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NSW GOVERNMENT RESPONSE

TO

THE PRODUCTIVITY COMMISSION'S DRAFT RESEARCH REPORT

INTO

THE REFORM OF BUILDING REGULATION

OCTOBER 2004

INTRODUCTION

The New South Wales Government welcomes the opportunity to review and comment on the Productivity Commission's Draft Research Report into the Reform of Building Regulation.

The Commission is commended on the scope of issues canvassed in the Report and the level of detail provided on a number of the subject matters.

Generally speaking, the basic thrust of the Draft Report's findings and recommendations are supported in principle. General comments regarding aspects of the Draft Report and its recommendations and comments relative to specific recommendations where such are questioned, not supported or additional information/clarity is sought, are contained below.

GENERAL COMMENTS

Role of the Australian Building Codes Board (ABCB)

The intended governance, roles and responsibilities of the ABCB are generally supported in principle and it is agreed that a revised Inter-Government Agreement (IGA) is necessary to identify and document such in a clear and concise manner.

However, the revised IGA needs to clearly articulate that the ABCB is not nor intended to be a regulator or regulation body. The making and/or amending of regulation relative to building control matters is clearly a policy role and responsibility of government. The Board's primary role, which needs to be maintained in the future, is the provision of performance based codes and standards to support State and Territory building control legislation.

This aspect is also relevant to the proposed name change for the ABCB, which is commented upon in more detail in the response to Draft Recommendation 11.3 below.

Regulatory Systems – National Consistency

It is acknowledged that various stakeholders and end users of the Building Code of Australia (BCA) are strongly encouraging greater consistency between the States and Territories in the administration, implementation and enforcement of the BCA. It is also acknowledged that this is practically very difficult to achieve holistically across the various Acts and Regulations throughout Australia which give legal effect to the BCA and control its administration and application in the respective jurisdictions.

Whilst the holistic outcome may not be achievable and even desirable in certain respects, it is felt that tangible improvements could be made on a progressive basis, without the need for major and complex administrative reform. Whereby, key issues which impact on the administration, implementation and enforcement of the BCA, are identified and agreed and model provisions offering a consulted solution to these issues are developed for consideration of inclusion in State and Territory legislation when such legislation is being reviewed or amended.

This priority focussed and progressive approach has the potential to achieve some realistic short and medium term outcomes without the imposition and implications of developing major reform proposals which are unlikely to receive support.

Ongoing Development and Reform of the Building Code of Australia

Recommendations relative to improving the Performance Requirements of the BCA (including the provision of measurable criteria to assist in judging compliance with such) and maintaining and updating the core technical provisions of the Code (ie the Deemed to Satisfy Provisions), are strongly supported, so too is the high priority status given to both.

The work associated with these recommendations has a key and crucial role to play in ensuring that the BCA continues to provide acceptable levels of health, safety and amenity, whether a building is designed and constructed using either the performance based approach or the recipe based approach provided for under the Code.

Consolidation of Building Regulations

Consolidation as far as practicable of all requirements relating to the design and construction of buildings into the BCA, will have a positive impact in terms of ensuring that all relative provisions are considered and addressed at the appropriate design and construction stages and alleviate the need for costly and time consuming remedial works when certain provisions are overlooked or unknown.

The recommended action for the ABCB to continue pursuit of this outcome, is strongly supported.

RIS Process for Standards Australia

The proposal to have a Regulatory Impact Statement type analysis undertaken by Standards Australia on Standards proposed for reference in the BCA which are likely to have major impact, is strongly supported.

It is considered that this approach will assist to improve the rigour and accountability of the development process and assist in expediting the review and adoption of Australian Standards by the BCA. Furthermore, this proposal should be extended to include all documents that are being considered for referencing in the BCA, not just Australian Standards.

COMMENTS RELATING TO SPECIFIC RECOMMENDATIONS OF THE DRAFT RESEARCH REPORT

Draft Recommendation 6.5

The ABCB (or its replacement) should continue its work on removing inconsistencies between occupational health and safety (OH&S) legislation and the BCA and incorporating relevant OH&S requirements that impact on building into the BCA.

- With respect to this Recommendation, there is a need to make sure that such provisions are limited to those aspects which impact on the design and construction of buildings (possibly the use of the building also in certain respects).
- This issue should also be seen as a component of the bigger "consolidation" exercise which Recommendation 6.1 is attempting to address.

Draft Recommendation 6.6

The ABCB (or its replacement) should set up a rigorous framework to assess whether it is appropriate to include any additional mandatory requirements in relation to environmental objectives in the BCA.

Refer comments below in relation to the use of the term "environmental".

Draft Recommendation 6.7

The ABCB (or its replacement) should put in place a system for assessing mandatory standards for buildings for energy efficiency to ensure they are soundly based (with benefits greater than costs) and that they are applied consistently across jurisdictions.

- The Intent of this recommendation needs to be clarified. Is the recommendation only relating to those mandatory standards contained in the BCA or any mandatory standards applied across Australia?
- There is a significant difference between the two in relation to time and resources to undertake the task and the intended role and outcome for the ABCB in terms of ensuring uniform application.
- Variations between States and Territories relative to energy efficiency are often more than just climate zone based (refer page 140 of Draft Report). They often relate to varying Government policies and targets in relation to energy efficiency and energy savings and often need to go further than the BCA in addressing other significant issues such as peak demand and associated utility and infrastructure issues.

Clarification of the intent of this Recommendation and the expected role of the ABCB in actioning such needs to be provided in the Final Report.

Draft Recommendation 6.8

The ABCB (or its replacement) should pursue, in consultation with interested parties (especially fire authorities), increasing the asset protection objective of the BCA in relation to building categories other than stand alone residential housing, to align with the requirements generally imposed by fire authorities and favoured by insurance companies.

- This Recommendation implies that the “BCA benchmark” relative to “asset protection” should be raised to align with that of the Fire Authorities and the Insurance industry.
- Currently there is no quantification of this benchmark or agreement between these respective bodies of what this benchmark should be, nor are the impacts of raising the “BCA benchmark” to this level known.
- It needs to be recognised also that the regulators, fire authorities and insurance industry have different objectives and goals in terms of delivering their core business and associated outcomes. From a regulatory perspective, the BCA’s primary goal is the delivery of acceptable minimum standards in terms of health, safety and amenity; its role is not to regulate for best practice.
- Any proposal to amend the BCA to incorporate a greater level of “asset protection” needs to go through the same degree of rigour in terms of its development, consideration and impact assessment, as any other proposal to amend the Code and should not be pre-conditioned on requirements which may be favoured by any particular body or organisation.
- It is agreed that this issue requires further investigation to ensure that the BCA has the correct balance between the issues of life safety and property protection in the delivery of acceptable minimum standards for the community. Furthermore, additional clarity in this matter would be beneficial in applying both the Deemed to Satisfy Provisions of the Code and more importantly, in giving clear direction in the development of Alternate Solutions, particularly those relevant to the fire safety aspects of the BCA.

Accordingly, it should be recommended that the relevant parties pursue and consult on this matter, with the intent of achieving acceptable and agreed outcomes for the community which provide for the appropriate balance of life safety and property protection in the BCA.

Draft Recommendation 7.1

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

- It is questioned whether this proposed activity is an appropriate role for the ABCB to be undertaking. Adoption of this recommendation would be a departure from current activities and add to an already congested work program.
- The delivery of this outcome would also traverse the work of various government agencies (and legislation) in the respective States and Territories outside of the building control portfolios (as this matter is often controlled by other than building control agencies), adding to the complexity of the process and the likelihood of delivering a nationally uniform outcome.

This Recommendation is not supported as it is not considered an appropriate role for the ABCB and it is considered highly unlikely that the ABCB would be able to deliver a nationally uniform outcome relative to this matter.

Draft Recommendation 8.4

The ABCB (or its replacement) should continue its efforts to expedite BCA reforms. Governments could consider incorporating into a revised IGA explicit target timeframes for different stages of the consultation and decision-making process. However, any such timeframes must appropriately reflect the need for comprehensive consultation and rigorous impact analysis.

- The practicality of this Recommendation is questioned in relation to the concept of incorporating into the IGA, explicit target timeframes for different stages of the consultation and decision-making process relative to the BCA reform agenda.
- Reforms need to continue to be based on a demonstrated need and need to be prioritised in order of importance and benefits to the government, industry and community.
- All reforms are individual and come with their own unique circumstances. Prescribing specific timeframes within the IGA for the consultation and decision making processes which would be relevant to all reforms, would be very difficult (if not impossible) to achieve. This is due to the different size, nature, and complexities of various reforms and the various stakeholders associated with such reforms (including the need for a whole of Government response to certain reforms).
- The need for comprehensive consultation and rigorous impact assessment (which is fully supported) will vary the timeframes considerably depending on the nature and complexity of the reform. Furthermore, caution needs to be exercised that arbitrary time frames do not adversely impact on the delivery of good quality reform proposals and outcomes.

This Recommendation should be revisited in terms of its appropriateness and practicality.

Draft Recommendation 8.6

The ABCB's cost recovery arrangements should be amended to be made consistent with the Australian Government's cost recovery guidelines. The revised IGA, when presenting future funding for building regulation reform, should be structured so as to provide sufficient funding for the reform agenda and to enable a minimum level of access to the BCA, free of charge.

- The concept of the BCA being accessible to the broadest range of practitioners and the community is very much supported and it is agreed that greater access to and uptake of the BCA, will have a positive effect in terms of Code compliance and enforcement.
- The concept of minimum cost access to the BCA for one off and infrequent users is also supported and moves by the ABCB to provide access to the Code through various libraries, councils and a variety of electronic forms is assisting to facilitate this outcome.
- It could be said that the delivery of the BCA results in both a "public" and "private good". The BCA through its Performance Requirements provides for the minimum acceptable mandatory levels of health, safety and amenity which must be met in the design, construction and use of buildings (public good).

The BCA also provides through its Deemed to Satisfy Provisions (DTS), a comprehensive suite of non-mandatory technical solutions/recipes, which end users can utilise with the confidence that such meet the Code's Performance Requirements, alleviating the need to develop individual solutions (private good).

- A significant amount of ABCB and the State and Territory Government time and resources are committed to developing and maintaining a comprehensive, cost effective and practical suite of DTS Provisions which are used extensively by industry practitioners in the design and construction of buildings.
- Anecdotal evidence in the Draft Report suggests that the cost of the BCA is potentially having a negative impact on access to the Code and consequently compliance with, and enforcement of, the Code. It is felt that further investigation and documentation is needed to fully articulate and substantiate this claim.
- In relation to the cost of the BCA, one aspect that needs to be appreciated and taken into consideration, is that the BCA constitutes a "package" of requirements/provisions some of which are contained in the BCA and many of which (particularly in relation to the DTS which is providing the "recipe" solutions for end users), are contained in referenced Australian Standards and other documents. These documents have to be obtained also for an end user to be in possession of the full set of provisions which constitute "access to/compliance with the BCA".
- The BCA adopts some 100 primary reference Australian Standards and many hundred secondary and tertiary Standards, the cost of which are controlled by the commercial operations of Standards Australia and which the ABCB and governments have no control over.
- Making the BCA freely available will not overcome the need to or cost associated with, purchasing these referenced documents, which can often be the greater cost and accordingly may not eliminate the perceived disincentive outlined in the Draft Report.
- In addition, a significant component of the income derived from the sale of the BCA is re-invested into its ongoing development and reform which in turn provides a considerable benefit to the industry and other end users of the Code.

This Recommendation should be revisited in terms of the “private good” aspect of the BCA and how this issue relates to the assessment of the current arrangements with respect to compliance with the Australian Government cost recovery guidelines.

Also, it is felt that there is a need for a more robust case to be presented in relation to the concerns raised regarding the pricing of the BCA (not including its referenced documents), being a disincentive to purchasing the BCA and resulting in reduced accessibility, compliance and enforcement of the Code.

Draft Recommendation 10.1

There should be a recommitment by governments, in a revised IGA, to the objective of consistency across jurisdictions for building regulation. State and Territory Governments should ensure that BCA amendments determined by the ABCB (or its replacement) are automatically referenced in State and Territory legislation and that jurisdictional variations and additions are minimised.

Whilst this Recommendation is supported in principle, the IGA must clearly maintain the ability for States and Territories to include variations to the BCA, when the achievement of national uniformity is not practical or possible.

Draft Recommendation 11.1

The mission statement for the ABCB (or its replacement) should be amended to:

In addressing issues relating to health, safety, amenity and the environment, to provide for efficiency in the design, construction and use of buildings through the creation of nationally consistent building codes and standards and effective regulatory systems.

Reference to the term “environment”

- Concern is expressed with the use of the word “environment” in the proposed mission statement in lieu of reference to “sustainability”.
- “Environmental protection” encompasses many aspects of the built, natural and social environments and is an area where governments have a clear mandate to develop policy and controls to ensure sound and effective outcomes for the community at large. Environmental protection is much broader and more encompassing than “sustainability” and is not a matter that the ABCB or its replacement should be attempting to control or regulate.
- Sustainable buildings and sustainable construction are principles that are strongly supported and will have a positive impact on creating a better built environment, are compatible with the broader goals of environmental protection and are aspects where the BCA potentially can make a measurable contribution.
- The ABCB in conjunction with the States and Territories, have invested a considerable amount of time and effort over the past eighteen months in undertaking research and consulting with a broad range of stakeholders with respect to the role that the Board and the BCA could play in relation to “sustainability and sustainable construction” (relative to the built environment), with the aim of achieving nationally consistent outcomes and avoiding the proliferation of regulation by others.
- The outcome of this process was a recommendation from the Board that “sustainability” should become a goal of the BCA (which is strongly supported by stakeholders) and to assist in defining what the BCA intends to address under the banner of sustainability, the ABCB have identified energy, water, materials and indoor air quality as the issues to be considered initially.

- As with other aspects of the BCA, if elements of “sustainability” are to be addressed with regulatory action, they would need to be subject to the Council of Australian Governments regulatory review process and only be regulated where it is considered and validated that the market is deficient.

Community expectations

- It is noted that any reference to “community expectations” has been removed from the mission statement and the subsequent proposed objectives. Whilst it is appreciated that defining “community expectations” and achieving a consistent and uniform outcome in this regard is difficult (as outlined on pages 82-87 of the Draft Report), Governments (and the ABCB) have a significant role to play in understanding and responding to the needs and expectations of the community in the development of policy and delivery of on the ground outcomes. Accordingly, it is important that this aspect is considered in some context in the decision making process relative to the development and reform of building regulations.
- Community needs and expectations change from time to time and are often the initial link in the reform chain for specific issues. An example of this is the recent BCA reforms relative to acoustic privacy, where changing community needs and expectations were the catalyst for the ensuing reforms.

Reference to the “environment” as proposed is not supported and it is recommended that reference to the “environment” be replaced with a reference to “sustainability” wherever occurring in the proposed mission statement and subsequent objectives.

Governments need to be sensitive to the needs and expectations of the communities they represent and this aspect needs to be considered as a component of the core business and decision making processes associated with the ongoing development and reform of building regulations.

Draft Recommendation 11.2

The objectives of the ABCB (or its replacement) should be amended to:

Proposed Objective 1

Establish building codes and standards that are the minimum necessary to address efficiently relevant health, safety, amenity and environmental concerns.

In determining the area of regulation and the level of the requirements, the Board should ensure that:

- ***there is a rigorously tested rationale for the regulation;***
- ***the regulation would generate benefits to the community greater than the costs (i.e. net benefits);***
- ***there is no regulatory or non-regulatory alternative (whether available to the Board or not) that would generate higher net benefits.***

Refer comments in relation to Draft Recommendation 11.1 above with respect to reference to the “environment”.

Draft Recommendation 11.3

The ABCB's name should be changed to the Australian Building Regulation Board (ABRB), to better reflect its proposed wider responsibilities and future work agenda.

- Concern is expressed at the proposed name change and in particular the proposal to incorporate a reference to "Regulation" in the Board's title, which is not supported.
- The ABCB is not a regulator and has no responsibility or power to make or change legislation. This is clearly the responsibility of the State and Territory governments responsible for building control.
- The proposed name change will send a confusing message to stakeholders in relation to the roles and responsibilities of the ABCB.
- The ABCB to date has performed a much broader role than just "keeper of the Code" (page 312 of Draft Report) and the current name of the Board has not been an impediment to undertaking projects, obtaining stakeholder input and cooperation and delivering outcomes in areas that are not directly related to the "BCA content". It is not envisaged that such would be an impediment in the future as there does not appear to be significant changes proposed in the roles and responsibilities of the Board.
- The ABCB's involvement in projects that are not directly linked to the content of the BCA are to a very large extent, related to the improved application and implementation of the BCA. Hence the current name still has relevance in this context.
- The current name also has national and international recognition and respect and there would need to be strong and compelling reasons to change such, which do not seem to be apparent at this point in time.

The proposed name change is not supported for the reasons stated above and in the absence of a strong demonstrated need for a name change it is recommended that the status quo remain.

Draft Recommendation 11.4

A new Inter-governmental Agreement should be negotiated by all nine governments, so as to implement many of this study's recommendations:

- ***establish the Australian Building Regulation Board (ABRB) in place of the ABCB***
- ***clarify the ABRB's mission statement and objectives***
- ***agree to shared funding and removal of charges for the BCA***
- ***re-confirm the commitment to national consistency***
- ***strengthen the use of regulatory impact statements to enhance rigour for mandatory regulations***
- ***outline the future work program, as proposed.***

Refer comments above in relation to Recommendations 8.6, 10.1, 11.1, 11.2 and 11.3.