

National Competition Policy Review of the Building Act 1975

**REPORT OF THE
INTERDEPARTMENTAL REVIEW COMMITTEE
FORMED TO UNDERTAKE
A NATIONAL COMPETITION POLICY
REVIEW OF THE BUILDING ACT 1975.**

1. THE LEGISLATION

Queensland's principal legislation regulating the design and construction of all buildings is the *Building Act 1975* and its subordinate legislation. It makes provision for the accreditation of building certifiers, and sets standards for all buildings in Queensland.

The primary objectives of the *Building Act 1975* and its subordinate legislation are to safeguard public health, safety and the welfare of the community now and in the future from building fires, structural failures, defective design and materials and the like.

Specifically, the Building legislation provides a framework for:

- the application of the Building Code of Australia;
- the establishment of accrediting bodies for building certifiers;
- accreditation and regulation of building certifiers.
- the assessment of development applications;
- building inspections and certification;
- siting requirements and works (clearances, utilities etc); and
- swimming pool fencing, and material and installation standards for floating buildings.

2. THE NEED FOR A REVIEW

In April 1995, the Commonwealth, State and Territory Governments signed a set of agreements to implement a National Competition Policy (NCP). Under the policy, each participating jurisdiction committed to implementing a series of competition reforms. Pursuant to these agreements, each participating jurisdiction was obliged to review and, where necessary, reform all legislation that contained measures restricting competition.

3. SCOPE OF THE REVIEW

In addition to examining the existing legislation, the Review took into account proposals to improve the performance of building certification, including the recommendations of the *Review into Building Certification in Queensland* conducted by the Local Government Association of Queensland.

The Review did not include an examination of the Building Code Australia (BCA) which is adopted under *Standard Building Regulation 1993*. The CoAG Committee on

Regulatory Reform (CRR) examined the need for a national review of the Code in 1999. CRR noted that the process set out in the new Code was satisfactory and that the Code was substantially better than its predecessor. CRR also noted that the Code dealt with issues that were far wider than those of competition policy and agreed that there not be a full review of the Code, but that CRR will need to monitor the operation of the Code to ensure that competition policies are being taken into account.

Nor did the Review examine the need for a compliance regime. A compliance regime is not anti-competitive provided the standards used as benchmarks are relevant, developed in accordance with community expectations, applied uniformly and not in a discriminatory way. However, “how” a compliance regime is enforced can involve unreasonable restrictions on competition. The compliance regime established under the Queensland building legislation is designed to ensure, within practical limits, that buildings meet all applicable technical codes and standards and is not a restriction. However, some of the operational elements of the regime have been identified as potentially anti-competitive and were examined in the Review.

4. TYPE OF ASSESSMENT

The Queensland Legislation Review Timetable¹ identified potential restrictions on competition in the *Building Act 1975* and subordinate legislation. The Review was undertaken as a minor review in accordance with the Queensland Government’s *Public Benefit Test Guidelines* (Queensland Treasury 1999).

The decision to undertake a minor review was based on the following considerations:

- the restrictions identified in the legislation are designed to address public health and safety issues through the application of uniform building codes, not restrict competition;
- the accreditation requirements for building certifiers do not appear to be a significant impediment to market entry and are covered by Mutual Recognition legislation;
- all Australian jurisdictions require the accreditation of building certifiers in some form;
- the complaints and disciplinary processes are open and accountable; and
- although the number of stakeholders is potentially large, the impact of any changes is likely to fall on a distinct group in most instances.

The guiding principle for the review of legislation, as contained in Clause 5(1) of the Competition Principles Agreement (CPA), is that legislation should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.

5. CONDUCT OF THE REVIEW

The Review was undertaken in conjunction with the Review of the Sewerage and Water Supply legislation. Both Reviews were undertaken by a Review Committee with the assistance of independent Consultants. The Review Committee comprised a representative from each of the following:

- Local Government Services, Department of Local Government and Planning – Chair;

¹ Queensland Government, 1996.

- Building Codes Queensland, Department of Local Government and Planning;
- Queensland Building Services Authority; and
- Department of Treasury.

A draft Public Benefit Test (PBT) Report was prepared by the Consultants and released for consultation. The draft PBT Report was provided to all Local Governments and key stakeholder groups/associations directly for comment. At the same time, the conduct of the Review was advertised in the Courier Mail indicating that copies of the Consultant's draft Report were available for comment from the Department of Local Government and Planning and on the Department's website. Following consideration of submissions, the Consultants prepared a final Report for the Review Committee.

6. REGULATORY FRAMEWORK

6.1 Industry Structure

6.1.1 Building Codes Queensland

Building Codes Queensland (BCQ) (a service area of the Department of Local Government and Planning) is responsible for developing and administering appropriate building codes and approval mechanisms under the Building legislation and the Integrated Planning Act 1997.

In addition, the Chief Executive of the Department of Local Government and Planning hears appeals in relation to decisions made by the Queensland Building Services Authority relating to the professional misconduct of building certifiers.

6.1.2 Building Surveyors and Allied Professions Accreditation Board

The Building Surveyors and Allied Professions Accreditation Board (BSAP) is responsible for assessing the technical skills and experience of applicants for accreditation by the Building Services Authority (BSA).

6.1.3 Building Services Authority

In order to ensure building certifiers make decisions in the public interest, the legislation provides an accreditation system for all building certifiers, which includes an auditing regime and a complaints process managed by the Building Services Authority.

6.1.4 Local Governments

Under the both the *Building Act 1975* and *Integrated Planning Act 1997*(IPA), local governments are required to perform statutory functions upon which private certifiers must rely. These functions include providing advisory and statutory functions to private certifiers, archiving certain documents associated with a development application (for public access if required) and filing decisions of private certifiers.

6.1.5 Building Certifiers

Since 30 April 1998, the IPA has provided applicants with a choice of obtaining building approvals from either a council or an accredited private certifier. The functions of building certifiers as set out in the building legislation include –

- Assessing and deciding development applications
- Inspecting or accepting certification on the building (or demolishing of buildings and structures) for compliance with the Act
- Issuing certificates or statements of classification
- Issuing show cause and enforcement notices for work within the jurisdiction of the certifier.

Currently there are 373 building certifiers in Queensland (Table 6.1). The majority of the building certifiers have endorsement of their accreditation to operate as private sector certifiers.

Table 6.1 Number of Building Certifiers licensed by QBSA (as at June 2001)

Accreditation level	Total	Employed by Local Government	Employed by other entities
Building Surveyor (endorsed as private sector certifiers)	120	43	77
Building Surveyor (not endorsed as private sector certifiers)	19	12	7
Assistant Building Surveyor (endorsed as private sector certifiers)	163	98	65
Assistant Building Surveyor (not endorsed as private sector certifiers)	45	31	14
Building Surveying Technician (not endorsed as private sector certifiers)	26	16	10
Total	373	200	173

Source: QBSA (2002)

Building surveyors can certify all classes of buildings and structures, while assistant building surveyors and building surveying technicians can only certify buildings and structures of specific dimensions (Table 6.2). Building surveying technicians, who are not employed by the local government, cannot issue building approvals and cannot be endorsed as private sector certifiers. They can only assist in assessing and inspecting buildings.

Table 6.2 Building Certification Roles – by Licence Category

Level	Can certify	Can, under supervision, assist and inspect:
Building surveyor	All classes of building and structures	Not applicable

	structures (including residential units and flats)	
Assistant building surveyor	Buildings and structures up to 3 storeys and total floor area of no more than 2000m ² .	All classes of buildings and structures
Building surveying technician	If employed by a Local Government – Buildings and structures up to 2 storeys and total floor area of no more than 500m ² .	If not employed by a Local Government – Buildings and structures up to 2 storeys and total floor area of no more than 500m ² .

Source: LGAQ (2001)

A Departmental survey of 14 major councils in June 2001 shows that private certifiers (excluding those in Council business units) accounted for 62 per cent of all building approvals, with a 68 per cent share of non residential approvals.

7. ASSESSMENT OF RESTRICTIONS

7.1 Restrictions on Competition

In undertaking the PBT, the Consultants examined restrictions to competition in the Act relating to:

- accreditation requirements (qualifications and experience etc);
- character test;
- accreditation fees;
- treatment of building surveying technicians;
- charges for statutory functions;
- compulsory insurance;
- disciplinary processes; and
- conflict of interest.

In addition, consultation undertaken by the Consultants during the PBT identified potential conflicts of interest in local governments providing building certification services in competition with private certifiers, while also undertaking regulatory functions that private certifiers rely on. Areas where a conflict of interest can arise include the setting of fees and charges, the quality and timeliness of advisory and statutory services provided to private certifiers, and the way in which some councils have interpreted the legislation. The conflicts of interest were identified, along with other matters, as having an impact on competition in instances where such conflicts caused local governments to compete with private sector certifiers in a non-competitively neutral manner. The potential for this to occur was identified by the LGAQ in its recent review of building certification.

7.2 Competitive Neutrality of Local Government

Current arrangements

Under current arrangements, those local governments which voluntarily adopt competitive neutrality principles for their certification activities by implementing the Code of Competitive Conduct under Chapter 9 of the *Local Government Act 1993*, are required to establish a complaints process. Such a complaints process includes an initial consideration of the complaint by the business unit followed by an investigation of the complaint by a suitably trained referee appointed by the local government. The referee's findings are provided to the local government which must then decide how to respond. There is no legal requirement for the local government to take action to address a competitive neutrality breach or avenue of appeal. There is no complaints mechanism where local governments elect not to implement the Code of Competitive Conduct.

PBT Report Recommendation

To address the concerns raised about local governments not applying competitive neutrality principles when competing with private sector certifiers, the Consultants concluded in their PBT report that there are two basic options:

1. Retain the existing arrangements where both local government and private sector certifiers can provide certification services but with enhancements in terms of monitoring private certification work and in addressing conflict of interest and competitive neutrality issues for local governments; or
2. Allow only private sector certifiers to provide certification services, except in remote regions where local governments would be able to continue to provide these services, and with enhancements in terms of monitoring private certification work.

The Consultants concluded that the first option could be justified if it was considered that effective arrangements could be developed to address the conflict of interest and competitive neutrality issues and if it was considered that it was essential to provide the community with the ability to choose between a public certifier and a private sector certifier. Specifically, the Consultants considered that in order to more effectively deal with this problem, the following arrangements would need to apply:

- (a) Improved guidelines on how to ensure compliance by Local Governments with full cost pricing and competitive neutrality principles in relation to building certification and related statutory services;
- (b) Private sector certifiers to have access to an independent and effective complaints mechanism in relation to full cost pricing and competitive neutrality issues; and
- (c) Powers of an independent reviewer or similar means to ensure the full cost pricing and competitive neutrality issues are effectively resolved.

Alternatively, the Consultants concluded that the second option could be justified if it was considered that it would not be possible to develop effective arrangements to address the conflict of interest and competitive neutrality issues and if it was considered that the licensing and monitoring arrangements for private sector certifiers would provide the public with adequate protection.

Review Committee Recommendation

After examining the issues raised by the Consultant in the PBT Report and making an assessment of the likely impacts of the two options outlined by the Consultant, the Review Committee recommends the first option for the following reasons.

The second option (private sector certifiers only) has the potential to reduce the choice available to consumers in the provision of building certification services. In deciding which local governments should be permitted to provide certification services and those which should be excluded, the State Government would be asked to make a judgement of the number of private sector certifiers likely to operate in each council area and whether that would be sufficient to ensure an adequate level of competition (however that could be measured). Such a judgement by the Government would be further complicated by the need to ensure that competitive certification services are available for all types of development likely to occur in each council area, now and in the future. It is not clear that this is an appropriate task for the State Government or whether it has the appropriate skills to undertake such a task. Further, the number of local governments involved is likely to be greater than an initial consideration would suggest. Experience in relation to the provision of other services to rural areas suggests that it is more than just “remote” councils where private sector certifiers may not have an incentive to provide competitive services or any services at all.

The second option fails to recognise the major gains that have been achieved in the delivery of certification services under the current mix of private and public providers. This does not mean that there are not significant issues in relation to competitive neutrality that need to be addressed, but these need to be put in perspective. A survey of 14 major councils in June 2001 found that there has been a high degree of market penetration (over 60%) by private sector certifiers in the three years since building services have been opened to competition. Nevertheless, the survey also indicated that 38% of applicants in those areas still preferred to seek approvals from local governments.

Given the above, the Review Committee considers that the Consultants have overstated the level of the competitive neutrality problem, based as it is on anecdotal evidence provided largely by some private sector certifiers. As indicated above, this does not mean that there are no issues to be addressed. The question is whether the level of the problem is sufficient in all council areas to warrant abandoning the current arrangements altogether and moving to a private sector only model. The Review Committee believes this is not the case and that it is possible to put in place effective arrangements to address the conflict of interest and competitive neutrality issues.

The Consultants have indicated that such arrangements should include:

- (a) improved guidelines on how to ensure compliance with competitive neutrality principles;
- (b) access to an independent and effective complaints mechanism; and
- (c) an independent reviewer or similar means to ensure the competitive neutrality issues are effectively resolved.

The Department of Local Government and Planning already publishes comprehensive guidelines to assist local governments in the application of full cost pricing to local government businesses which adopt competitive neutrality principles. The Review Committee recommends that the Department examine these guidelines in consultation with local governments and representatives of private certifiers with a view to amending

or enhancing them as required to meet the specific needs of local government certification activities. The guidelines should also address suitable arrangements for the range of size and operational arrangements of Local Governments in Queensland.

As outlined above, under current arrangements, there is generally no avenue for appeal independent of local government in relation to councils' smaller business activities. However, in the case of complaints against councils' "Roads Business Activities", appeal to the Queensland Competition Authority (QCA) is possible. A local government also has the option of appointing the QCA as its referee. The appeal and reference to the QCA is in recognition of the fact that, by definition, a council's roads business activity will always be competing directly with other government and/or private sector road construction and maintenance businesses.

The Review Committee agrees with the need for an independent complaints mechanism and considers that the best option is to adopt a mechanism similar to that which applies for roads business activities under the *Local Government Act 1993*. However, there should be a staged implementation to enable the Government to develop the enhanced competitive neutrality guidelines recommended above and for Local Governments to put in place competitively neutral arrangements. In addition, consideration should be given as to what would be an appropriate threshold for the complaints mechanism to be applicable.

However, the Review Committee does not support the establishment of an independent reviewer or similar means to ensure the competitive neutrality issues are effectively resolved. There is no precedent for such a body in terms of enforcing the outcome of competitive neutrality complaints, nor is such a requirement included in the relevant provisions of the *Competition Principles Agreement*.

7.3 Accreditation

Current arrangements

Only accredited building certifiers can perform building certification and other specified building-related functions. The legislation provides for three accreditation levels and reserves certain areas of practice to some levels. Accreditation includes a requirement to meet educational and experience criteria. The Building Surveyors and Allied Accreditation Board (BSAP) assess the eligibility of building certifiers for accreditation by the BSA. As part of maintaining their accreditation building certifiers must also complete compulsory professional development.

PBT Report Recommendation

The PBT report acknowledges the current educational and experience requirements for accrediting building certifiers seem reasonable. However, the report recommends building certifiers should be free to choose the nature and extent of continuing professional development that is in their best interest.

In addition, the report recommends BSAP should not have sole discretion to determine accreditation requirements.

The PBT Report also examined a proposal for additional planning competencies to be required for those building certifiers who issue building approvals. This proposal was developed to address concerns identified in the review of building certification about instances of non-compliance by private sector certifiers with planning scheme

requirements. The PBT Report concluded the requirement for building certifiers to possess appropriate planning competencies may provide a significant public benefit. However, effective competition would be constrained unless the competitive neutrality problems within Local Governments are effectively addressed.

The Report also identified there may be scope to adopt an approach that has similar benefits but is less restrictive in its impact on competition (e.g. requirements on Local Governments to clarify their planning requirements and make them more accessible). While all local governments are required to introduce new IPA schemes by March 2003, examination of these schemes prepared to date indicate the level of complexity will persist and interpretation of schemes will continue to be a problem.

The PBT Report concluded that further consultation and investigation are needed to establish whether an additional planning competency for building certifiers would provide a public benefit.

Review Committee Recommendation

The Review Committee does not agree that the accreditation system alone would provide adequate and effective means of compelling building certifiers to undertake continuing professional development. Building legislation is subject to constant revision. The absence of a mandatory CPD requirement will increase pressure on the auditing system.

However, the Review Committee believes the CPD scheme should be better focused at addressing inadequacies in the competencies of the building certifier profession. The Review Committee recommends the Building Act should require the chief executive of the Department of Local Government and Planning to approve appropriate CPD schemes that address the inadequacies in the competencies of the building certifier profession.

The Australian Building Codes Board (ABCB), which is established by an intergovernmental agreement between the Commonwealth, State and Territories to develop national building standards, has recently completed a review of the national accreditation framework for building certifiers. The Review Committee recommends the Building Act should require BSAP, in determining accreditation requirements for building certifiers, to comply with the national accreditation framework produced by the ABCB. This will address concerns about the discretion of BSAP in determining accreditation requirements for building certifiers.

Concerning the proposal for an additional planning competency, private certifiers issuing building approvals that do not comply with town planning requirements are the primary source of complaint by councils.

The PBT Report identified that the number of complaints registered by the BSA against building certifiers is small in relation to the number of building approvals that have been issued. However, the Review Committee believes the number of registered complaints understates the extent of non compliance with the legislation by private certifiers. Investigations by the Department of Local Government and Planning confirm the ignorance and negligence of a small number of private certifiers, poor advice provided by some councils and the complexity of planning schemes to be the major contributing factors.

The problem highlights difficulties in the current legislation, as certifiers are not accountable to local communities. As a private certifier is allowed to issue a building

permit allowing work to proceed, this is effectively certifying that all other planning requirements have been met. The legislation assumes that planning requirements would be easy to interpret but this has not been the case, with many planning schemes requiring complex legal interpretation.

As local government is accountable to the community for maintaining local planning standards the Review Committee believes local government should participate in accrediting and auditing those certifiers who are required to ensure planning scheme requirements are met, provided competitive neutrality issues are addressed. This will increase the accountability of private certifiers back to local government and the community.

It is not feasible for each council to accredit private certifiers to operate in their area. Therefore, the Review Committee supports a two level scheme administered by the BSA with local government participation.

All building certifiers would be accredited by the BSA as is currently the case. The BSA would assess their technical competency and if accredited, these certifiers would be allowed to assess but not approve building plans for compliance with the building regulations. However, to issue approvals, a higher level of accreditation from the BSA would be required to ensure the certifier has the necessary planning and regulatory skills. Alternatively, building certifiers accredited at the base level could issue an approval upon gaining approval by the relevant council of the planning aspects of an application. The Review Committee recommends that the Department of Local Government and Planning, in consultation with BSA, the LGAQ and private certifier representatives establish the necessary planning competencies for the additional accreditation.

7.4 Character Test

Current arrangements

In order to be accredited as a building certifier an applicant must pass a “fit and proper person” test. In deciding whether the applicant is a fit and proper person to be accredited as a building certifier, the BSA may consider:

- dealings in which the applicant has been involved and the standard of honesty and integrity demonstrated in the dealings; and
- any failure by the applicant to carry out statutory obligations and the reasons for the failure, and
- any other matter the BSA considers appropriate.

PBT Report Recommendation

A requirement that applicants must pass a subjective test as to their good character has the potential to exclude persons from practising despite possessing the necessary qualifications. The PBT report acknowledges the requirement for a building certifier to pass a “fit and proper person” character test results in a benefit to the public and should therefore remain part of the legislation. However, the report recommends the legislation needs to be more objective and not allow broad discretion by the BSA.

Review Committee Recommendation

The Review Committee supports the recommendation the legislation needs to be more objective and not allow broad discretion by the BSA.

7.5 Accreditation Fees

Current arrangements

The accreditation fees levied on building certifiers provide the necessary resources to undertake random audits and investigate complaints. The accreditation fee prescribed in the *Building Regulation 1991* is \$500 per annum, with a once only \$100 administration charge for the initial assessment and approval of a building certifier applicant. The way in which accreditation fees are set could constitute a restriction on entry especially for small operators.

PBT Report Recommendation

The PBT report acknowledges that while the accreditation fees appear high relative to other professions, unless they are clearly exorbitant, they will not be a major restriction on competition. The main issues relate to the manner in which Local Governments implement arrangements to ensure that they comply with competitive neutrality with respect to their commercial certification services.

The PBT report also advocates the BSA increase the frequency and scope of audits of building certifiers, including audits of compliance with planning approvals and codes. If the BSA is to increase its activities to the extent necessary to ensure community standards are not compromised, the cost of operating the accreditation system will increase.

The PBT report identified there would be a public benefit that would justify levying accreditation fees, fines and audit fees to adequately cover monitoring costs of certification services. The specific options for additional BSA funding include raising the current annual accreditation fee; imposing an additional fee for private sector certifiers (recognising that they are the main focus of BSA audits); imposing a percentage levy on building work, or imposing an audit fee commensurate with the number of building applications assessed by each entity, supplemented by a discount and penalty system. The Report concludes the best option for covering the costs of monitoring would be one where the fee was as closely related as possible to the income generated by the certifier in undertaking the certification work, with discounts to reward good performance and penalties for poor performance.

Review Committee Recommendation

The Review Committee recommends that the enhanced competitive neutrality guidelines recommended above should address the manner in which local governments implement arrangements to account for the accreditation fees of their building certifiers as competitive neutrality adjustments. This will ensure that they comply with competitive neutrality with respect to their commercial certification services.

The Review Committee supports increasing the frequency and scope of audits of building certifiers, including audits of compliance with planning approvals and codes. The role of the BSA in auditing the work of certifiers is crucial to the smooth and effective operation of the whole system. At present, the risks for certifiers are relatively low due to the low frequency of audits and the difficulty in applying appropriate penalties quickly.

In respect of providing adequate funding to operate the accreditation system, the Review Committee agrees the best option for covering the costs of monitoring would be one

where the fee was as closely related as possible to the income generated by the certifier in undertaking the certification work, with discounts to reward good performance and penalties for poor performance.

7.6 Building Surveying Technicians

Current arrangements

The *Standard Building Regulation 1993* reserves certain areas of practice to building certifiers depending on their level of accreditation and whether they are employed by a local government or not. Building certifiers accredited at the level of building surveying technicians employed by Local Governments can approve building work of the most common sizes of buildings. Their private sector counterparts cannot approve any building work. They can only assist in assessing and inspecting building work.

PBT Report Recommendation

The PBT report states these arrangements are a breach of competitive neutrality. However, the PBT report concluded allowing only building surveying technicians employed by remote and small councils to approve building work could be justified. Otherwise, building surveying technicians must only assist in assessing and inspecting building work irrespective of who they work for.

Review Committee Recommendation

The prescribed qualifications for accreditation as a private certifier entail having appropriate education and experience, sufficient to be accredited at the level of building surveyor or assistant building surveyor with the Building Surveyors and Allied Professions Accreditation Board (BSAP). These requirements are intended to prevent inexperienced certifiers from entering private practice. The current BSAP rules for accreditation as a building surveyor technician do not require the applicant to have any regulatory experience. It is therefore unacceptable for all building surveyor technicians to be eligible to practise as private certifiers.

A recently completed review of the national accreditation framework for building certifiers undertaken by the Australian Building Codes Board (ABCB) also decided against allowing building surveyor technicians to be eligible to practice as private certifiers. The ABCB framework only allows for building surveyor technicians to be employed by councils. The purpose of this was to ensure remote and small communities would be served by council staff with some building surveying expertise but supported by the regulatory expertise of the whole council.

The Review Committee supports allowing only building surveying technicians employed by remote and small councils to approve building work. Otherwise, building surveying technicians must only assist in assessing and inspecting building work irrespective of who they work for.

7.7 Fees for Statutory Functions

Current arrangements

Under the Building Act Acts, local governments are required to perform statutory functions upon which private certifiers must rely. These functions include providing information to private certifiers, archiving certain documents associated with a development application (for public access if required) and filing decisions of private certifiers. The performance of these statutory functions is a public service that should be provided by councils at a reasonable charge. This view is reflected in the Building Act, which states councils may charge for services, as long as the charge is reasonable.

These provisions have the potential to restrict competition by conferring a disbenefit by adding to the costs faced by only one section of the market (ie private certifiers).

PBT Report Recommendation

The PBT report identifies the main issue regarding fees for statutory functions is the need for local governments to achieve competitive neutrality in their charges. Any advantage enjoyed by local government certifiers should be reduced to the extent that equivalents for such Council charges are reflected in their charges to clients for commercial services as competitive neutrality adjustments.

In addition, the PBT report recommends councils should be responsible for ensuring development in their area is consistent with the planning scheme. This raises the issue of how such a function should be funded. Currently there is no specific fee that Councils can charge for ensuring that there is compliance with their planning requirements. The funds come out of rates or any excess from other statutory charges.

Given concerns about accountability and transparency, the PBT Report recommends there be a separate fee to cover the costs of auditing to ensure compliance with planning requirements. In addition the report recommends any additional statutory charges should not be introduced until improved arrangements are implemented to address conflict of interest and competitive neutrality problems associated with Councils.

Review Committee Recommendation

The Review Committee recommends the enhanced competitive neutrality guidelines address the need for local government to achieve competitive neutrality in their fees for statutory functions. In particular, the guidelines should identify any advantage enjoyed by local government certifiers should be reduced to the extent that equivalents for such Council charges are reflected in their charges to clients for commercial services as competitive neutrality adjustments.

While the cost of Local Government undertaking planning audits of building approvals could be covered by its rates as a community service obligation, there is also an equally valid argument that the building applicant should cover these costs. Therefore, where a private certifier approves development, the Review Committee believe it would be reasonable for Local Government to recover auditing costs.

7.8 Compulsory Insurance

Current arrangements

Private building certifiers are required to have a minimum level of professional indemnity insurance. While providing consumer protection, compulsory insurance requirements can have the effect of restricting access to the profession or occupation, thus reducing competition and increasing prices. To the extent that operators cannot obtain insurance at a price they can afford to pay, they are effectively excluded from the market. Insurers may thereby take on the role of de facto regulators of standards, since they will ultimately determine who is and is not able to practice. The cost of insurance of itself may increase the cost of providing the service. To the extent that premiums do not fully reflect claims experience, the effect is for practitioners with better performance and their clients to subsidise the practices of poorer practitioners.

PBT Report Recommendation

Rather than specifying a compulsory requirement for professional indemnity insurance the PBT report examined whether building certifiers should be required to advise homeowners and builders whether they have professional indemnity insurance and the nature and extent of the cover. However, until an effective accreditation system is operating the PBT report concluded the requirement for compulsory professional indemnity insurance should be retained.

Review Committee Recommendation

The Review Committee believes reliance on the auditing system to eliminate all fault by building certifiers is not practical. The \$1million minimum Professional Indemnity cover required by the *Standard Building Regulation 1993* is to ensure home owners are adequately covered for the negligence and incompetence of building certifiers. It is expected that the development industry would be astute enough to handle such matters but home buyers would not have sufficient knowledge to satisfactorily deal with this matter.

7.9 Disciplinary Processes

Current arrangements

The Building Act provides for the accrediting body to investigate complaints against building certifiers and decide whether or not the building certifier is guilty of professional misconduct. If found guilty, the penalties range from no further action, reprimand, imposition of conditions, compulsory education courses, suspension of accreditation through to cancellation of accreditation. A building certifier may appeal to the chief executive if dissatisfied with the accrediting body's decision, and then to the Planning and Environment Court if dissatisfied with the chief executive's decision.

PBT Report Recommendation

The PBT report identified several issues with the current disciplinary processes for building certifiers including ensuring natural justice, clarity in the definition of professional misconduct, inappropriate penalties for minor and major offences and overlapping responsibilities in investigating complaints. The PBT report also acknowledges the LGAQ review made several useful recommendations that would improve disciplinary processes.

Review Committee Recommendation

The private certification system relies on accreditation, auditing, and complaints handling by the BSA to maintain the performance of private certifiers. If the auditing and complaint management system were not effective, the level of non-compliance would increase, as would public dissatisfaction. The Review Committee recommends the *Building Act 1975* be amended as follows to improve the disciplinary processes for building certifiers.

- The code of conduct regulating the behaviour of building certifiers will now be approved by the chief executive of the Department of Local Government and Planning. This will also allow the department to respond to emerging professional practice issues more effectively.

- To minimise the number of disputes that proceed to a formal complaint, it is proposed to give the BSA the ability to require mediation independent of the BSA to be undertaken before the BSA will investigate a complaint.
- The definition of ‘professional misconduct’ will be amended to create a category of ‘unsatisfactory conduct’ for minor offences and leave more serious misconduct as ‘professional misconduct’. This will address criticisms the current complaint system is too rigid with no clear distinction between offences for basic administrative mistakes and offences that are serious technical breaches. An appropriate range of penalties for each category will be provided.
- To enable the BSA to address poor standards of professional practice, the disciplinary action that may be taken against a building certifier will be expanded. This will include developing a system of demerit points and on the spot fines, for unsatisfactory conduct (i.e. minor administrative offences and mistakes). Penalties will increase for continued unsatisfactory conduct leading to an offence of professional misconduct.
- The powers currently held by the BSA to determine the guilt, and appropriate discipline, of a building certifier for a charge of professional misconduct will be transferred to the Queensland Building Tribunal established under the *Queensland Building Tribunal Act 2000*. This will address concerns the BSA undertakes the roles of both prosecutor and judge in a disciplinary matter. However, responsibility for determining the guilt and appropriate penalty for a lesser charge of unsatisfactory conduct will remain the responsibility of the BSA. Appeal of the BSA decisions on the lesser charge will be to the Queensland Building Tribunal.
- As councils are responsible for maintaining the integrity of their planning schemes, Councils should be responsible for auditing the planning aspects of private certifiers works and laying disciplinary charges against building certifiers in the Tribunal. The advantage of this proposal is that it increases the accountability of private certifiers back to local government and the community, who have the primary interest in ensuring planning standards are upheld.

7.10 Conflict of Interest

Current arrangements

All building certifiers are prohibited from engaging in building certifying functions that could involve a conflict of interest. Building certifiers are deemed to have a conflict of interest if they have direct or indirect pecuniary interest in the building or structure, or for building work:

- they carry out the work or are employed by the owner or person who carries out the work;
- are engaged to carry out other functions (other than giving regulatory advice) by the owner or person who carries out the work; or
- have a direct or indirect pecuniary interest in the building work or in an entity carrying out the building work.

PBT Report Recommendation

The PBT report acknowledges conflict of interest is a major issue and that there is a need for special regulatory arrangements. It finds the existing regulatory provisions are

adequate. The current legislation deters private certifiers from accepting a benefit as a reward to act in contravention of the Act through the accreditation system and by providing a penalty of 165 penalty units for matters such as acting outside their scope of powers. The PBT report also agrees with the recommendations in the LGAQ report calling for greater community awareness to improve consumer knowledge.

Review Committee Recommendation

Owner awareness is a critical accountability mechanism in ensuring both builders and certifiers perform adequately. An owner should clarify, and be satisfied with, who will be issuing development approval for their building work before signing a contract with a building contractor.

However, builders generally choose to engage private certifiers without the knowledge of and consent of the owner. Most major building companies have entered into contractual arrangements with private certifiers to provide services. Councils advise that in domestic situations, owners generally believe the building work is to be approved by the council.

A requirement to only allow owners to engage certifiers is not favoured. It is unlikely in many instances home buyers will engage a certifier other than recommended by a building contractor. In addition, in the case of house and land packages, the owner is the developer or building contractor. Instead, the Review Committee recommends building certifiers should be required to advise an owner who is doing the certification work for their building and who is responsible for mistakes and how these are addressed.

There also appears to be some confusion as to the respective role of private certifiers and builders. The purpose of a private certifier inspecting work is to decide if the construction generally meets minimum health and safety standards required by the Building Act. However, the primary responsibility for compliance with the Act rests with the builder. Workmanship issues are also the sole responsibility of the builder. The Department of Local Government and Planning is currently preparing a brochure, which clearly outlines the role of the certifier in this regard.

In addition, where builders engage certifiers, the owner is unlikely to receive approval documents until after the contract is completed as these documents are forwarded to the builder. To address this, the Review Committee recommends building certifiers be required to provide copies of building approvals and inspection certificates directly to the owner.

Summary of Review Committee Recommendations

1. The Department of Local Government and Planning amend or enhance existing competitive neutrality guidelines to meet the specific needs of local government building certification activities. The guidelines should address suitable arrangements for the range of size and operational arrangements of Local Governments in Queensland.
2. The *Local Government Act 1993* be amended to allow competitive neutrality complaints concerning local government building certification businesses and the performance of statutory building functions to be provided for in the same manner as complaints concerning the roads business activities of local governments.

However, there should be a staged implementation to enable the Government to develop the enhanced competitive neutrality guidelines recommended above and for Local Governments to put in place competitively neutral arrangements. In addition, consideration should be given as to what would be an appropriate threshold for the complaints mechanism to be applicable.

3. The establishment of an independent reviewer or similar means to ensure the competitive neutrality issues are effectively resolved is not supported. There is no precedent for such a body in terms of enforcing the outcome of competitive neutrality complaints, nor is such a requirement included in the relevant provisions of the *Competition Principles Agreement*.
4. The Building Act should require the chief executive of the Department of Local Government and Planning to approve appropriate continuing professional development schemes that address the inadequacies in the competencies of the building certifier profession. The Review Committee does not agree that the accreditation system alone would provide adequate and effective means of compelling building certifiers to undertake continuing professional development.
5. The Building Act should require the Building Surveyors and Allied Professions Accreditation Board (BSAP), in determining accreditation requirements for building certifiers, to comply with the national accreditation framework produced by the Australian Building Codes Board. This will address concerns about the discretion of BSAP in determining accreditation requirements for building certifiers.
6. The Building Act should require an additional planning competency for building certifiers who issue building approvals. Consultation should be undertaken with stakeholders to determine the appropriate planning competencies when developing the Regulation.
7. The competitive neutrality guidelines should address the manner in which local governments implement arrangements to account for the accreditation fees of their building certifiers as competitive neutrality adjustments.
8. The BSA should increase the frequency and scope of audits of building certifiers, including audits of compliance with planning approvals and codes. At present, the risks for certifiers are relatively low due to the low frequency of audits and the difficulty in applying appropriate penalties quickly.

9. The best option for providing adequate funding to operate the accreditation system would be one where the fee was as closely related as possible to the income generated by the certifier in undertaking the certification work, with discounts to reward good performance and penalties for poor performance.
10. Only building surveying technicians employed by remote and small councils should be allowed to approve building work. Otherwise, building surveying technicians must only assist in assessing and inspecting building work irrespective of who they work for.
11. The competitive neutrality guidelines address the need for local government to achieve competitive neutrality in their fees for statutory functions. In particular, the guidelines should identify any advantage enjoyed by local government certifiers should be reduced to the extent that equivalents for such Council charges are reflected in their charges to clients for commercial services as competitive neutrality adjustments.
12. Local Governments should be able to recover auditing costs where a private certifier approves development.
13. Until an effective accreditation system is operating the requirement for compulsory professional indemnity insurance should be retained.
14. Building certifiers should be required to advise an owner who is doing the certification work for their building and who is responsible for mistakes and how these are addressed. In addition, building certifiers should be required to provide copies of building approvals and inspection certificates directly to the owner.
15. The *Building Act 1975* should be amended as follows to improve the disciplinary processes for building certifiers.
 - The code of conduct regulating the behaviour of building certifiers will now be approved by the chief executive of the Department of Local Government and Planning. This will also allow the department to respond to emerging professional practice issues more effectively.
 - To minimise the number of disputes that proceed to a formal complaint, the BSA be given the discretion to require mediation independent of the BSA to be undertaken before the BSA will investigate a complaint.
 - The definition of 'professional misconduct' be amended to create a category of 'unsatisfactory conduct' for minor offences and leave more serious misconduct as 'professional misconduct'. This will address criticisms the current complaint system is too rigid with no clear distinction between offences for basic administrative mistakes and offences that are serious technical breaches. An appropriate range of penalties for each category will be provided.
 - The disciplinary action that may be taken against a building certifier be expanded to enable the BSA to address poor standards of professional practice. This would include developing a system of demerit points and on the spot fines, for unsatisfactory conduct (i.e. minor administrative offences and mistakes). Penalties would increase for continued unsatisfactory conduct leading to an offence of professional misconduct.

- The powers currently held by the BSA to determine the guilt, and appropriate discipline, of a building certifier for a charge of professional misconduct should be transferred to the Queensland Building Tribunal established under the *Queensland Building Tribunal Act 2000*. However, responsibility for determining the guilt and appropriate penalty for a lesser charge of unsatisfactory conduct should remain the responsibility of the BSA. Appeal of the BSA decisions on the lesser charge will be to the Queensland Building Tribunal.
- As councils are responsible for maintaining the integrity of their planning schemes, Councils should be responsible for auditing the planning aspects of private certifiers works and laying disciplinary charges against building certifiers in the Tribunal. The advantage of this proposal is that it increases the accountability of private certifiers back to local government and the community, who have the primary interest in ensuring planning standards are upheld.