulation so this outcome is not significant though in other jurisdictions the outcome may be less clear.

While this is not an intractable issue, it is apparent that there needs to be a rational approach to the development of objectives, particularly in the consolidation of building related matters that cross departmental boundaries within government/s.

### **Amenity**

The principle that building regulations represent the minimum standards acceptable to the community should be embraced. However, this definition is very open ended as the expectations of the community can be subject to various influences. The definition may be extended to state that requirement for amenity is the minimum level of regulatory intervention (other than for health and safety) to ensure the provision of accessible services and protection from nuisances expected by the community for the benefit of an individual that is not in control of the risk. In this definition sound transmission in public buildings, disabled access etc would be within the consideration of the building approval.

However, the requirement for energy efficiency appears incongruous, particularly in a Class 1 dwelling. Matters such as these may be better suited as a land use planning approval process. A clear and rational delineation between the objectives of planning and building would be beneficial as this would allow the principled development of building regulations and remove tedious duplications that are frustrating to developers and the community generally.

## **Pace of Reform**

While there can be no doubt that the ABCB have achieved many positive outcomes, there is some concern that practitioners have not been keeping pace with the reforms. In Tasmania much of the training appears to be delivered by professional organisations such as the Australian Institute of Building Surveyors. However, there is no routine training for practitioners on (for example) the regular amendments to the BCA. These amendments may appear minor such as a change of a standard from AS 1170 (1989) to AS/NZS 1170.0(2002) however the impact of such a change is substantial and an innocuous reference belies its importance. When preparing amendments to the BCA it is imperative that there is a clear definition of responsibility and cost associated with training to all parts of Australia.

However, it is not just a matter of assigning responsibility and cost. It is also important that practitioners have a willingness to participate and absorb the cost (directly and indirectly) for retraining. As a possible means of benchmarking the performance of the ABCB it is suggested that surveys be routinely undertaken of practitioners to gauge their capacity to participate and keep abreast with reforms including regulation reform, code development and amendment and standards amendment. The performance of the ABCB should not be measured by the volume of reforms introduced but by the capacity of the ABCB to transfer knowledge to those that give effect to reforms. If it can't be demonstrated that practitioners are keeping pace, the rate of reform should be slowed.

## **Existing Buildings**

It is noted in the Issues Paper that (at page 2) the BCA applies to elements of existing buildings. This is a simplistic approach and further examination will reveal that there are considerable deviations away from the BCA with respect to existing buildings in some jurisdictions (see Reg 55 Tasmanian Building Regulations and 5.7 and 9.9 Victorian Building Regulations). These regulations acknowledge that existing buildings are lawfully constructed and should be capable of some modification without a major review of the health, safety and amenity afforded by the building. The deregulation of the approval process has highlighted a need to provide greater definition for standards in these buildings so there is less reliance on discretionary powers exercised by private enterprise.

If this same philosophy is to be continued under the national administrative framework it will be necessary to develop objectives that are appropriate for the redevelopment including the repair, alteration, extension and change of use of these buildings. If a different standard applies to some redevelopment of existing buildings this should be made apparent in objectives for the legislation.

In conclusion it is considered that many of the difficulties associated with the successful implementation of further reforms arises from a need to develop and articulate clear objectives for the building regulation process. Objectives that relate to both new and existing buildings that integrate with other approval processes in a coherent and logical manner. This will also facilitate the development of focused standards development and research.

Thank you for the opportunity to provide these comments.

Yours sincerely

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