

REFORM OF BUILDING REGULATION PRODUCTIVITY COMMISSION ISSUES PAPER

SUBMISSION FROM THE DEPARTMENT OF HOUSING & WORKS

INTRODUCTION

The Department of Housing and Works (DHW) provides the Western Australian Government's housing and works functions. The Department handles much of the Government's building asset and project management and leads industry, housing and built environment policy.

The Department of Housing and Works is responsible for the administration of the Building Code of Australia in Western Australia. It represents Western Australia on the Australian Building Codes Board, Building Codes Committee and at other relevant National and State forums. The technical building control and advisory functions are located in the Building Codes & Regulation branch within the Office of Policy & Planning.

The Building Codes and Regulation branch is broadly responsible for:

- Advice on and promotion of building codes and regulation within government, industry and the community;
- support, and participation in National and State committees and forums relating to the development of building regulation;
- Administrative functions related to technical building matters including the regulations of swimming pool barrier systems, construction, repair and maintenance of dividing fences and the processing of building appeals to the Minister; and
- Development of appropriate qualifications and educational standards for building surveyors.

In May 2003, the Western Australian Government moved the building regulation function from the Department of Local Government and Regional Development to the Department of Housing and Works. This has enabled the building regulatory role to become more integrated with broader building industry policy, legislation and public works functions undertaken by the Department of Housing and Works.

Specific initiatives presently include security of payments legislation, registration and regulation of building professionals, insurance issues including professional indemnity and public liability insurance, development of a Western Australian housing strategy and support for building industry training, research and development.

At present, Western Australia is the only State that has not updated its legislation as part of national building reforms. The Western Australian Government has recognized the need for new legislation to bring Western Australia into line with other jurisdictions. Currently, the Office of Policy and Planning is in the process of developing a *Building Act* which would provide for an efficient and effective system for dealing with building approval applications, the granting of building approvals, enabling appropriate enforcement of building standards, and ensuring that essential safety features are adequately maintained for the life of the building.

There is strong support for improved building legislation from the local building industry and it is anticipated that the Government will finalize proposals for new legislation towards the end of 2004 when the current Productivity Commission inquiry is completed.

This submission does not provide details of the conceptual framework proposed for building regulation in Western Australia or the likely content of the proposed *Building Act*. A discussion paper is currently being finalized for Ministerial approval prior to release for public comment. This paper and relevant background material will be provided to the Productivity Commission when available, and will cover a number of issues raised in the Productivity Commission discussion paper.

This preliminary submission provides a Department of Housing and Works view of the major issues that might be usefully considered by the Productivity Commission as part of its current inquiry.

THE INTERGOVERNMENTAL AGREEMENT

The Department of Housing and Works considers the Australian Building Codes Board and the Building Code of Australia have delivered significant reform to the building industry and have successfully engineered a national approach to the maintenance and development of building standards in Australia. Therefore, there are strong grounds for the Inter Governmental Agreement (IGA) that underpins these mechanisms to be continued to enable continuation and refinement of national building standards. There are equally strong grounds for the BCA to remain as the primary, single, technical reference document establishing the minimum standard of construction and maintenance for all Australian buildings. The Productivity Commission may wish to consider whether the IGA could be extended to ensure that similar matters captured in other jurisdictional legislation, and associated policies, are consolidated and housed within the BCA.

The Productivity Commission may also wish to consider whether greater importance should be placed on harmonizing jurisdictional administrative provisions, ideally within the context of a national framework for a preferred administrative model supporting the delivery of the BCA.

This could have numerous benefits including:

- enabling the growth of interstate, and international, business by making it easier for a manufacturer to enter the market knowing that a national system of building regulatory measures is consistently applied across the nation
- supporting access to a national pool of suitably qualified, and accredited, building practitioners who are conversant with national building control law
- facilitating building surveyors, builders, architects, engineers and other building industry professionals understanding of the relevant Acts, Regulations and Codes by reducing the number of jurisdictional differences currently embedded in State and Territory building control legislation.

EFFECTIVENESS OF THE ABCB

General

The Department of Housing and Works considers that the ABCB has worked effectively to produce and manage the BCA and associated reforms.

The ABCB has in place a regulatory amendment process that is open, transparent and seeks submissions from the widest possible group of stakeholders and the community. It has drawn regulatory representatives together from across the nation to resolve technical and administrative regulatory issues. It has representation from the peak national and state industry groups and government agencies. Its regulatory policy developmental processes are transparent, accountable, thoroughly researched and widely accepted.

The ABCB administration is customer focused, professional, project-driven, provocative and democratic. The central co-ordinating role has enabled some very significant regulatory reforms to be implemented, such as the introduction of energy efficiency measures for houses in 2003. It has fostered consumer protection by establishing, and maintaining, an appropriate level of minimum construction standards for Australian buildings.

Major regulatory amendment proposals are clearly set out within regulation documents and cost-benefit analysis is researched, and reported upon, via regulatory impact statements.

There is probably limited value in the Productivity Commission undertaking detailed reconsideration of the ABCB's performance under its current mission and better value would be had from considering future opportunities for reform.

National Approach

The existing IGA requires that the ABCB office and jurisdictions allocate resources to achieve the objectives of the IGA.

The ABCB and BCA have made a marked difference to the efficiency, maintenance and improvement of minimum technical standards, and regulatory approval turnaround times by establishing a national approach to minimum construction standards, instead of perpetuating a proliferation of jurisdictional, idiosyncratic regulatory arrangements.

The current national approach is considered to be very important as it has numerous benefits:

- It promotes interstate and international trade and business expansion;
- It ensures that resources harnessed in developing regulatory provisions are efficiently managed and duplication restricted;
- It promotes open dialogue across all jurisdictions thus generating a pool of regulatory solutions gleaned from the best sources within the nation;
- It is a practical option given that Australia is a relatively small nation, in international terms, consisting of approximately 20 million persons;
- It facilitates the training of industry practitioners without the need to tailor courses of study to meet individual jurisdictional idiosyncrasies;
- It facilitates the mobilisation of expertise throughout the nation such that all regions within the country have access to suitably qualified and experienced regulatory professionals;

The current funding model works well as it proportionally allocates contributions based on a jurisdiction's level of building activity rather than a formula based on population. The contribution is not onerous and the ABCB office contributes the lion's share of operating funds and generates a significant amount of revenue from sales of the BCA.

In order to maintain a truly national approach it is critical that the Commonwealth continues to participate in, and support, the functioning and funding of the ABCB.

Industry Involvement

The presence of industry representatives on the ABCB takes the board out of the usual arrangements for national coordinating bodies (typically operating under Council of Australian Government rules and reporting to a Ministerial Council). Input from independent members with considerable industry experience strengthens the quality of discussion and the robustness of decisions, and should continue.

It is arguable that some key areas of industry or national industry bodies are not directly represented, and that the number of industry representatives should be increased. The Department of Housing and Works believes this type of board works most effectively when members are not seen to represent a particular body or sectional interest, but rather are chosen for their individual knowledge and experience. With ABCB decisions being made by mixed industry and jurisdictional representatives, it can be argued that the role of the jurisdictional representatives is more that of technical and administrative experts, with strong understanding of their jurisdictions' issues, rather than as persons representing a formal jurisdiction view.

The Productivity Commission might also consider greater consumer input into the Australian Building Codes Board. There is a range of options to achieve greater consumer input that could be considered such as Board membership, more active consumer consultation via focus groups or formalised consultation.

Alternative Legal and Management Structures

The current IGA, which makes the ABCB part of a Commonwealth Government department has worked and delivered good results. There do not seem to be compelling practical needs to change this arrangement.

The ABCB has a strategic aim of being a "board of decision makers." It is unlikely that individual governments are willing to bind themselves to national decisions without some input at ministerial level, and would be particularly unwilling to bind themselves to decisions made by a hybrid government–industry board without any chance of ministerial or government veto. The only way of guaranteeing that ABCB decisions are accepted by all governments is a Ministerial council similar to the Council of Australian Governments model. Pragmatically, the current board structure works well (arguably better than many inter-government coordination bodies) and the limited risk that an individual jurisdiction may wish to opt-out of a particular ABCB decision does not seem to justify a change.

The legal status of the ABCB as an arm of the Commonwealth government is more problematical, especially given the limited role of the Commonwealth in practical building regulation matters. It is worthwhile for the Productivity Commission to examine alternative

legal structures, but it is not clear to the Department at this stage that there is an obviously better alternative.

NATIONAL ADMINISTRATIVE FRAMEWORK

Further progress is necessary towards a national administrative framework to support the BCA. While it would no doubt be desirable to have truly uniform legislation governing building standards and administrative frameworks, the time and cost involved in such an exercise are unrealistic, and are unlikely to get priority given recent legislative reforms in most jurisdictions.

The industry is now addressing new issues that have arisen since the reform initiatives of the 1990s, and these may offer some scope for further harmonisation. These issues include responses to the insurance issues, the introduction of proportionate and limited liability, free trade agreements and the emerging importance of sustainability and amenity. A more detailed discussion of the impact of these issues will be set out in the forthcoming Discussion Paper for a Building Act to be released by the Department of Housing and Works later this year.

The most achievable outcome is national harmonisation of administrative process, supported by individual legislation in each jurisdiction to deliver a consistent framework. This allows individual jurisdictions to tailor their legislation to local laws and practice while still delivering a national reform agenda. Recent examples of successful attempts to achieve legislative harmonisation are registration mechanism for architects and security of payment laws in the building and construction industry.

Perhaps once a nationally preferred administrative framework is developed, as is currently proposed by the ABCB, jurisdictions could be asked to show cause as to why they prefer not to adopt a particular element of that framework at a particular time.

PERFORMANCE CODES AND ALTERNATIVE SOLUTIONS

Performance Codes

The ABCB has an aim to develop the BCA as a performance standard, where outcomes are specified, but where the means to achieve those outcomes are left open to the designer. The Department of Housing and Works supports the development and use of performance standards, but suggests the Productivity Commission may wish to consider some of the implications of a continuing move to performance standards, and the way performance standards are administered. The difficulties of dealing with performance standards under the current BCA are discussed below under “alternative solutions.”

Prescriptive standards (such as traditional building by-laws and the “deemed to satisfy” provisions in the BCA) allow an untutored person to prepare a design, and for that design to be checked against the prescribed standards by, say, a local authority building surveyor. In such a model it is conceivable that a single person, or a single profession (building surveyor) can master the prescribed standards and check all aspects of a building.

Performance standards mean the designer must have a strong understanding of the principles underlying the standard, and in effect restrict design to professionally trained people (architects, engineers, and the like). Equally, checking the validity of a design against a performance standard requires the same sort of professional knowledge as the designer needs.

For a complex building it is inconceivable that a single person or a single profession is capable of checking all aspects of a building against all performance standards.

The development of performance standards complicates the traditional view of a design phase (which is currently unregulated—any person may design a building and present it to a licence issuing authority for approval) and a one-stop checking and certification stage. There are many permutations between self-certification by professionally qualified building designers that a specific design meets the performance requirements and a rigorous regime of independent checking of all performance aspects that puts no professional responsibility on the designers at all. It may well be a vital task for the ABCB or some successor to devise and implement a nationally consistent framework that deals with the complexities of performance standards in a regime of proportionate liability and capped professional liability.

Alternative Solutions

The BCA currently allows performance standards to be used as “alternative solutions” to “deemed to satisfy” provisions. There is a strong view within the WA building industry that the methodology to determine alternative solutions for the BCA needs to be more rigorous and the approval processes standardised.

Due to the very specific nature of alternative solutions that are tailored to individual building development proposals there is potential for approval delays where a BCA alternative solution is proposed by a building proponent. The proliferation of fire engineered building solutions has exacerbated this problem, which has developed to a point where buildings are being constructed that may not adequately meet the performance requirements as required, and articulated within, the BCA.

This could be addressed by:

- Developing an administrative process to specify how a BCA alternative solution is to be managed describing what form of application documentation is required and how to successfully argue for a proposal to be approved by a regulatory authority.
- The establishment and maintenance of a national database of BCA alternative solutions that may be applied to a variety of buildings and that may be used in improving the BCA.
- Greater control of the application, review and approval timeframes associated with BCA alternative solutions.

At present, an applicant for building approval may not fully communicate the nature, and extent, of a BCA performance-based submission to the licence issuing authority. This results in many applications being approved without the licence issuing authority being fully aware of the type of BCA alternative solution being proposed. Problems may then arise when the alternative solution is challenged by building inspectors during the construction phase of building, with the builder claiming that the alternative solution has been approved.

This could be overcome by an administrative requirement stipulating that all alternative solutions be identified when an application is lodged with a licence issuing authority and a requirement that the licence issuing authority be made fully aware of the proposal and it has approved it.

The Department of Housing and Works is particularly interested in working with local building industry stakeholders to hear and address their concerns on the management of BCA alternative solutions. It is understood that the Australian Building Codes Board is planning to investigate the operation of alternative solutions to address industry issues and devise improved procedures.

SCOPE OF BUILDING CONTROL

The ABCB and building control legislation in most jurisdictions is traditionally confined to building standards dealing with life safety. In recent years the ABCB has developed the BCA to address “amenity” issues such as energy efficiency and universal access. It is clear that the BCA can be further developed to address more amenity, efficiency and sustainability measures. At the same time that building control has been venturing beyond minimum safety standards, other regulatory regimes (notably planning) have started to impact on building and design standards. In Western Australia the introduction of “R-Codes” into planning schemes has meant that many built form issues are dealt with through planning rather than building control. This can be exacerbated by local laws relating to building matters, or even local exemptions or provisions in the BCA.

There is scope to make the building approval process easier for proponents through policies that prevent local government authorities from developing additional building standards beyond the BCA requirements. Currently, there is considerable confusion between town planning and building regulatory requirements from the consumer’s perspective. Industry in Western Australia is concerned at the proliferation of regulatory requirements and the delays caused in processing building licence applications by the need for additional approvals. The introduction of sustainability issues into building control is likely to further complicate the regulatory framework. A meeting of Planning and Local Government Ministers in Perth in February 2004 considered the need to manage the proliferation of sustainability standards and responded favourably to a proposal for all sustainability issues to be managed by the ABCB and incorporated in the BCA.

In Western Australia the Department of Housing and Works and the Department of Planning and Infrastructure are working to develop better processes and coordination to reduce approval delays and clarify overlapping regulatory issues between planning and building regulatory matters. It would be very useful for the Productivity Commission to examine the alignment of building standards, planning, sustainability and other approvals into a coherent process, and whether this is a role for the ABCB.

CODE MAKING PROCESSES

The BCA relies upon the referencing of applicable Standards produced primarily by Standards Australia International (SAI). It is important that SAI and the ABCB continue to work closely together to ensure that Referenced Documents are appropriately structured, formatted and produced in a co-ordinated manner. The Productivity Commission may wish to consider how the SAI and ABCB can maintain strong collaboration and coordination in the development of Australian standards.

DELIVERING OUTCOMES

Qualifications of Building Practitioners

It is apparent Australia has access to a state-of-the-art technical building code through the BCA but the benefits are reduced due to the ad hoc skill levels of those who administer and enforce building standards. It is not in the national interest to have a technical document that is not universally applied in a similar manner across the country. There is agreement amongst jurisdiction for qualifications and registrations of Architects, and an agreement from the 1990's on a national framework for qualifications of building surveyors. It is highly desirable to develop a uniform process for the qualification and registration of all building practitioners—especially for dealing with performance solutions.

The introduction of contestable certification services has significantly lifted the professional status of building surveyors and their collective knowledge and skill base. Western Australia is currently examining this concept and anticipates the incorporation of higher-level qualification requirements through legislative amendments shortly. A particular issue in Western Australia is the lack of access to appropriate courses for building surveyors. The Western Australian Government strongly endorses the development of a national qualification framework but recognizes that there can be problems accessing appropriate training in more remote locations.

Without necessarily revisiting previous inquiries into professional regulation it may be useful for the Productivity Commission to consider how national uniformity of qualification and registration can be achieved.

CONCLUSION

The Department of Housing and Works supports the development and management of national building standards through the work of the Australian Building Codes Board and the Building Code of Australia.

However, there are a number of issues that should be considered to ensure the ongoing success of the Building Code of Australia including:

1. Alignment and perhaps unification of building, planning, sustainability and other approval processes.
2. The management of BCA alternative solutions.
3. A national qualifications framework for building practitioners.
4. How Standards Australian International and the Australian Building Codes Board can maintain strong collaboration and coordination in the development of Australian standards
5. How the Australian Building Codes Board develops mechanism to increase consumer input into the organisation and processes.