REFORM OF BUILDING REGULATION

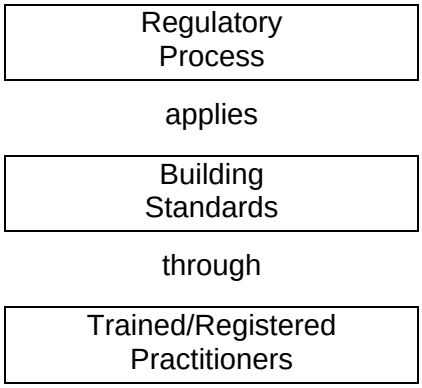
Response to Productivity Commission Draft Research Report

This submission is provided by the Department of Housing and Works with input from the Departments of Planning and Infrastructure, Consumer and Employment Protection, and the Sustainable Energy Development Office. This submission is not a response to the findings and recommendations of the Draft Report, but provides comment and additional information on matters covered by the Commission, or where the Commission has sought specific input.

WHOLE OF GOVERNMENT COMMITMENT

The Commission recommends that there be whole-of-Government commitment to reforms and regulations within each jurisdiction, such that jurisdictional representatives on the Board can speak and vote with broad authority. The Commission also comments that jurisdictions should look to group building regulation functions into one agency. The Commission suggests that jurisdictional commitment and a whole-of-Government approach would be supported by an annual meeting of responsible Ministers.

There appears to be some confusion about how such arrangements might work, and particularly the respective roles of the Board and the jurisdictions. The Department of Housing and Works has adopted a conceptual framework for the building regulation process that identifies three broad functions.



The Regulatory Process is the administrative framework and legislation that requires owners to submit proposed buildings for assessment and approval for construction and use. At its broadest level this includes planning, heritage and other approvals as well as building code compliance. Western Australia is currently reviewing the regulatory process as part of the development of a new *Building Act*. The conceptual framework for this Act is supplied as an attachment to this submission for your information. It would be useful for the Productivity Commission to set out as precisely as possible what regulatory processes are covered in the report, and what processes should be covered by the new inter-government agreement.

The Building Standards are the standards for design and construction—focussed on the Building Code of Australia, but including other standards such as plumbing, electrical, and the like. There is no functional difference between, say, having a Building Code of Australia that covers only "building" matters and a Plumbing Code of Australia that covers plumbing matters—both of which must be complied with, and a single Building Code of Australia that includes both building and plumbing standards. It would be useful for the Productivity Commission to set out what areas of standards should be covered by the inter-government agreement and the Board, and whether the Board should have some overriding control or

policy direction on standards, such as the new Plumbing Code of Australia, that are developed outside of the Building Code of Australia.

Successful design and construction depends on a pool of skilled practitioners. These are currently regulated through a number of processes, including State and territory based registration Acts (e.g. architects, builders), private registration systems (e.g. professional engineers) and trade-based qualifications (e.g. plumbers, electricians). The Commission has asked for comment on training, and specific comments are made below. It would be useful for the Productivity Commission to set out what professional and trade areas come within the ambit of "building regulation" and should be covered under the inter-government agreement.

It is not clear in the Commission's interim report where the proposed Board's responsibilities lie against this model. Is it restricted to developing building standards only, with the regulatory processes managed by jurisdictions and coordinated through a regular Ministerial meeting, or is the Board intended to have some independent authority to specify regulatory processes as well? The same questions can be asked in respect of practitioner training and registration. The extent to which jurisdictions are prepared to surrender sovereignty for regulatory processes is yet to be tested.

REGULATORY SYSTEMS

National Template for Home Building Contracts

To the extent that this issue is within the Commission's term of reference, there are some concerns about the establishment of a national template for home building contracts. Such an exercise would be costly and making use of such a mandatory template may be impractical in light of the differences in building legislation, practices and terminology in the various jurisdictions across Australia.

If a national template were to be considered, a body such as Standards Australia should produce a national template stipulating the "rules of the game". Standards Australia is best placed to develop such a template as it is an internationally recognised leader in the facilitation of standardisation solutions and currently develops and publishes a suite of Australian Standards publications. The ABCB should be considered a standards expert, not a contracts expert, and a national contract template would be best dealt with by a body with considerable expertise in developing standardised contracts.

To include BCA compliance as part of the contract, the BCA should be specified as the default standard. A person may contract over and above this minimum standard but should not be allowed to drop below it. A national template should state that where no higher standard is specified in the contract, the BCA standard applies as a minimum default standard.

WA Proposal for a *Building Act*

Western Australia is currently reviewing the regulatory process and has developed a conceptual framework for a *Building Act*. This framework identifies the stages needed to design, assess, construct and operate a complex building, and explores some mechanisms for dealing with the issues that arise. The key points from this framework are:

- A distinction between the process of certifying compliance with the Building Code of Australia (which in the case of a complex building will be a compilation of certificates from appropriate experts in specific fields) and the process of issuing a permit to commence construction or occupy and use a building:

- A recognition that different competencies may be needed for compliance certification (i.e. technical expertise in a specific aspect of building behaviour) and for permit issuing (i.e. expertise in regulatory principles and laws);

- Recognition that a permit to commence construction (a "building licence") may cover compliance with requirements separate from traditional building control, such as planning, heritage, etc;

- A need to clearly allocate responsibility for aspects of design, checking, construction and maintenance and to record who is taking that responsibility;

- A flexible mechanism that provides for private sector certification of compliance without necessarily requiring private sector issuing of a building licence.

ADMINISTRATIVE ARRANGEMENTS AND ROLE OF THE BOARD

It seems the best way to ensure jurisdictions commit fully to national reforms and standards is for a formal whole-of-Government commitment at Ministerial level. The Commission suggests an annual meeting of responsible Ministers would deliver this. Jurisdictional commitment to the level and consistency anticipated by the Commission may only be achieved through a standing Ministerial Council meeting under COAG rules with a formally-agreed scope of operation. There are some difficulties with this approach, including:

- Relatively slow and bureaucratic decision-making;
- Political differences;
- Removal of authority from Board members if the Ministerial Council is the ultimate decision-maker;
- Difficulty of including industry representatives in a formal government structure.

There are a number of different models for the operation and support of Ministerial Councils. The most appropriate model may be along the lines of:

A formal, COAG-based **Ministerial Council** responsible for:

- Nationally consistent administrative arrangements for building regulation;
- Adoption of nationally consistent building standards;
- Nationally consistent professional/occupational standards and registration systems for building practitioners.

It is possible that the departmental administration that supports each Minister attending the Ministerial Council, and the CEO that attends the related preparatory meetings common to Ministerial Councils, could be different from the agency that provides the jurisdictional representative on the Board. This could reflect, for example, a department having broad policy responsibilities working with a statutory authority that applies building standards.

An **Australian Building Codes/Regulation Board** that:

- Acts as secretariat for the Ministerial Council;
- Provides research and technical advice to jurisdictions and the Ministerial Council;
- Prepares nationally consistent building codes.

The Board would consist of representatives of industry and government (i.e. its current membership) and would have observer status at Ministerial Council meetings. The jurisdictional representative on the Board could be chosen for knowledge of building codes matters rather than administrative responsibility for building regulation.

The process of setting up a formal Ministerial Council with clear responsibilities would force jurisdictions to clarify roles of their various agencies, and possibly promote the concentration of building regulation matters into a single agency, such as the Victorian Building

Commission. It would also promote the "whole-of-Government" buy-in to ongoing building regulation reform.

Although consumer representation on the Board is desirable, there are inherent difficulties with endeavouring to directly represent the interests of consumers. While the Commission observes that consultation with the State and Territory consumer/fair trading departments could be a mechanism to reflect consumer issues, this may not be sufficient. To properly represent the views of consumers, broader consumer consultation should be undertaken, possibly through the use of appropriate external consultants.

Memorandum of Understanding

The Commission also seeks comment on the desirability of a Memorandum of Understanding between the ABCB and the Department of Industry, Tourism and Resources and whether such a mechanism would adequately address concerns about the independence of the Office. If the thrust of the Commission's recommendations on the whole-of-government approach by jurisdictions and the use of regular Ministerial meetings are adopted, the re-negotiation of the Inter-Government Agreement will inevitably spotlight the legal status of the Board and how it relates to the individual governments. The adoption of a formal Ministerial Council does not require a fundamental change to the status of the Board as an arm of the Commonwealth Government, and there are strong grounds for the current arrangement to continue. It may however be useful for the administrative status of the Board to be formalised through a Memorandum of Understanding so that the current "apolitical" approach to the Board is preserved. If the Commission believes a Memorandum of Understanding is worthwhile it would be useful for the Commission to outline the matters that should be dealt with.

NATURE OF THE BUILDING CODE

Coverage of the Code

The Building Code of Australia has traditionally attempted to prescribe life-safety standards only. In recent times the Code has developed to include energy efficiency and disabled access is soon to be added. The Commission has recommended that the Code fire safety provisions be aligned with fire authority requirements and thus include asset protection as an acknowledged Code outcome.

It is clear that the "core" life safety provisions of the Code still require considerable work to refine and define performance requirements (as recommended by the Commission) and there is understandable caution in some parts of the industry for the Code to move into new and more difficult areas such as sustainability. On the other hand, there are clear pressures from industry to move to a "one book of rules" approach where all applicable standards are included in the Code.

The Western Australian conceptual framework (set out above, and in the attachment) acknowledges that a building may need to be certified as complying with a number of different standards before a building licence is issued. It does not really matter if some of these are life-safety standards only (and perhaps labelled as BCA standards) and others are amenity standards such as disabled access (and perhaps labelled as DDA standards). Equally, it would be possible for all of these various standards to be grouped into one integrated standard.

The Commission should be clear in its recommendations as to whether it sees the role of the Board as being:

- To develop and refine a "traditional" BCA focussed on life safety in traditional building code aspects, with other parties developing complementary codes, and a joint responsibility to ensure compatibility between the various standards; or,

- To develop a "modern" BCA that covers both life safety and amenity issues, but still restricted to traditional building code aspects, with other parties developing complementary codes; or,
- To develop a "modern" BCA that covers both life safety and amenity issues, but still restricted to traditional building code aspects, and control and guide other parties developing complementary codes; or,
- To develop a "one set of rules" BCA that includes all relevant building related standards.

Performance Measures and Assessment

The Commission rightly draws attention to the work needed to develop the performance measures in the current BCA to enable it to operate effectively as a performance standard. To complement this it is important for there to be national consistency in the methods used to assess compliance with a performance standard. Assessment processes are likely to be technically complex, and will need to ensure that adequate performance in one area of expertise does not compromise performance in another aspect of building performance. There is some danger in a combined "performance" and "deemed to satisfy" standard where some aspects are determined on a performance basis without cross checking that deemed to satisfy provisions in complementary areas are still effective.

It is likely that compliance assessment will become increasingly complex as the BCA develops amenity and sustainability provisions where adequate performance may involve trade-offs between competing ideals. Future compliance assessment may involve complex computer-based modelling tools rather than the historical approach of comparison of specific aspects against a single performance measure. This approach is already evident in the use of sustainability assessment tools such as the New South Wales "BASIX" system, and is likely to become more evident as other jurisdictions grapple with these issues.

TRAINING

The Commission seeks comment on the role the Board might play in the training (and presumably registration) of building practitioners with responsibility for applying the Code. In general training and registration should be the responsibility of relevant agencies or registration boards. The Board would provide information on skills or specific knowledge that may be needed for specific classes of registration relating to Code certification, but would not be directly involved in the registration process.

There is considerable fragmentation of responsibility for various professions related to building work and certification; both within jurisdictions and between jurisdictions. In most cases, the training and registration of practitioners is based on a broader set of skills and knowledge than simply understanding of the Building Code of Australia. For example, architects are expected to demonstrate contract administration expertise as well as technical design expertise in order to be registered. Although there is some logic in promoting the registration of building practitioners as part of a building regulation process, some practitioners (e.g. engineers or electricians) work in different aspects of construction, and registration would not fit easily into a building-focussed agency.

There are good grounds for grouping the training and registration responsibilities for building practitioners into the same portfolio or agency so as to benefit from administrative efficiencies and policy consistency. However the existing fragmentation and the practical difficulties of coordinating legislative reform over many areas in many jurisdictions make it unrealistic to expect national consistency in the short term. It would be inappropriate to charge the Board with the task of coordinating and delivering national reform in this area at the expense of greater focus and resource allocation to Code development. As a general proposition, practitioner standards should sit outside the building standards process, with

regulatory processes drawing on separate registration categories for the various practitioners.

For these reasons the Board should not have any direct training responsibilities in the area of practitioner registration. However the Board may have responsibilities in informing practitioners of BCA developments and in the use of specific tools or processes for applying the Code.

INSURANCE

The Commission seeks comment on the appropriate role of the ABCB in regards to insurance sector issues impacting on building regulation. This is a complex area, where some of the consequences of recent insurance reform have not been fully explored or appreciated.

There has been a common expectation by governments that requiring practitioner or indemnity insurance is a cheap, market-based way of sustaining a high level of practitioner skill and competence. In effect the insurance companies become *de facto* regulators, prescribing standards that practitioners must meet in order to practice in the industry. This approach has unravelled in the wake of the collapse of HIH Insurance where it has become clear that:

- Prescribing insurance in legislation causes significant problems if the insurance market is not prepared to offer cover;
- In a tight market, insurance companies are reluctant to provide cover where risk cannot be quantified, thus leaving specialist contractors without access to insurance;
- Insurance companies base their willingness to provide cover on the assets of a practitioner rather than skill and competence;

More fundamentally, consumers would prefer the loss not to have occurred at all, rather than have access to some funds to compensate for what might be irreparable loss such as physical injury or destruction of family records and heirlooms.

Insurance reform in the wake of the collapse of HIH insurance has significantly restricted the ability of building owners or users to rely on practitioner insurance for restitution of economic loss. The introduction of proportionate liability for economic loss and the ability to limit liability under Professional Standards Acts make it much more difficult for a consumer to recover losses. Firstly the consumer must identify all the practitioners that contributed to the loss, and then hope that the loss attributable to each practitioner is within the liability cap and/or the available insurance cover. This will inevitably lead to consumers paying more for comprehensive building insurance, and relying on their own cover to fund losses due to building defects. Building insurers will still seek to recover their losses from any responsible practitioners, but the cost of recovery against multiple defendants and the likelihood of liability caps limiting recovery will force premiums to rise.

The combined impact of these changes is that insurance is much less effective as a *de facto* registration process, and jurisdictions are more likely to need effective training and registration schemes to maintain appropriate practitioner standards and protect consumers.

An associated issue that arises from these insurance reforms is the role of various registration schemes. A practitioner may be registered under specific occupational legislation (e.g. *Architects Act*, *Builders Registration Act*), have insurance and continuing professional development prescribed by a scheme registered under a *Professional Standards Act*, and be authorised to certify compliance with the Building Code of Australia under a separate *Building Act*. There does not seem to be any particular consistency to these arrangements, and it is likely that there will be growing incompatibility between different registration processes. Although as outlined above this is a complicated area that the Board is not well

equipped to address, it may be something that could be usefully addressed over time by a Ministerial Council.

It is not mandatory in Western Australia for builders to take out professional indemnity ('PI') insurance. To introduce such insurance is likely to increase costs and impose an additional burden on industry, particularly if insurance is not readily available in the private market. Given the competition implications in relation to national competition policy, a rigorous cost benefit analysis would need to be undertaken to demonstrate its effectiveness prior to any attempt to change the law.

An exception to this is private certifiers. Private certifiers should be required to hold PI insurance to safe guard the interests of consumers. Private certifiers are building surveyors and other certifying practitioners employed by parties other than local or State government authorities. The certifiers are responsible for issuing building licenses or recommending to local or State government authorities that a license be issued. As such, their customers need an avenue for protection in the event that building licenses are issued improperly.

Housing indemnity insurance (HII) should continue to remain solely within the jurisdiction of the individual State and Territory Governments. It would be helpful for the Commission to set out reasons for a national approach.

The HII scheme in Western Australia has always been a 'last resort' system since it became mandatory in 1996. As a result, Western Australia has not experienced the same level of difficulties as have been reported in other States. In fact, other States have changed their HII legislation to reflect our 'last resort' system in Western Australia. Further, in Western Australia builders remain liable for warranty claims made by a home owner or successive owners for a six year period following practical completion, an important consumer protection measure.

Considerable progress has been made towards the harmonisation of the HII schemes in the major States (excluding Queensland). For example, Western Australia is considering introducing reporting requirements for insurers based on the system recently introduced in New South Wales.

The impact of complications arising from the collapse of HIH Insurance Group and the events of 11 September 2001 appears to be subsiding. Recently, several insurers and mutual fund applicants have expressed interest in entering the HII market in Western Australia, with one major insurer intending to launch its HII policy in Western Australia in a few weeks time.