

PRESENTING THE

# BUILDING REGULATORY REFORM

## SUMMIT 2018

**Creating an effective Australian building regulatory framework for the 21<sup>st</sup> century**

**21 – 22 February 2018 | The Shine Dome, Canberra**

The Building Products Innovation Council (BPIC) and Lovegrove & Cotton Lawyers invite you to a Summit on Building Regulatory Reform.

This free-to-attend, invitation-only Summit will bring together Australia's leaders and strategists in building control to identify opportunities and weaknesses in the current building regulatory framework. It is aimed at uncovering the inflection points where small tweaks could lead to big change, and potentially conceive mechanisms and new governance models that might produce a more consistent and effective national building control paradigm. Regardless of differences in jurisdictional approaches or the amount of funding allocated to the administration of these systems.

In short, we are aiming to create a paradigm where regulatory compliance is something that each player in the building supply chain wants to achieve – voluntarily and enthusiastically. This will involve seeing the problem from new perspectives, asking difficult questions and coming up with elegant, innovative solutions. This is a big agenda that looks beyond current discussions about cladding and building safety. You will hear from key industry stakeholders and participate in facilitated discussions with a view to proposing and planning strategies for the future.

By the end of the Summit, it is hoped that participants will be able to articulate the scope and basic structure of a draft White Paper, tentatively titled: "*An Effective Australian Building Regulatory Framework for the 21st Century.*"

### SUMMIT PRESENTATIONS INCLUDE:

- |                                                                                                                                                            |                                                                                                                                             |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"><li>• <b>Simplifying Planning and Building Regulations</b></li></ul>                                                     | <ul style="list-style-type: none"><li>• <b>What Went Wrong and Why: A Blueprint for Reform</b></li></ul>                                    |
| <ul style="list-style-type: none"><li>• <b>Accountability in Certification</b></li></ul>                                                                   | <ul style="list-style-type: none"><li>• <b>Lessons Learned from the Non-Compliant Façade Fiasco</b></li></ul>                               |
| <ul style="list-style-type: none"><li>• <b>Reform to Legislation</b></li></ul>                                                                             | <ul style="list-style-type: none"><li>• <b>Insurance Implications of Non-Conforming Buildings</b></li></ul>                                 |
| <ul style="list-style-type: none"><li>• <b>Best practice elements of enlightened building control for the third millennium - 2018 and beyond</b></li></ul> | <ul style="list-style-type: none"><li>• <b>The State of Contemporary Property Development Structures and Systems in Australia</b></li></ul> |
| <ul style="list-style-type: none"><li>• <b>Product-Specific NCC Performance Solutions and Part A2 Compliance Pathways</b></li></ul>                        | <ul style="list-style-type: none"><li>• <b>Cracks in the Compact City: Tackling Split Incentives in the Multi-Unit Market</b></li></ul>     |

***The Building Regulatory Reform Summit and workshop sessions will provide an opportunity to listen to the entire sector in order to determine pressure points and develop possible solutions.***

The diverse and high-calibre audience offers a significant knowledge translation opportunity. The Summit is a think-tank concept conducted in a neutral political environment that is relatively informal, to enable peers to work towards a blueprint for a national building regulatory system that is robust and appropriate for Australia' future.

Key speakers have been carefully chosen to provide a broad overview of their sector issues, concerns and visions for the future of building regulation:

## SUMMIT PRESENTERS

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**KIM LOVEGROVE**

RML, F.A.I.B - **Lovegrove & Cotton Lawyers**



**DR JONATHAN BARNETT**

Technical Director, **RED Fire Engineers Pty Ltd**

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**PROF BILL RANDOLPH**

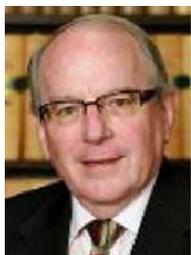
Director, **City Futures Research Centre, UNSW**



**STEPHEN KIP**

Fire Safety Engineer & Building Surveyor, Adjunct Associate Professor, **Victoria University College of Engineering & Science.**

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**PROF IAN BAILEY**

AM SC, Board Member, **Society of Construction Law Australia**



**GIL KING**

GDipArts(Crim), BA(PolSt) DipBldgSurv, CEO - **Real Estate Institute of Victoria**

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**CHRIS JOHNSON**

Chief Executive Officer, **Urban Taskforce Australia**



**DR JONATHAN DRANE**

Western Sydney University, **Sydney Graduate School of Management**

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**KARL SULLIVAN**

General Manager Policy, Risk and Disaster Planning Directorate - **Insurance Council of Australia**



**MICHAEL WYNN-JONES**

Associate – **UTS Institute for Public Policy and Governance**

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# BUILDING REGULATORY REFORM SUMMIT

## Wednesday 21 February 2018

# DAY 1

08:30 Registration, welcome and refreshments

### CONVENE IN THE IAN WARK THEATRE

09:00 Chairperson's Opening Address

#### 09:10 Simplifying Planning and Building Regulations

- We are becoming over regulated in the building industry which adds costs.
- Innovation must be encouraged in planning and building processes.
- Housing affordability will be assisted by new ideas in building.
- Prefabrication must be part of a smarter building approach in Australia.

Chris Johnson, *Chief Executive Officer, Urban Taskforce Australia*

#### 09:50 The State of Contemporary Property Development Structures and Systems in Australia

- The current state (and decay) of property development systems and practices.
- How we got here: The history of decay of those systems 1950 to 2017.
- Construction and Property Development System breakdowns.
- How we move forward: A Scenario based risk framework.

Dr Jonathan Drane, Western Sydney University, **Sydney Graduate School of Management**

10:30 Morning refreshments and networking break

#### 11:00 Reform to Legislation

- What is wrong with the present system?
- Allocation of responsibility.
- Allocation of risk.
- National consistency.

Prof Ian Bailey AM SC, *Board Member, Society of Construction Law Australia*

#### 11:45 What Went Wrong and Why: A Blueprint for Reform

- 'The end justifies the means' approach results in outcome failures.
- There is still fundamental failure on the most basic building projects.
- The harmonisation dilemma – a crisis of identity.
- The fire brigade approach to regulation.
- Increased regulation and enforcement - This has been tried and failed.

Gil King, GDipArts(Crim), BA(PolSt) DipBldgSurv, *CEO - Real Estate Institute of Victoria*

12:30 Networking lunch and refreshments

#### 13:30 Cracks in the Compact City: Tackling Split Incentives in the Multi-Unit Market

- What are we talking about? The recent scale of multi-unit development.
- Quality in the multi-unit market – buyer beware.
- Conceptualising the split incentive problem: risk shifting and fragmented decision-making.
- Possible solutions: integrated procurement, risk sharing and culture shift.

Prof Bill Randolph, *Director City Futures Research Centre, UNSW*

#### 14:10 Lessons Learned from the Non-Compliant Façade Fiasco

- How did we arrive at the façade compliance problem and who is responsible?
- Who should cover rectification costs?
- Why is the system making it so hard to fix the problem?
- When do we have to get on top of it?

Dr. Jonathan Barnett, *Technical Director, RED Fire Engineers Pty Ltd*

### CONVENE IN THE JAEGER ROOM

#### 14:50 Workshop: Delineating the Problem

Facilitated workshop to capture key issues, problems and insights, identifying what needs to change and uncover any inflection points in the system.

16:00 Afternoon refreshments

17:00 Wrap up

# BUILDING REGULATORY REFORM SUMMIT

## Thursday 22 February 2018

# DAY 2

08:30 Registration, welcome and refreshments

### CONVENE IN THE IAN WARK THEATRE

09:00 Chairperson's Opening Address

09:10 **Best practice elements of enlightened building control for the third millennium - 2018 and beyond**

- Best practice enforcement and compliance.
- Models that are conducive to economic sustainability of probity regimes.
- Maximising construction quality outcomes and public safety.
- Statutory approval regimes.

Kim Lovegrove RML, F.A.I.B - **Lovegrove & Cotton Lawyers**

09:50 **Accountability in Certification**

- Accountability issues – the big picture.
- Improving the certification of buildings.

Michael Wynn-Jones, *Associate* – **UTS Institute for Public Policy and Governance**

10:30 Morning refreshments and networking break

11:00 **Product-Specific NCC Performance Solutions and Part A2 Compliance Pathways**

- The performance-based NCC allows only three compliance pathways.
- Site-specific performance solutions and NCC Part A2.
- A case study of external wall weatherproofing.
- How to improve understanding and compliance.
- The importance of performance-based design principles for products and buildings.

Stephen Kip - *Fire Safety Engineer & Building Surveyor, Adjunct Associate Professor*, **Victoria University College of Engineering & Science**.

11:40 **Insurance Implications of Non-Conforming Buildings**

- How do insurers set premiums?
- How do insurers assess non-conformance?
- Insurance implications of detected non-conformance?

Karl Sullivan, *General Manager Policy, Risk and Disaster Planning Directorate* - **Insurance Council of Australia**

12:30 Networking lunch and refreshments

### CONVENE IN THE JAEGER ROOM

13:30 **Workshop 1: Developing workable, future-proof solutions**

Facilitated workshop to conceive mechanisms and models that will produce a consistent, effective national building control paradigm, regardless of differences in jurisdictional approaches, the influence of party ideology or the level of regulatory funding available.

**Workshop 2: Structuring a White Paper**

Facilitated workshop to capture solutions that can be developed into a White Paper, and a call for volunteers to participate (post-Summit) in a Working Group to research, flesh-out and publish the document.

16:00 Afternoon refreshments

17:00 Wrap up and thanks

### SPONSORSHIP OPPORTUNITIES

Excellent opportunities exist to showcase your organisation. For further information, please contact:

Rodger Hills: eo@bpic.asn.au

### VENUE DETAILS

The Shine Dome

15 Gordon Street, Canberra, ACT 2601



# BUILDING REGULATORY REFORM SUMMIT 2018

## Issues Paper

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October 2017

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The Building Products Innovation Council (BPIC) is a national peak body representing Australia's leading building products industries and related services. BPIC's members and associated companies directly employ over 200,000 Australians with more than 470,000 employed indirectly. Their collective industries are worth over \$54B in annual production to the Australian economy.

One of BPIC's primary objectives is to enhance building affordability through regulatory reform and provide support for a nationally consistent regulatory framework for the building industry.

BPIC works to fulfill these aims by gathering and supplying practical and current industry information on behalf of BPIC member organisations and other organisations and companies that are not members but follow BPIC through various means. This industry-wide approach to responding to regulatory issues, helps to ensure that Governments are informed of potential problems in the building industry and are provided with appropriate industry-considered responses.



The construction law firm Lovegrove & Cotton was established in Melbourne in 1993 and has contributed significantly to the legal fabric of the construction industry and modern day building regulation in Australia.

Lovegrove & Cotton has become a practice that provides expertise in all facets of construction law, including but not limited to:

- Regulatory law reform
- Mergers and acquisitions
- Dispute resolution for large to medium cases

We traverse multimillion dollar matters but by the same token our residential disputation practice canvasses acting for small to medium enterprises (SMEs). We are involved in contract formulation, dispute avoidance and resolution strategies. We protect and enforce the rights and interests of building contractors, engineers and building practitioners with regard to a wide range of issues including OH&S matters and practitioner conduct. We represent practitioners before, Building Practitioner Disciplinary Tribunals and Boards. We also represent councils and local government in the area of compliance.

## Acknowledgments

In preparing this paper the objectives of BPIC and Lovegrove & Cotton are focused on encouraging building regulatory reform and supporting a nationally consistent regulatory framework for the building industry. This summit is closely aligned with both organisations' mission and they wish to gratefully acknowledge that this Issues Paper has been developed with support and input from the individual members of BPIC, including the Australian Glass and Glazing Association, Australian Institute of Quantity Surveyors, Australian Steel Institute, Australian Window Association, Cement, Concrete & Aggregates Australia, Concrete Masonry Association of Australia, Engineered Wood Products Association of Australasia, Gypsum Board Manufacturers of Australasia, Housing Industry Association, Insulation Council of Australia and New Zealand, Insulated Panel Council Australasia, HIA National Manufacturers Council, Roofing Tile Association of Australia, Steel Reinforcement Institute of Australia and Think Brick.

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## The Building Regulatory Reform Summit

From the 21<sup>st</sup> to the 22<sup>nd</sup> of February 2018, an invitation-only Building Regulatory Reform Summit will be held in Canberra to bring together Australia's leaders and strategists in building control to identify opportunities and weaknesses in the current building regulatory framework.

The Summit is aimed at uncovering the inflection points where small tweaks could lead to big change, and potentially conceive mechanisms and new governance models that might produce a more consistent and effective national building control paradigm. Regardless of differences in jurisdictional approaches or the amount of funding allocated to the administration of these systems.

By the end of the Summit, it is hoped that the participants will be able to articulate the scope and basic structure of a draft White Paper, tentatively titled: "*An Effective Australian Building Regulatory Framework for the 21st Century.*"

This Issues Paper has been prepared to provide Summit participants with an overview of the major concerns currently being publicly voiced about our national building regulatory framework, and to provide context for discussion at the Summit.

### Key Assumptions

In developing the format for the Summit, a number of key assumptions were acknowledged. These are:

- The nature of Australia's system of government is such that there are always likely to be differences in jurisdictional approach to building control across the country.
- Despite responses to short-term crises, the overall trajectory of governments is towards reduced spending on regulatory enforcement and minimalist compliance strategies.
- Self-interest, competition and the need to make profit are powerful drivers amongst all parties in the building supply chain that if harnessed appropriately, could be used to improve building outcomes instead of eroding them.
- Whilst better regulation may be part of the answer, other supporting mechanisms, processes and technologies might also play a key part in addressing the gaps in the system.

### Potential Outcomes

The Summit may lead to a range of outcomes, such as:

- Developing a holistic understanding of the structural and systemic weaknesses of the existing building control regime.
- Governments and industry developing a better understanding of each of their roles and the contributions they can make to finding solutions.
- Recommendations and agreements for collaborative work by governments and industry to develop potential solutions.

### Process

The Summit is a think-tank opportunity conducted in a neutral political environment that is intended to be relatively informal, to enable peers to work towards a blueprint for a national building regulatory system that is robust and appropriate for Australia's future.

- Day One will involve the airing and capturing of matters that are ailing building control and compliance and the key mechanisms that are not coping or do not exist.
- Day Two will involve the identification and development of workable, future-proof solutions.

## Australia's Building Control Regime: A Brief Modern History

Australia's building regulatory framework supports approximately 10 per cent of Australia's gross domestic product and nearly 10 per cent of Australia's workforce.

As the Australian Constitution does not mention matters regarding the safety, health and amenity of people in buildings, or land use planning and development, responsibility for these matters rests with the State and Territory Governments. As a result, we have a situation where states and territories have implemented eight individual building regulatory regimes.

A major step forward was taken in 1994 when the Council of Australian Governments (COAG) signed an inter-government agreement that established the Australian Building Codes Board (ABCB) and tasked it with maintaining and improving the Building Code of Australia now known as the National Construction Code (NCC). This same agreement also committed the Commonwealth, states, territories and local government to deliver a national administrative framework for building.

But 23 years later, the world has moved on and major disruptive influences have changed the manner in which building work is designed and delivered, how risk is allocated and how regulators seek to manage today's laws. Even if consistency had been achieved, it is reasonable to believe that these changes would still be a cause to ask whether the administration of building is effective and relevant. Whether or not the building regulatory framework is meeting community expectations is another question that needs to be asked. The historic focus on the structural and fire performance of buildings as well as waterproofing is no longer seen by the industry or the public as comprehensive enough. Given that the majority of Australians spend the majority of their lives indoors, aspects such as thermal comfort, indoor air quality, daylight requirements and energy efficiency have become mainstream concerns.

In an age where building materials are no longer predominantly Australian made and the range of professionals involved in the design and construction of buildings has become more diverse, where a performance based building code underpins the administrative processes and where the way that buildings are constructed is changing rapidly, building compliance and control has become the subject of much scrutiny in recent years. Also the insurance industry is now factoring in resilience (a building's ability to cope with bushfire, flood, hail, wind, cyclone, earthquake and other foreseeable disasters) and building durability, while at the same time creating policy exclusions for non-conforming product and non-compliant building practices.

Observers have noted that our current system is nationally fragmented, needlessly complex and based on an old regulatory model which is increasingly incapable of dealing with modern industry issues and rapid change. It often fails to facilitate identification of defective work, fails to hold to account those responsible for building defects where these are detected, and fails to support innocent victims who inherit responsibility for resolving defective work.

A review of our state-based building control law is long overdue in the wake of recent building failures and has become a matter of some urgency. This is an opportunity for stakeholders to "look outside the box," and seriously question the assumptions that underpin the current building regulatory framework in Australia. To reduce complexity, improve the efficiency and effectiveness of the system, as well as future-proof the system to meet the changing processes and products that will continue to emerge over the next decades.

## The Existing Building Compliance Regime

The Building Ministers Forum (BMF) is responsible for setting the regulatory agenda for both the administration of building control and reforms to the National Construction Code (NCC):

- **Composition:** The BMF is a Council of Australian Governments (COAG) body responsible for building regulation. The Chair is the Federal Minister supported by a federal Department secretariat. The members comprise each of the State and Territory Building Ministers. The BMF meets annually, or on an as needed basis.
- **Powers:** The BMF provides strategic direction to the preparation of the NCC by the Australian Building Code Board (ABCB) and makes executive decisions regarding regulatory reforms in building control.

The NCC is a joint initiative of the Commonwealth, States and Territories, administered by the ABCB under an Inter-Governmental Agreement (IGA). The ABCB administers (produces and maintains) the code:

- **Composition:** The ABCB Board consists of ten to sixteen members including a Chair, the head of each Commonwealth, State and Territory Administrations responsible for building matters, up to five industry representatives, and a representative of the Australian Local Government Association.
- **Mandate:** ABCB updates and maintains the NCC, as well as providing educational support for users of the NCC. The ABCB facilitates regulatory impact assessments where required for significant amendments to the NCC in accordance with COAG's principles for national standard-setting bodies.
- **Limitation of mandate:** The ABCB is responsible to the Building Ministers Forum, which it makes recommendations to and takes policy direction from. The ABCB is not a regulatory body and does not have the power to take decisions to reform the code unilaterally, or to set the administrative processes around the application of the NCC in state and territory building systems.

States and Territories enforce the NCC:

- States and Territories are responsible for adopting the NCC through building legislation and managing its enforcement generally in reliance on local government authorities.
- States and Territories have the ability to create variations to the technical requirements of the NCC based on specific criteria set out in the IGA.

Plan Approval:

- The mechanisms for ensuring that buildings are designed and constructed to comply with the NCC vary from jurisdiction to jurisdiction and are defined in their individual building legislation.

Construction Approval:

- The mechanisms for ensuring that a regulator can detect and remedy non-compliance with the NCC vary from jurisdiction to jurisdiction and are defined in their individual building laws and regulations.

The NCC sets out minimum necessary standards in relation to safety, health, amenity and sustainability for all new building work throughout Australia. It is comprised of the Building Code of Australia (BCA) and the Plumbing Code of Australia (Volume 3). The overall goal of the NCC is to *“enable the achievement of nationally consistent, minimum necessary standards of relevant safety (including structural safety and safety from fire), health, amenity and sustainability objectives [in the design and construction of new buildings] efficiently.”* The NCC is a model building code that is given legal effect through State or Territory building legislation. States and Territories can choose to apply these provisions with or without amendments.

There are two ways for a building design to show compliance with the NCC minimum performance requirements:

1. **Follow the Deemed to Satisfy (DTS) provisions:** The NCC provides a list of construction measures or details which are deemed to meet the performance requirements of the NCC. This is currently the most common route for compliance despite the overriding nature of the performance requirements of the NCC. This pathway generally involves reference to Acceptable Construction Practices and Acceptable Construction Manuals.
2. **Develop a performance solution:** This compliance path gives the applicant the freedom to choose any technology and product for the building design, provided that they can produce acceptable evidence to a building certifier that the building will meet or exceed the performance requirements for each element of construction. This may be demonstrated through modeling, testing or other evidence that the building's design is capable of meeting the performance requirement.

## Issue 1 - How Transparent are the Main Players?

Feedback from a recent BPIC survey indicated a high level of ignorance within industry regarding the very existence of the Building Minister's Forum (BMF). Survey respondents noted that the BMF seems to provide very little information on the issues it is working to address. Where the BMF has provided information, there appears to be no process for updating interested industry parties or the public. Where public statements of actions to be taken have been made, mechanisms for feedback also seem to be lacking. The same observations were made by respondents with regard to the ABCB Board and the Building Codes Committee.

## Issue 2 – How Independent and Diverse are the Main Players?

Currently the BMF, ABCB, BMF-Senior Officers Group (BMF-SOG) and the national Building Regulators' Forum (BRF) all have representatives from similar organisations/jurisdictions. Is this a good model for diversity of views and expertise? Is there a risk of potential group-think, or situations where if a group or jurisdiction doesn't get their way in one forum they can bring it to the next one? Should there be more interaction between these groups and others in related sectors such as planning, infrastructure, health and so forth?

## Issue 3 - Is the Focus on 'As-Design' Compliance and Not Also 'As-Built' Compliance Defensible?

There appears to be little (if any) supporting information as to why our building regulatory framework focuses on 'as-design' compliance and not also 'as-built' compliance. Yet it is clear from industry and from recent building tragedies, that such an approach is misplaced at best and a danger to public safety at worst. Whilst industry accepts that the NCC is a code and that 'compliance with the code' is a jurisdictional matter, it has mystified many as to why the ABCB has not attempted to establish model compliance guidelines for jurisdictions to follow and why jurisdictions have not required 'as-built' compliance. Even within the NCC, opportunities abound for the inclusion of 'as-built' verification processes, but these have not been pursued. In the absence of hard quantifiable research that argues the benefits of 'as-design' compliance over 'as-built' compliance, one can only assume that this is another unexplained policy imperative that has probably outlasted its usefulness.

## Issue 4 – Lack of Building Performance Trajectories

Whilst there is heated debate within industry and government about energy efficiency trajectories for the NCC, these discussions overshadow any discussion about code trajectories in general. There has never been a greater emphasis on building science and technology than there is today. Advances in building materials occur every year. Appliances are just beginning to be designed to communicate with buildings, with each other and with building users. Buildings can achieve new levels of quality, safety and energy efficiency, while the costs associated with implementing innovations are decreasing.

Unfortunately we are not seeing a corresponding effort on the part of the BMF to set code trajectories in the areas of structural, waterproofing, fire safety and so forth. In fact, none of the key building elements of the NCC has a clear trajectory or even the hint of considering that there might be a need for such things. This rudderless approach means that industry has no clear pathway beyond the regular 3-year update cycle of the NCC. This puts a brake on innovation, stifles economies of scale and deters investment in product development and manufacture.

A further consequence of the lack of code trajectories is that it hobbles the ability of ABCB staff to be able to develop effective and well supported code changes that meet long-term regulatory objectives. In the absence of this strategic leadership, mid-level bureaucrats find themselves having to make significant building regulatory changes in response to short-term crises or current political issues.

## Issue 5 - Lack of Appetite for Enforcement by Jurisdictions

One of the major criticisms of the current building control regime in Australia is the ever-decreasing appetite for the enforcement of building codes and regulations. As has been pointed out by many experts, good legislation and strong regulation is useless without adequate enforcement. This is a multi-jurisdictional problem where no-one seems willing to take responsibility for building conformity and compliance. As pointed out by recent high-level government investigations in Queensland, New South Wales and Victoria, building regulators have not been auditing approval authorities and design professionals, nor have they been conducting a host of other compliance and enforcement processes that their own legislation says should be done.

## Issue 6 - Is Too Much Conformity Responsibility Placed at the End of the Construction Process?

A cursory check of the various building acts in each jurisdiction will show that most of them absolve everyone in the building supply chain - except for the building certifier - of specific responsibility for the compliance of buildings. The absence of a 'duty of care' from everyone in the building supply chain creates the lack of a legally enforceable regime of responsibility for compliance. This is inappropriate, as it leaves the checking of projects until the very final stage of construction. The result is significant risk because by that time, non-conforming building products and non-compliant practices are often hidden away inside the structure. In addition to the difficulty in locating non-compliance, the cost of rectification is highest at the final construction stage.

## Issue 7 - Fragmented Jurisdictional Legislation Related to Buildings.

In each jurisdiction, building control measures are scattered amongst a range of legislative vehicles (e.g. Building Act, Planning Act, Strata Act, Conveyancing, and so forth). In many cases there are clear inconsistencies and sometimes conflicts in relation to duties and the parties expected to carry out those duties. Any review of the building control mechanisms must also incorporate all the related and interlocking legislative requirements that are in force.

## Issue 8 - Where Does the NCC Stand Against International Best Practice?

There has not been a detailed study undertaken to benchmark Australia's NCC against other building codes internationally. However there are criteria we might use to ascertain for ourselves, how effective the NCC is in practice. Consider some of the following criteria the Global Building Performance Network uses to compare international building codes:

### Levels Beyond Minimum

- Does the code and complementing policies encourage buildings to go beyond minimum requirements?
- Is this well documented for instance by certification schemes introducing well defined classes 'above standard level'?
- Can the code 'stretch' or 'reach' beyond minimum requirements and reward buildings that achieve significant savings, improved performance or lower insurable risk than standard design?

### Enforcement Standards and Guides

- Does the code set out suggested post occupancy verification processes, standards and guides?
- Are surveys independently conducted on compliance rates and do they demonstrate a high rate of compliance?

### Certification Standards and Guides

- Does the code set out suggested post occupancy certification processes, standards and guides?
- Is the certification system robust and well integrated in the process?

### Policy Integration

- Is there a system of rating or labeling for building components?
- Are there any special incentives or requirements for public buildings to pave the way for the rest of the market?
- Are there supporting measures, which increase building performance and or allow minimum requirement levels to be exceeded (e.g. reduced property tax, lower insurance higher incentive, better loan conditions, grants etc.)?
- Are there education systems to ensure capacity in all parts of the construction sector?

## Issue 9 - Is the Rationale Behind a Performance-Based Construction Code Still Sound?

The performance-based NCC was developed around a hierarchy of requirements for buildings, drawing heavily on the hierarchy that was published by the Nordic Committee on Building Regulation in the late 1970s. The ideology behind a performance-based code is that it focuses on the following attributes (IRCC, 2010):

- Minimum requirements, not aspirational goals.
- Objective outcomes, not subjective methods.
- Final product delivery, not process of delivery.

The theory is that performance-based regulations have been considered useful in reducing ambiguity in product requirements across interstate and international market borders. Where prescriptive, process oriented regulations may generate confusion, performance requirements are thought to provide clearer means of assessing suitability and eligibility of traded goods in different markets. The expected results were a greater use of internationally developed products within domestic markets.

But it is also well known that performance based codes have some serious down-sides that have been documented in the Centre for International Economics' report – Benefits of Building Regulatory Reform (2012):

- Increased costs of building surveying, engineering and design associated with performance-based solutions.
- Increased difficulties in assessing compliance with performance-based regulation.
- Increased lifecycle costs, including:
  - A tendency for performance-based design solutions to shift the financial burden from the construction phase to the owner in the maintenance phase, from passive systems to active systems.
  - When builders/developers use the performance approach to reduce cost to the exclusion of other considerations or where the final performance based approach results in lower building performance than the DTS approach.
  - Performance-based design solutions may increase the level of energy and water consumption by building occupants.
  - Decisions made at the design phase to meet performance requirements may specify or restrict how space in the building can be used.

The problems don't stop there, performance based building solutions are intrinsically more complex and:

- Significantly increase insurance costs while reducing underwriting options due to higher risk profiles presented by performance-based solutions.
- Result in an increase of imported products (much of it poorly regulated) into the building market.
- Introduce a need for increased competence of practitioners involved in design through to implementation of designs is necessary in order to achieve compliance.
- Increase the risk of non-compliance as contractors need to deliver "one off" bespoke or custom variants for which they have insufficient training – most building industry training is aimed at mastering standardised construction techniques and installation approaches.
- Result in owners being unlikely to have awareness of the impact of performance-based designs and may be oblivious to requirements that could impact their legal obligations.

Much of this down-side risk associated with a performance based code and building solutions would disappear if the correct supporting policies, administrative processes and regulatory environment were in place through the application of state and territory building legislation. Unfortunately our building regulatory regime has rushed headlong into embracing a performance based paradigm, whilst at the same time propping up and promoting a prescriptive based building administration eco-system. Whilst performance and prescriptive regimes are not mutually exclusive, they have enough differences for serious and systemic code compliance issues to manifest.

## Issue 10 - Is the NCC Drafting, Review and Change Process Effective?

The primary means of revision of the NCC is via the Proposal for Change (PFC) process, whereby individuals and/or the industry can propose changes to the NCC for consideration. The process is supposed to be democratic, effective and efficient, but is it? PFCs appear not to be judged on their inherent merits, but on the volume of quantitative supporting data and the number (and significance) of organisations that support the change. There

appears to be evidence that the PFC process can allow critical code problems to endure for years before rectification.

A case in point is widespread misuse/abuse of the residential Reference Building compliance method. In January 2013, a PFC was lodged with the ABCB calling attention to the fact that the Reference Building Verification provisions of the NCC Volume Two were being used as a first choice assessment method instead of the more appropriate Deemed-to-Satisfy (DTS) process on standard residential designs, and also to achieve poor design compliance (less than 6 Star energy efficiency) rather than innovative design compliance. The PFC was not progressed because the proponents only had anecdotal evidence and were only able to secure the support of four other organisations. As of the release of this Issues Paper, the problem has grown exponentially worse in a number of jurisdictions (primarily WA, SA, VIC and NT) and a working group within the ABCB has been formed to review and tighten up the Reference Building Verification provisions for the 2019 release of the NCC. This six and a half year lag between code problem identification and code problem resolution is not uncommon, but nor is it acceptable for a 21<sup>st</sup> century regulatory regime.

The PFC process also has another less obvious but equally troubling aspect. Even if a PFC is speedily reviewed and adopted, it often only fixes one aspect of the NCC and can ignore interrelations with other parts of the code. Hence there is widespread industry criticism that the NCC contains many instances of rules laid down in one section that contradict or weaken other parts of the code.

Other areas of concern regarding the NCC development and review process include:

- The PFC process seems to operate as a pseudo feedback mechanism, in the place of a proper feedback mechanism from each jurisdiction. By divorcing code development from code compliance, the NCC often ignores the practicalities of compliance because it is seen as a jurisdictional issue and not the ABCB's problem.
- In light of the fact that the NCC is referenced in the majority of building litigations and disputes, it seems incongruous that the document is not reviewed either through legal peer or Law Society to check the wording of the code. The benefits of having legally unambiguous code definitions and clauses would be substantial.
- The trend within the NCC over the last few years has been to push people to look up referenced standards and not articulate requirements within the NCC. This factor appears to be a contributing factor in the growing problem of building non-compliance. In effect, standards are being used as blanket proxy compliance mechanisms instead of clearly articulating the compliance requirements in the NCC.
- The substantially disjointed nature between the development of the NCC (by the ABCB) and its implementation and administration (by jurisdictions) appears to be leading to a lack of willingness on the part of ABCB staff, to provide industry advice. This situation is compounded by the fact that even if ABCB staff might be willing to help practitioners, they do not have the regulatory authority to provide advice and determinations regarding the NCC.
- The NCC is perceived to be a document that repeatedly leaps from high level principles to minute details (e.g. the size of CPR signs around pools), with the assumption is that users will seek advice if they don't understand anything, but this is often not the case. Furthermore the means of determining compliance or pursuing non-compliance is inadequate and there is inadequate assignment of responsibility/processes to parties in the building supply chain other than builders (e.g. specifiers, suppliers, installers, etc).
- The NCC is written primarily from the point of view of how buildings should be used and makes no accommodation how people actually use buildings.
- The NCC is written from the standpoint that materials and products will be installed in a structure in a set-and-forget manner, ignoring repair and maintenance issues (e.g. post-construction access and inspection).
- The NCC is full of definitions and terminology that is not commonly used (nor understood in some cases) by the industry. This reduces the readability and comprehensibility of the document and contributes to non-compliance.
- Much of the evidence supporting the NCC and its directives, is based on Australian circumstances. However, Australia has too small a population to determine statistical significance of some issues in key areas. The NCC should be more embracing of overseas statistics and data.

## Future Directions

As we ponder the future of our building regulatory framework, perhaps instead of calling for our regulatory system to be nationally consistent, maybe we should simply ask that the practical outcomes of the system are consistent. Perhaps instead of trying to impose hierarchical or free-market governance models on the system, it is time we looked at other possibilities such as network governance and emerging new business models.

In the same way that web apps can integrate different software platforms, perhaps we need mechanisms that produce the required market output, regardless of differences in jurisdictional regulatory 'platforms' that exist.

With the jurisdictional appetite for enforcement of regulations at an all-time low, maybe we need to find ways to make regulatory compliance something that each player in the building supply chain wants to achieve – voluntarily and eagerly. Maybe there are ways to incentivise everyone in the industry to do the right thing. Perhaps tools like mutual enforcement, building rating schemes, expanded vendor duty of disclosure, process transparency, open data exchange, and standardised rulemaking can short-circuit the impact of the three year political cycle and party ideology on our building regulatory system.

Given the complexity and the inertia of the existing regulatory system it is imperative that we identify the main inflection points where a small amount of effort or change, will have a disproportionate positive effect.

Also, we should be thinking about what success would look like. Would anyone have a problem with compliance mechanisms that are: endemic and self sustaining; cost governments little or no money; cannot be easily sidestepped or gamed; use existing and readily available professional/trade expertise; significantly reduce litigation and risk; and are seen as just a normal cost of doing business and not unnecessary red tape? Doesn't the public deserve to have building stock that is commensurate with living in a first world economy?

## Principles to be Applied at the Summit

To address issues and achieve objectives, a common set of principles will be applied to determining viable solutions during the Summit:

- Identify and propose solutions to key failures in the building control regime.
- Reduce regulatory burdens on industry and increase productivity by ensuring that building compliance systems are well designed, transparent, nationally consistent and clearly communicated to industry and the community.
- Enhance the ability of industry to plan ahead and develop innovative, practical and cost-effective construction solutions, which will also lower compliance costs for households and businesses.
- Prepare the building sector for changes to building processes, technologies and community expectations.
- Where possible, approaches should be consistent across Australia, while recognising differences in the relative effort required to achieve acceptable outcomes in different jurisdictions.
- The greatest net economic, social and environmental benefit should be provided to the Australian community as a whole.
- The need for increased standards must be justified relative to other feasible economic and regulatory policy options, including self-regulatory and voluntary approaches, that could be used to achieve similar levels building performance.
- Approaches should be based on achieving measurable outcomes and allow maximum flexibility and innovation in how these outcomes are achieved in particular buildings.
- Measures should be structured to allow the collection of nationally consistent data to assist future policy development.
- Approaches adopted should be reviewed on a regular basis to ensure they remain relevant and effective.
- Approaches adopted should be able to endure beyond the 3 year political cycle and be impervious to party/political ideologies.
- Approaches should seek to remove any conflict-of-interest issues in the building control process.