

SUBMISSION : STREAMLINING AND MODERNISING THE NATIONAL CONSTRUCTION CODE

Thank you for the opportunity to provide a submission in response to the discussion paper published by Treasury on Streamlining and Modernising the National Construction Code (NCC).

I am a lawyer and consultant to governments across Australia. I specialise in advising government as regulators.

In 2017, in the wake of the Grenfell Tower fire, I was commissioned by Building Ministers, together with Professor Peter Shergold, to review building regulation across Australia. Peter and I produced the Building Confidence Report (BCR) in February 2018. Following the publication of the BCR, in 2019-2021, I was included on the Expert Advisory Board that assisted the ABCB to undertake its work on the implantation of the BCR.

I have continued to advise Australian governments and statutory bodies on building regulatory issues since the BCR was published. That has included Ministerial appointments to conduct reviews for the Qld and NSW governments as well as being commissioned via the ABCB to advise all governments on pathways for enhanced building product regulation in 2024. The former NSW Building Commissioner and current Victorian Building and Plumbing Commission as well as Cladding Safety Victoria have also commissioned me to conduct reviews and write reports on building regulatory issues.¹ I advised the ACT government extensively on the development of property developer accountability laws and have also advised the WA government on various policy development projects.

In addition to my work relating to building regulation, I also regularly advise other regulators on regulatory practice, policy development and on the exercise of their powers and functions on a day to day basis. This has included the regulators of sectors such as early childhood education, water and health.

My submission to this project is bold. I advocate for the creation of a national statutory body which would be responsible for the NCC as well as key regulatory functions that would support the regulation of the building industry by the Commonwealth, states and territories in collaboration. I believe that while the current inter government agreement model has been a worthwhile arrangement for several decades, it is no longer fit for purpose and it is time for all governments to send a clear message to consumers and

¹ Copies of all published reports can be found on my website at <https://weirlegalconsulting.com/published-reports-reviews/> In addition, many reports and reviews I have prepared are not published.

industry that governments are taking meaningful steps to ensure that the significant investment in addressing housing affordability and housing supply issues will not result in a legacy of defective buildings.

I appreciate that in the face of strong commitment from all governments to increase housing supply, making significant changes to the building regulatory framework that I have suggested below may be resisted as 'increasing red tape' or slowing down the delivery of completed housing. However, many of the changes I have proposed are not new, they are consistent with the recommendations in the BCR which have had broad support across industry stakeholders who have continued to insist the BCR should be implemented across Australia in a harmonised way. Further, as part of the BCR Implementation project completed by the ABCB in 2021, an impressive body of work has already been done which would form a good foundation to support my proposal below.

I welcome the opportunity to also meet with the project team to discuss my submissions further.



Bronwyn Weir
Director, Weir Legal and Consulting

Does the current ABCB governance model work? Why or why not? What should change, if anything?

The ABCB governance model has not been a failure. It has operated over decades and delivered generally high quality technical documents that are an essential feature in the building regulatory system in Australia. However, over recent times there has been a loss of confidence in the governance arrangements for the ABCB, as is reflected by this review.

The ABCB governance model has always had its shortcomings. Inherent in the model is that whilst the 9 Australian governments agree to collaborative governance through the IGA, in practice, states and territories retain sovereignty over the introduction of variations and amendments to the NCC.

Over recent years the number of variations has gone up and the willingness to implement amendments to the NCC has waned, despite the fact that those amendments have been agreed to as being appropriate by all governments and industry via the ABCB Board governance model. There are also many examples in building legislation where discretion is given to certifiers/surveyors not to require full compliance with the NCC or where planning laws encroach to override building regulations. These things undermine the intent of the IGA and NCC to the point where there is now a lack of confidence in the governance of the ABCB.

Every time there are more variations and agreed amendments to the NCC are not implemented, the national framework is eroded and the productivity benefits of having a national code are undermined.

If we are to stem this erosion of the national code and the productivity benefits that go with it, the states and territories must agree to prioritise national consistency over sovereignty. They need to put national interest, and the interests of the national construction industry and consumers ahead of acting independently on decisions about the NCC.

States and territories often make variations or refuse or delay implementation of amendments because of pressure from industry groups. In some cases, the very groups that are represented at the ABCB Board table aggressively lobby state and territory governments to ignore decisions of the ABCB. This may stem from the politics within some national associations, which are also fraught with tensions between national and state based interests.

Continuing with the current ABCB model is unlikely to stem or reverse the erosion in harmonisation and confidence that has occurred and is still occurring. This is because, to add to the inherent weakness in the model, housing supply policies have elevated political interest in the work of the ABCB.

We are at a point where there needs to be a recalibration of how building regulation works in Australia. Because housing supply and housing affordability have become such important issues for Australia and because of the billions of taxpayer funds being invested into building new buildings, it is imperative the federal government takes a more meaningful role in the regulation of the building industry and does so in a way that increases harmonisation of building regulations.

We know that more than 50% of multi storey residential buildings are likely to have significant defects which burden end users for years or sometimes decades.² That means governments are now funding the construction of new buildings, at least 50% of which will inevitably have defects. This will clog up courts and tribunals, drive scarce skills and materials towards an ever growing building rectification industry and in many cases, lead to significant mental health and poor financial outcomes for consumers and taxpayers.

The state and territory regulators do not adequately regulate the residential construction sector, particularly the multi storey residential sector. Most of them do not know how to and seem unwilling to take on any responsibility to do so. The NSW government did have a decent crack at this under the authority of its inaugural Building Commissioner, David Chandler (2019-2024). Since his departure, I am hearing that his good work is being unravelled by a government that is less interested in prioritising building compliance. Victoria and the ACT are on the cusp of beginning to use new stronger powers to regulate during construction. These will hopefully have an impact on levels of compliance with the NCC.

Meaningful national harmonisation and improved regulatory effectiveness must be insisted upon by the federal government if we are to improve productivity and prevent a legacy of defective buildings arising from this massive push for new housing.

The ABCB needs to be replaced with a federal statutory body that would oversee and coordinate building regulation across Australia that should remain primary the responsibility of state and territories. The federal body ought to be responsible for the NCC in addition to other key regulatory features which must be operated at a national level, namely

1. building product safety, including a national register for higher risk products;
2. a national registration/licensing scheme for key practitioners ;
3. collecting building information in a national data base that can be used to inform regulatory activity and the development of the NCC;

²<https://www.nsw.gov.au/departments-and-agencies/building-commission/building-and-construction-resources/research-on-serious-building-defects-nsw-strata-communities>;
<https://www.vic.gov.au/other-building-defects>

4. dedicated and ongoing research and development to support and inform the development of the NCC.

The **attached** 1 pager illustrates key features of my proposed model.

The states and territories should maintain primary responsibility for building regulation but be held to defined regulatory practice standards and requirements that are able to deliver more effective oversight of the residential construction industry. This should include increased regulatory oversight during construction to prevent non-compliance and improving regulatory consistency in key areas through amendment to their building regulatory laws. The states and territories should also have to report to the public on their progress towards the defined standards and requirements in exchange for federal government funding.

The construction industry is an \$80 billion industry that employs over 1 million people and is the engine room of our economy. It is essential that we have a national statutory body that has a more meaningful role in our national building regulatory framework.

The IGA governance model necessitates a large unwieldy Board of almost 20 people. By its very nature, decision making from a Board like this will be cumbersome, burdened with administration and open to criticism. Whilst industry representation is appropriate, there are inherent conflicts of interest in this model because representatives from industry associations will necessarily be there to reflect the interests of their members rather than approaching decisions from the perspective of public interest, national considerations or consumers.

If the IGA model were retained but there was a reduction in the number of members, this would require the exclusion of some state or territory representatives or reducing the ratio of government to industry representatives, both of which would give the impression that decisions do not properly represent all stakeholders. By replacing the ABCB with a statutory body this does away with the need to have equal representation. Advisory bodies could be retained in some form, but a separate statutory body is warranted.

National registration

My proposal for a national registration scheme for the building industry, stems from the fact that our fragmented and inconsistent registration and licensing schemes impact on the portability of skills and create unnecessary compliance burden. Further, as noted in the BCR, all states and territories do not register the key actors in the building and construction chain, leading to gaps in competency and accountability. Since BCR, some jurisdictions have introduced new categories of registration (for example for engineers) but they have done so inconsistently leading to increased complexity and burden for that profession.

I note the recent announcement by the Treasurer that the National Competition Council will undertake a review of the effectiveness of mutual recognition laws. This is welcomed. I expect it will confirm that mutual recognition laws have had limited positive impact on improving productivity in the construction industry because of their complexity and because of the resistance to them by states and territories.

There is often concern about recognising the registration of people who have carried on their occupation in another state where that the statutory role of that occupation differs to the state the person is now seeking recognition from. The national model I have proposed could resolve some of the underlying inconsistencies in the role and function of building practitioners under more harmonised building regulations. This would facilitate greater harmonisation to underly and national registration framework.

The national scheme for the regulation of medical practitioners through Ahpra is the model that should inform a national registration scheme for building practitioners.

I note the BCR implementation work included a national registration framework in which considerable work was done to define categories of registration together with proposed qualification and experience requirements.

Any national registration framework should be supported by tailored practice standards and codes of conduct for each category of practitioner. These could be developed by Standards Australia or through a similar process.

Building product safety

In relation to building product safety, I produced a report for the Australian governments on how regulation of building products should be progressed called the [Building Products Assurance Framework – Regulatory Options](#). It recommended reforms to the NCC together with the establishment of a National Designated Product Register to be administered by a national body. My submission to this review is consistent with the recommendations in that report.

In addition to those recommendations, the existing Codemark and Watermark schemes should continue to be administered by or through the new national body with a review and improvements to the operation of both schemes. (I note consideration of the Codemark and Watermark schemes was out of scope for the above report).

Stakeholder engagement

The discussion paper says that some stakeholders report that there has been ineffective stakeholder engagement leading to inadequate technical advice on the impact of proposed changes. I am not aware of the details of these complaints and cannot comment on this issue.

The proposal for change process is complex, it involves engagement with many stakeholders with different interests, to establishing an evidence base, undertaking regulatory impact analysis and obtaining consensus from a diverse ABCB.

As far as I am aware, the ABCB staff have been rigorous in following good regulation making guides and practices. I am aware that there have been occasions where despite the results of cost benefit analysis weighing against a proposal for change, the Board has determined the change should be made. This can undermine the credibility of the NCC and have long lasting implications.

Cadance for amendments to the NCC

Recent calls to pause changes to the NCC are said to be justified because the 3 yearly cycle for change is too burdensome. It is said that this is a contributor to the industry's inability to deliver on the housing supply targets. With respect, I do not agree.

After having yearly updates to the NCC/BCA for 20 years, the cadence for amendments to the NCC was changed to every 3 years around 2016. Prior to that change the ABCB did their research on the pros and cons of different amendment cycle lengths. Three yearly was agreed but before too long Ministers were asking for out of cycle amendments because there were urgent changes that could not wait for the next round of amendments. There is nothing wrong with a 3 year cycle that allows for urgent amendments if needed. If anything, a two year cycle would be better. Extending the cycle beyond 3 years is not sensible. It will only promote state and territory variations and see the NCC become stale and out of date. It would also lead to a backlog of proposals for change.

The world is moving quicker not slower. Change is an inevitable part of business and life. For a large complex document like this, it is essential that it can be updated regularly to reflect changing practices, knowledge and disputes about interpretation.

Complexity of NCC

On the topic of interpretation issues, my view is that complaints about the code being poorly written or too hard to understand are overstated.

Any technical document that is also a statutory instrument will always present interpretation issues. It is not possible to write a document like the NCC and not have regular debate about what certain clauses mean. That is the nature of legislation.

I am sure that every effort has been made in the past to draft the NCC clearly. Ongoing efforts should always be made to identify and improve poor drafting as part of continuous improvement. Where stakeholders raise issues about lack of clarity or where there are commonly asked interpretation questions, these should be examined to see if clarity can be improved. However, the NCC will always remain open to interpretation and debate.

The NCC is a technical document and a legislative instrument that is used by non-lawyers daily. Often non-lawyers will favour an interpretation that influences the cost of construction because they are not trained in the principles of statutory interpretation. There will be a propensity by some to look for alternative interpretations either because of commercial pressures or because they are seeking to justify non-compliance. What is needed is to educate users to understand that when the courts get involved, they will interpret the NCC in a way which reflects the objectives and purposes as stated in the NCC. This will usually mean that interpretations driven by preferred commercial outcomes or to retrospectively justify non-compliance will not be accepted over those that are grounded in the promotion of safety and amenity outcomes.

There have been many references to how many pages there are in the NCC and referenced standards. It is suggested that this, in itself is a problem and that we must reduce the number of pages in order to simplify the document. Less pages are likely to result in greater ambiguity. When using the code for a particular building, either vol 1 or vol 2 will apply, not both. For each trade, they are not likely to need to refer all parts of the volume that applies, in fact in a lot of cases they just need to refer to a handful of relevant standards. One of our biggest problems is that builders and trades do not refer to the NCC or standards enough or at all. To suggest that every builder and trade has to look at thousands of pages of NCC to do their work every day and that if we reduce the number of pages it will all become much easier for them, is fanciful.

In relation to state and territory variations, many of these will reflect the issues I have raised above, that is, the rising 'independence' being asserted by states and territories at the expense of have a truly national technical standard. This needs to be curtailed. There should be strict parameters for when variations can be introduced, and each variation should sunset after 5 years. Over that period, either the change should be taken up nationally or it should be deleted. Exceptions could be allowed in very limited circumstances. For example, where there is a genuine geographical condition which warrants the variation.

The performance based code

On the question of the code as a performance based document with prescriptive minimum standards as a pathway for compliance, my view is that this should remain. However, regrettably, I think performance is too often used as a retrospective, 'get out of jail free' card to justify non-compliance with DTS. Regulating the improper use of performance solutions was addressed in the BCR and is a role for state and territory legislation and regulation.

Unfortunately, the BCR recommendations on this issue have not been fully adopted by the states and territories. However, there have been efforts to improve the

documentation of performance solutions via changes to the NCC. More work is required in this area.

Increased use and understanding of the NCC

One of the findings of the BCR was that design practitioners did not appear to understand and be using the NCC as they should. Instead, in practice the appointed building surveyor/certifier would participate in design meetings to advise on NCC requirements.

Contrary to those practices, most of the state and territory schemes prohibit the appointed building surveyor/certifier from participating in the design. The reason for this is that the appointed surveyor/certifier is supposed to conduct an independent review of the approval documents to determine whether they comply with the requirements of relevant regulations including the NCC. If the surveyor/certifier is signing off on designs they have participated in preparing, they are marking their own work. I believe this has led to a practice where designers rely on the surveyor/certifier to correct their documentation or tell them what it needs to include to meet the NCC. Designers generally do not themselves engage with the NCC to independently prepare the required documentation.

I am aware that in Victoria there has been a move towards having a consulting building surveyor within the design team who is not the appointed building surveyor for the work. This should help separate the appointed surveyor from design but it does not necessarily encourage the design team to become more familiar with the NCC themselves as they would still be relying on the consultant building surveyor for advice on NCC compliance.

In NSW the *Design and Building Practitioner Act* requires design practitioners to declare their documentation complies with the NCC. This was intended to require them to become more familiar with the NCC. Anecdotally, this has led to improved quality of design although the Act only applies to design for class 2, 3 and 9c buildings and only in NSW.

Some have complained that these new declared design requirements have created excessive cost, especially for remediation of existing buildings. This might be the case but given the uplift in capability required and the additional time it would take to prepare a better standard of documentation, one would expect there to be market adjustments leading to increased cost. Over time as capability improves and the capacity of designers increases (which would be expected if there is the demand for these services), costs should level out. Only time will tell, however, if the end result is better

quality design and in turn increased compliance with the NCC this will mean fewer defects for consumers which is what we need to strive towards.

Changing systemic failures takes time and commitment, we should not be reversing sound regulatory policy reform before the new laws have the opportunity to be fully embedded and their benefits can be evaluated. This is relevant to this review because it goes to the argument that it is not the NCC that is the problem, it is the way it is implemented and the effectiveness of the regulatory oversight mechanisms which is lacking. This is not the responsibility of the ABCB but it should be of great concern to the federal government.

I would also suggest that detailed practice standards be drafted that are tailored to each of the practitioner categories. The practice standards should articulate good practice, including in relation to the design and use of the NCC and performance solutions. The practice standards for certifiers produced by the NSW are a good example. Practice standards could be developed by Standards Australia or through a similar process then referenced in the NCC or in state laws. They should also be used in the education of practitioners through universities and the VET sector and as part of CPD.

Useability and accessibility

By all means, look for ways to create a modern document with IT features that reflect the latest technology and improve the accessibility and navigation of the code for all.

I support adopting international standards where appropriate. There is no need to reinvent the wheel.

Innovation and housing diversity

As noted above, performance solutions are too commonly misused to justify non-compliant construction or design. I seriously doubt performance based design is used for innovation anywhere near as much as people would like to think. Research on this question may be warranted.

I don't think it is the role of the NCC to 'better support diverse types of housing'. I also don't think the NCC is a barrier to the uptake of new products or methods of construction. Unfortunately, it is all too common for new products to be used, sometimes extensively, without any evidence of suitability. Combustible cladding is a clear example of this. The NCC did not stop manufacturers selling this non-compliant product extensively. Nor did it stop industry from installing it.

The combustible cladding crisis reflects chronic systemic failures which I don't believe have been addressed by reforms that have occurred since this crisis came to the attention of governments and the community. The NCC was not the problem, lack of compliance with the NCC by every actor in the chain was the problem together with

lack of effective regulation by governments across Australia. The federal government should be asking what it needs to do to influence meaningful change to bring about higher levels of compliance with our NCC and to address the systemic failures in the system.

New products or diverse types of housing (whether good or bad) will be taken up if the market conditions are right. The NCC should always be updated to regulate new, commonly used products or methods of construction, hence the need to ensure at least a 2 year cadence in amendments. If we don't do this, we will find new products or methods of construction taking hold without proper technical standards to ensure minimum levels of safety and amenity.

National Building & Construction Authority

National Construction Code

National Registration Framework

National Building Product Safety

National Data Collection

- Development of Code with input from Committees
- Rulings on interpretation
- Informed by data collection
- Funded research program co-ordination

- Development of National Registration Framework (inc. Developers)
- Establish National competency frameworks/practice standards
- Approve accreditation bodies
- Co-ordinate the development of content on NCC & other courses/micro credentials for national training & CPD

- Based on National BP Assurance Framework
- Administer a designated product register
- Administer conformity schemes (eg WaterMark & Code Mark)
- Co-ordinate oversight & enforcement of recall/banning laws and supply chain laws by jurisdictions
- Establish min requirements for product technical information & traceability

- Central Data Base for building information
- Co-ordinate the development of national templates for building approvals process (regulated and administered by S&Ts)

JURISDICTIONS ALL IN

National Law - mirror laws enacted by each Jurisdiction

- Statement of duties & principles for key participants
- **Regulate and administer National Registration Framework (developed by National Regulator)**
 - o Anti-phoenixing controls
 - o Probity requirements
 - o Financial viability requirements
 - o Disciplinary actions
 - o Enforcement against unregistered/unlicensed persons
- Building Approvals Process (flexible interface with planning)
 - o Adoption of NCC with limits to state and territory variations
 - o Design quality controls inc. mandatory 3rd party review
 - o Mandatory inspections
 - o Documenting variations
 - o Reporting authorities (fire authority role)
 - o Staged approvals
 - o Occupation Approval process - building manual & maintenance reqts
 - o Process for work done without approval
- Regulatory Oversight - Full suite of enforcement powers including to audit practitioners and work and to rectify/stop defective work, emergency orders and directions
- Provide for role clarity and collaboration between State, Local, Private Surveyors
- Controls and reforms to support private certification model including requirement for state appointed certifiers for some types of work
- **Provision for data collection and use of national data base for lodgement and consistent templates**
- Specialist Tribunal for appeals from regulatory decisions
- Limitations on liability and statutory duty of care
- Consistent security of payment laws (including provision for statutory trusts)
- **Building product supply chain laws and product recall and banning powers with regulation co-ordinated by National Building and Construction Authority**
- Consistent Regulator Funding Model for Federal/State/Territory/Local Governments based on collection of building permit levy
- Consumer Protection (domestic/homes/apartments)
 - o Developer accountability – bond schemes, DLI, director liability
 - o Early dispute resolution support
 - o Warranty and/or DLI
 - o Contract controls