



**ECONOMIC INSIGHTS PTY LTD**

Economic Consultants

**PUBLIC BENEFIT TEST —**

**THE QUEENSLAND BUILDING ACT AND  
ASSOCIATED REGULATIONS**

**FINAL REPORT**

**PREPARED FOR THE QUEENSLAND DEPARTMENT  
OF LOCAL GOVERNMENT AND PLANNING**

**20 MAY 2002**

**CONTACT:  
DR JOHN FALLON  
PH: (07) 3831 1633**

## PREFACE

This report has been prepared by Economic Insights for the Queensland Department of Local Government and Planning. Economic Insights is an independent, Brisbane-based firm of economic consultants.

Please note this report contains the findings of Economic Insights and not the Queensland Government.

The report presents the findings of a public benefit test of certain restrictions to competition contained in the Queensland Building Act 1975 and its subordinate legislation.

A draft report was made available for public consultation by the Department of Local Government and Planning to inform interested parties of the public benefit test and to seek comment on the preliminary findings in the draft report. This final report takes account of views presented in submissions and from further consultation with key stakeholders in the period since the draft report was released.

## TABLE OF CONTENTS

OVERVIEW	1
1 INTRODUCTION	10
1.1 REASONS FOR THE PUBLIC BENEFIT TEST	10
1.2 THE PUBLIC BENEFIT TEST METHODOLOGY	10
1.3 THE APPROACH	11
2 THE LEGISLATION	12
2.1 THE LEGISLATION TO BE REVIEWED	12
2.2 THE OBJECTIVES OF THE LEGISLATION	12
2.3 THE LEGISLATIVE FRAMEWORK	13
2.3.1 Building Codes Queensland	13
2.3.2 Building Surveyors and Allied Professions Accreditation Board	13
2.3.3 Queensland Building Services Authority	14
2.3.4 Local Councils	14
2.4 THE REGULATED PRACTITIONERS	15
2.4.1 Building Certifiers	15
2.4.2 Development Applications	17
2.4.3 Building Inspections	17
2.4.4 Certification	18
2.5 THE LEGISLATED RESTRICTIONS ON COMPETITION	18
2.5.1 Accreditation	18
2.5.2 Character Test	20
2.5.3 Accreditation Fees	21
2.5.4 Building Surveying Technicians	21
2.5.5 Charges for Statutory Functions	21
2.5.6 Compulsory Insurance	21
2.5.7 Disciplinary Processes	22
2.5.8 Conflict of Interest	22
3 A GENERAL RATIONALE FOR THE REGULATION OF BUILDING CERTIFICATION WORK	24
4 KEY ISSUES RAISED IN PUBLIC CONSULTATION	26
4.1 COMPLAINTS ABOUT PRIVATE SECTOR CERTIFIERS AND THE PERFORMANCE OF THE CURRENT PRIVATE CERTIFICATION SYSTEM	26
4.2 STATUTORY CHARGES	28

4.3	OTHER COMPETITIVE NEUTRALITY ISSUES	31
4.4	ACCREDITATION	36
4.5	CHARACTER TEST	38
4.6	ACCREDITATION FEES	38
4.7	BUILDING SURVEYING TECHNICIANS	38
4.8	PROFESSIONAL INDEMNITY INSURANCE	39
4.9	DISCIPLINARY PROCESSES	39
4.10	CONFLICT OF INTEREST	40
5	THE ASSESSMENT OF BROAD REGULATORY OPTIONS	41
5.1	DEREGULATION	41
5.2	NEGATIVE LICENSING	41
5.3	CODE OF CONDUCT SUPPLEMENTED BY MINIMUM LICENSING REQUIREMENTS	42
5.4	POSITIVE LICENSING AND AUDITING OF OUTPUTS	43
5.5	ROLES OF VARIOUS ENTITIES	43
6	THE ASSESSMENT OF SPECIFIC OPTIONS FOR CERTIFICATION SERVICES, LICENSING AND REGULATORY ENFORCEMENT	47
6.1	OVERVIEW OF OPTIONS	47
6.2	OPTIONS FOR PROVIDING FORMAL CERTIFICATION SERVICES	49
6.2.1	Local Government and independent private sector certifiers to provide certification services with modifications to the current arrangements to address identified problems	49
6.2.2	Certification by only independent private sector certifiers with modifications to the current arrangements to address identified problems and with an exception for remote regions where Local Governments would still be able to provide certification services	51
6.2.3	Self certification by suitably qualified builders supplemented by the freedom to use independent private sector certifiers	54
7	THE ASSESSMENT OF SUPPORTING REGULATORY AND ADMINISTRATIVE OPTIONS FOR LICENSING, MONITORING AND ENFORCEMENT	56
7.1	ACCREDITATION	56
7.2	CHARACTER	58
7.3	ACCREDITATION FEES	59
7.4	BUILDING SURVEYING TECHNICIANS	62
7.5	CHARGES FOR STATUTORY FUNCTIONS	62
7.6	COMPULSORY INSURANCE	63
7.7	DISCIPLINARY PROCESSES	65
7.8	CONFLICT OF INTEREST	66

---

8	CONCLUSION	68
ANNEX A	PERSONS CONSULTED FOR DRAFT REPORT	72
ANNEX B	PERSONS CONSULTED FOR FINAL REPORT	75
ANNEX C	LIST OF SUBMISSIONS	76
ANNEX D	INTERJURISDICTIONAL REVIEW	78
ANNEX E	REFERENCES	87
FIGURES		
Figure 6.1	Building Certification – Government and Private Roles	48
TABLES		
Table 2.1	Number of Building Certifiers licensed by QBSA (as at June 2001)	16
Table 2.2	Building Certification Roles – by Licence Category	17
Table 2.3	Prescribed Qualifications and Training for Building Certifiers	19
Table 2.4	Minimum CPD Points Required by BSAP	19
Table 4.1	Results of Certifier Complaints (since 1998)	26
Table D.1	Number of Building Certifiers and Complaints	81

## ACRONYMS

AIBS	Australian Institute of Building Surveyors
BCQ	Building Codes Queensland
BSAP	Building Surveyors and Allied Professions Accreditation Board
CPD	Continuing Professional Development
LGAQ	Local Government Association of Queensland
PBT	Public Benefit Test
QBSA	Queensland Building Services Authority

## OVERVIEW

*This is a Public Benefit Test (PBT) of the building legislation*

Economic Insights has been engaged by the Department of Queensland Local Government and Planning to undertake a Public Benefit Test (PBT) of certain restrictions to competition in the Queensland *Building Act 1975* and its subordinate legislation. The PBT is to examine the costs and benefits of the restrictions to competition and alternative means of meeting the objectives of the legislation.

The approach that has been adopted is based on the application of appropriate economic and governance principles, consultation with key stakeholders and identification and qualitative assessment of features of the legislation. A preliminary draft report was made publicly available to help ensure transparency in the process and to facilitate the provision of key relevant information required to inform the PBT.

*In places we have presented a preference for certain options and recommendations, however, we note that there is scope to take a different view*

As this PBT is a minor review and qualitative in nature we are not able to definitively resolve all issues and definitively determine the best options. In places we have presented a preference for certain options and recommendations, however, we note that there is scope to take a different view.

*The legislation is focused on improving and safeguarding public health, safety and amenity*

The objectives of the Building Legislation are to improve and safeguard public health, safety and amenity in the design, construction and use of buildings.

*Building Codes Queensland is responsible for developing and administering appropriate building codes and approval mechanisms*

Building Codes Queensland, 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 Integrated Planning Act 1997. The Building Services Authority has responsibility for accrediting building certifiers and for maintaining proper standards of professional practice, including the monitoring of building certifiers. The Chief Executive of the Department of Local Government and Planning hears appeals in relation to decisions made by the Building Services Authority relating to professional misconduct of building certifiers.

*Local Governments have responsibility for town planning issues. They also provide commercial certification services in competition with private sector certifiers and regulate planning aspects of those certification services*

Both Local Governments and private sector certifiers offer commercial certification services while Local Governments also have some regulatory responsibilities in relation to certification services. In particular they are able to audit private sector certifiers work for compliance with town planning requirements.

There are 373 building certifiers in Queensland. They can work independently or for Local Governments. They are required to assess and approve development applications for building work, and inspect work for compliance with the

legislation. Private certifiers are also required to refer certain aspects of building proposals to Local Government for advice and approval.

The restrictions to competition examined by the PBT relate to —

*The restrictions to competition relate to: accreditation, a character test, accreditation fees, treatment of building surveying technicians, charges for statutory functions, compulsory insurance, disciplinary processes and conflict of interest*

- ❑ Accreditation. Building certifiers must be accredited at a particular level, depending on their qualifications and experience. There are also compulsory requirements for continuing professional development.
- ❑ A character test. Building certifiers must pass a “fit and proper person” test.
- ❑ Accreditation fees. The application fee is \$100 and the annual fee is \$500. The requirement for continuing professional development involves other fees, raising the total compulsory cost of accreditation.
- ❑ Treatment of building surveying technicians. 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.
- ❑ Charges for statutory functions. Local Governments can charge fees for various statutory functions, including providing information to private sector certifiers and processing documentation received from private sector certifiers.
- ❑ Compulsory insurance. Private sector certifiers are required to have minimum professional indemnity insurance of \$1 million.
- ❑ Disciplinary processes. The Building Services Authority can investigate complaints about certifiers and take disciplinary action.
- ❑ Conflict of interest. Building certifiers are not allowed to carry out their functions if there is a conflict of interest.

There is a clear rationale for at least some regulation of building certification work. There are information problems in the market that would prevent buyers from making sound decisions in the absence of some form of government intervention. In addition, there are third party effects that mean the decisions of one party can adversely affect another, third party, and there is a clear rationale for government intervention to protect these third parties.

*Some form of licensing is likely to be an efficient mechanism to deal with the information and public safety issues*

Information problems, public safety concerns and third party effects and the efficiency of some form of licensing in dealing with these effects are considered to provide a strong rationale for some form of licensing for building certification services.

If a decision is made that some formal licensing and monitoring of the work of building certifiers is required, there are important decisions to be made about which government entities should be responsible for such functions. It is



considered best if policy, regulatory and commercial functions are effectively separated.

*Many of the problems with the current arrangements relate to defining appropriate roles of the various public and private entities involved*

It is also considered that many of the potential conflicts of interest, competitive neutrality issues and inefficiencies that arise with the current arrangements relate to defining appropriate roles and ensuring effective accountability of the various public and private entities involved.

*Private sector certifiers have identified competitive neutrality as a key issue*

Private sector certifiers consulted for the PBT identified areas where a conflict of interest can arise. These include the setting of fees for regulatory functions, the quality of advisory and statutory services provided by councils to private certifiers, and the way in which some councils have interpreted the legislation with the single purpose of frustrating private certifiers.

Submissions made by Councils rejected many of the claims made by private sector certifiers. However, we consider that overall there is sufficient information available to confirm that there are important competitive neutrality issues that have not been effectively addressed by a significant number of Councils including some larger Councils.

*Local Governments may be reluctant to identify errors in the work of their own certifiers*

A competitive neutrality issue also arises because a Local Government may be reluctant to identify errors in the work of their own building certifiers as this could expose a council to a claim for costs. However, it was also claimed that private sector certifiers may also overlook minor defects by builders in order to keep their business. This is one reason for having the conflict of interest provision in the legislation. It also highlights the need to have an effective audit and enforcement mechanism in relation to the work of all building certifiers.

*A key issue is the responsibility for defective work*

There is also an important design weakness in the regulatory regime relating to the responsibility for defective work. The legislation places the onus on a building owner for correcting any defective work undertaken by a building certifier. The Building Services Authority has advised that owners are able to make a claim against a building certifier or a builder for defective work or seek to have these parties correct any defective work.

It is even possible that some Local Governments may have an incentive to overlook any errors arising from their own work. In the event that a building owner separately identifies an error in the work of a Local Government certifier, and makes a complaint against the certifier, the Local Government would be required to judge the adequacy of their own certifier. There is a conflict of interest that may prevent Local Government and private sector certifiers being treated equally.

It seems clear that the current regulatory system gives rise to an unavoidable and potentially serious conflict of interest. Not only does this conflict adversely affect

competition between Local Government certifiers and private sector certifiers, over time it has the potential to undermine building standards.

*Some private sector certifiers have pointed to delaying tactics*

Some private sector certifiers pointed to situations where Local Governments have engaged in unnecessary and unfair delay tactics when dealing with private sector certifiers. It was argued that approvals and relaxations for the clients of Local Government certifiers are given priority. In particular, it was claimed that plumbing and drainage approvals have been held back for no reason other than to inconvenience the private sector certifiers. This is possible because there are no time limits under the Standard Sewerage Law for the provision of those approvals. It was also claimed that some Local Governments have used the plumbing approval process to secure work for and/or subsidise their certification services business.

*There are also delaying tactics with regard to the provision of information*

Some private certifiers suggested that the delaying tactics are employed with regard to the provision of information. However, Local Governments claimed that Councils often do not have the information available or in a form to be able to provide it to private certifiers.

*There are important issues to resolve in terms of defining appropriate roles and responsibilities for State and Local Governments and private sector certifiers*

In relation to checking compliance with local building and planning codes, it is considered that Local Governments should retain a prominent role given their expertise and that they represent local communities where the building work occurs.

A further issue is the appropriate body to manage the licensing regime. Alternatives include creating a single body to manage all occupationally licensed trades in Queensland and removing building certifiers from the responsibility of the Building Services Authority or allocating all licensing responsibility to the Building Services Authority. Key aspects to consider for these alternatives are the potential for 'regulatory capture' (where the members of the regulated industry have too much influence over the regulator), the unit cost of service delivery of the regulatory arrangements and the degree of consumer protection provided.

*The options for providing commercial certification services include: retain the current arrangements, allow only private sector certifiers or self-certification*

The options for providing commercial certification services are —

1. Retain the current arrangements where both Local Government and independent private sector certifiers can provide certification services (with certain modifications to improve the performance of both private sector certifiers and Local Governments).
2. Certification by independent private sector certifiers only, except in remote areas, where Local Governments would still be able to provide certification services.
3. Self-certification by suitably qualified builders supplemented with the freedom to use independent private sector certifiers.

An option to allow only Local Governments to provide certification services was not assessed, because it is considered that it would be more restrictive to competition than the current arrangements. The Queensland Government's *Public Benefit Test Guidelines* do not allow the consideration of options that would be more restrictive than the current arrangements.

Option 1 is essentially the current arrangements with some enhancements to improve the enforcement process for private sector certifiers and to more effectively address the conflict of interest and competitive neutrality issues that arise for Local Governments. It is considered that in order to more effectively deal with these issues, the following arrangements would need to apply:

*If Local Governments continue to provide certification services, the following would need to apply: a) improved guidelines to comply with full cost pricing and competitive neutrality principles; b) private sector certifiers to have access to an independent and effective complaints mechanism; and c) powers of an independent reviewer or similar means to ensure full cost pricing and neutrality issues are effectively resolved*

- 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.
- c) Powers of an independent reviewer or similar means to ensure the full cost pricing and competitive neutrality issues are effectively resolved.

If these arrangements prove to be ineffective, there would be a need to consider formal, independent and transparent regulation of all statutory charges, associated service levels and all commercial fees levied by Local Governments, in relation to building certification.

*Allowing only private sector certifiers to practise, with an enhanced audit program, would overcome the main problems with the current arrangements*

Option 2, for providing commercial certification services, would only allow private sector certifiers to undertake commercial certification functions (except in remote regions), with Local Governments having an enhanced audit role co-ordinated by a centralised State Government agency. Provided an effective audit program was developed, it is considered that the public welfare objectives would not be compromised and there would be scope to realise cost efficiencies.

Given the nature of certification functions it is considered that option 3 which entails self-certification would provide no meaningful advance over option 1 or 2. It is considered unlikely that builders are typically equipped or interested in becoming certifiers and it is considered that most would therefore use independent private certifiers.

*The detected error rate for private sector certifiers is very low and many of the errors can be related to lack of clarity in town planning requirements. In addition private certification has led to improvements*

Concerns have been raised that private sector certifiers may not act in the public interest in the same way that Local Councils do because they can be commercially compromised. There are a number of observations that need to be made in response to this concern. The recorded error rate by the Building Services Authority of private sector certifiers is extremely low and many of the problems appear to relate to town planning issues. These may be related to a variety of

causes including inadequate planning competencies of certifiers, lack of clarity of Local Government requirements and problems with Local Governments providing the same standard of service to private sector certifiers that they provide to their own certifiers. In addition there seems to be general acceptance that the introduction of private certification has led to faster approvals and better service to the public. Finally, irrespective of which option is preferred there will always be an accountability and performance issue in relation to certification services and it cannot be presumed that Local Government certifiers can be guaranteed to be effectively focussed on the public interest.

*In determining the preferred option key aspects are: effectively addressing competitive neutrality issues and providing the public with adequate protection*

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 essential to provide the community with the ability to choose between a Local Government certifier and a private sector certifier.

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 sectors certifiers would provide the public with adequate protection.

In relation to the specific restrictions on competition, the main issues for several of the restrictions (accreditation fees, treatment of building surveying technicians, statutory charges and conflict of interest) relate to competitive neutrality issues. Either of the above basic options would offer improvements over the current arrangements but we consider option 2 would be more effective.

Once a decision has been made on who can undertake certification services and who undertakes the licensing and enforcement functions there is a need to consider a number of specific supplementary options. These specific supplementary options are more directly related to the identified restrictions on competition.

*The current educational and experience requirements for entry seem reasonable. However the requirement for continuing professional development cannot be justified*

In relation to accreditation, the current educational and experience requirements for entry seem reasonable. However it is considered that the requirement for continuing professional development cannot be justified. Certifiers should be free to choose the nature and extent of continuing professional development that is in their best interest. The audit and enforcement program should act as an effective accountability device and together with competitive rivalry provide appropriate incentives to undertake continuing professional development that is consistent with meeting the objectives of the legislation.

*BSAP should not have the discretion to determine accreditation requirements*

We have also identified a serious weakness in the current arrangements whereby BSAP, which is wholly owned by AIBS, has discretion over setting the prescribed requirements for accreditation. We consider that it is clearly not appropriate for an industry entity to have legislative authority to determine accreditation criteria.

During the course of the review, the Department of Local Government and Planning proposed that there should be additional planning competency requirements for accreditation and that a two level accreditation scheme administered by the BSA with Local Government participation should be established. The BSA would assess technical competency at one level and planning and regulatory skills at a second level which would be needed in order to issue approvals.

*Additional planning requirements may entail a public benefit, but there is a risk of an adverse impact on competition unless competitive neutrality and conflict of interest issues are effectively addressed*

This requirement would constitute an additional and potentially significant restriction on competition. While the requirement for planning competencies could entail a public benefit, there could be a risk of a substantial adverse impact on competition. Ideally the additional requirement should not be introduced until it had been demonstrated that the revised arrangements with respect to addressing conflict of interest and competitive neutrality problems of Local Governments were effective. Further consultation and investigation of this issue would be useful.

*The “fit and proper person” test needs to be defined to be more specific and avoid broad discretion*

In relation to the character test, it is considered that the “fit and proper person” test results in a benefit to the public and should therefore remain part of the legislation. However, to be effective and fair the legislated guidelines need to be more specific and not allow broad discretion by the accrediting body.

In relation to accreditation fees, 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. It is also noted that the requirement for continuing professional development raises the minimum cost of accreditation but that this cost could be avoided if continuing professional development was not compulsory.

*An application audit fee, supplemented by a discount and penalty system is most appropriate*

An additional fee for private sector certifiers to cover the costs of monitoring can be justified as long as competitive neutrality issues are addressed effectively. An application audit fee commensurate with the number of applications assessed by each certifier, supplemented by a discount and penalty system, is considered to be the most appropriate option. Such a fee would not be unduly restrictive on certifiers who are not full-time certifiers and it would not be excessive to other building industry participants.

*The main issues in relation to accreditation fees, building surveying technicians and charges for statutory functions relate to conflict of interest and competitive neutrality issues for Local Governments*

In relation to building surveying technicians the current arrangements are a clear breach of competitive neutrality. The options are to either allow private sector certifiers to have the same responsibilities or remove the advantage that building surveying technicians have when they work for Local Governments or allow the current arrangements to continue for remote regions or small Councils only. We consider the latter option would be justified by the associated public benefits.

In relation to charges for statutory functions, the main issue is the need for Local Governments to achieve competitive neutrality in their charges. If Local Governments are to continue to undertake commercial certification functions it is considered that it will be critical to implement recommendations a, b and c as outlined above in the context of option 1.

Given concerns about accountability and transparency we consider that it is better if there was a separate fee to cover the costs of auditing to ensure compliance with planning requirements. We emphasise, however, that higher statutory charges should not be introduced until improved arrangements are implemented to address conflict of interest and competitive neutrality problems associated with Councils.

*There may be a continued need for professional indemnity insurance, at least until there is better evidence that the audit and enforcement system is working effectively*

In relation to compulsory professional indemnity insurance it is considered that if there were an effective licensing and monitoring system there would be no need for such a compulsory requirement. However, compulsory professional indemnity insurance is considered to be warranted as a necessary check in the system, at least until there is better evidence that an enhanced audit and enforcement system is working effectively.

*There are a number of recommendations to improve the effectiveness and fairness of disciplinary processes and to address conflicts of interest for both private sector certifiers and Local Governments*

In relation to disciplinary processes, the recommendations include: mandatory mediation before a complaint can be submitted to the Building Services Authority; a revised definition of professional misconduct to distinguish clearly between administrative and minor mistakes and more serious technical breaches; developing a system of demerit points and penalties; and replacing the current provision for appeal to the Chief Executive of the Department of Local Government and Planning with appeal to an independent tribunal or similar low cost independent mechanism, with subsequent appeal to the Planning and Environment Court.

*A low cost step prior to hearing professional misconduct appeals in court is needed. Our preferred option is using the Queensland Building Tribunal for this purpose*

There should be an initial low cost step prior to hearing professional misconduct appeals in a Court. The options are to either use the Queensland Building Tribunal or to establish a Building Certifiers Disciplinary Panel. Given some concerns about the possibility of conflicts of interest for the Building Certifiers Disciplinary Panel, our preference would be to use the Queensland Building Tribunal.

In relation to conflict of interest it is considered that the current provision preventing building certifiers from undertaking functions for which there is a conflict of interest should be retained. However as noted in numerous places in this report there is also a need to more effectively address the conflict of interest and competitive neutrality problems for Local Government certifiers.

*We consider that information problems and public safety concerns provide a strong rationale for some form of licensing for building certification services*

In conclusion, we consider that information problems and public safety concerns provide a strong rationale for some form of licensing for building certification services. We also consider that many of the potential conflicts of interest, competitive neutrality issues and inefficiencies that arise with the current arrangements relate to defining appropriate roles and ensuring effective

accountability of the various public and private entities are involved. We have made a number of recommendations to address the key problems that were identified.

# 1 INTRODUCTION

## 1.1 REASONS FOR THE PUBLIC BENEFIT TEST

*The Public Benefit Test is required by the National Competition Policy*

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, including the review and, where necessary, reform of all legislation that contained measures restricting competition.

*This report presents the findings of the PBT*

The Queensland Legislation Review Timetable identified potential restrictions on competition in the *Building Act 1975* and its subordinate legislation. Under the National Competition Policy, a Public Benefit Test (PBT) is required of these restrictions and alternative means of meeting the objectives of the legislation. This report presents the findings of the PBT.

A draft report with preliminary findings was made publicly available for consultation from 28 March to 26 April 2002 as a key step in the conduct of the PBT. Consultation was undertaken with a number of key stakeholders in preparing the draft report and in seeking their views in the public consultation period. Submissions were also reviewed to take account of relevant information and views about the current system and options for reform.

## 1.2 THE PUBLIC BENEFIT TEST METHODOLOGY

*The Test must look at the costs and benefits of regulation*

The guiding principle for a PBT of restrictions to competition contained in legislation, as specified in Clause 5(1) of the Competition Principles Agreement, 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.

A PBT rests on the evaluation of the costs and benefits of the restrictions to competition and alternative means of meeting the objectives of the legislation.

This PBT of the restrictions to competition has been conducted in accordance with Queensland Government's *Public Benefit Test Guidelines*. Under the Queensland Government's Guidelines, legislative restrictions to competition will only be removed if a public benefit can be demonstrated.



### 1.3 THE APPROACH

*The Test is based on a qualitative assessment*

This review has been undertaken by Economic Insights, an independent firm of economic consultants, for the Department of Local Government and Planning. It has been classified as a minor review, meaning that the assessment is largely qualitative in nature (ie it is not intended to provide a detailed quantification of costs and benefits). This approach is considered reasonable by the Queensland Government given the nature and likely impact of the restrictions.

*The report builds on consultation with stakeholders*

The approach that has been adopted is based on the application of appropriate economic and governance principles, consultation with key stakeholders, review of public submissions and identification and qualitative assessment of key costs and benefits. The release of the preliminary report was a key aspect of the consultative method to help ensure transparency in the process and to facilitate the provision of key relevant information required to inform the PBT.

The review has been confined to restrictions identified in the terms of reference. The review has not specifically identified or comprehensively assessed possible additional restrictions associated with the legislation.

The list of key stakeholders consulted in the preparation of the draft report is provided in Annex A. A list of persons consulted for the final report is provided in Annex B. A list of all submissions received is provided in Annex C.

*It is considered that sufficient reliable information has been collected to form the basis for assessment of the options as set out in this report but given information constraints there is scope to form views and conclusions that differ from those presented in this report.*

In preparing this report, staff of Economic Insights have relied on information obtained through consultation with a range of public and private organisations and individuals. Much of the information has been provided informally and as such its accuracy cannot be independently verified. Further information was obtained from public submissions. The consultation and public submissions have identified a range of opposing views and it is not possible without further comprehensive information to definitively “prove” one view or the other.

However, it is considered that sufficient reliable information has been collected to form the basis for assessment of the options as set out in this report. This is because our views do not rely on the assertions of any particular group but are based on a combination of the application of economic and governance principles, review of legislation and key facts, a reasonably extensive consultation process for a minor review and evaluation of public submissions. We note however, that in some cases there is an absence of clear well documented proof so that in some cases there is scope to form views and conclusions that differ from those presented in this report.

## 2 THE LEGISLATION

### 2.1 THE LEGISLATION TO BE REVIEWED

#### *Building legislation*

The legislation to be reviewed is:

- Building Act 1975
- Standard Building Regulation 1993
- Building Regulation 1991

Other relevant legislation includes the:

- Integrated Planning Act 1997
- Building Services Authority Act 1991

The Building Legislation gives effect to the Building Code of Australia. The Code sets out the technical requirements for the design of all buildings in Australia. The Code and the need for an associated compliance regime are not part of this Public Benefit Test (PBT) review. However operational elements of the compliance regime that have been identified as potentially anti-competitive are part of the PBT and described below.

### 2.2 THE OBJECTIVES OF THE LEGISLATION

A PBT requires a definition of the objectives of the legislation in order to define the costs and benefits of the restrictions to competition and its alternatives. The relevant definition is usually defined in the legislation or in documents prepared to support the introduction of the legislation (eg the Second Reading Speeches to Parliament by the responsible Minister).

#### *The legislation is focused on public health, safety and amenity*

In this instance the relevant objectives are not clearly spelt out in the legislation nor in the supporting documents. Nonetheless there appears to be a consensus that in essence the objectives are to improve and safeguard public health, safety and amenity in the design, construction and use of buildings. It is widely considered that the legislation responds to a community expectation that buildings will meet appropriate standards in terms of public health, safety and amenity.

The legislation is designed to facilitate the achievement of the objectives by specifying various requirements with respect to building practices and the regulation of those practices.

## 2.3 THE LEGISLATIVE FRAMEWORK

### 2.3.1 Building Codes Queensland

*BCQ has responsibility for developing and administering building codes*

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.

BCQ also provides advice to local government and industry on the interpretation and application of building and plumbing regulations. Where possible, best practice techniques are promoted through education and dissemination of information, to either supplement or replace the use of formal regulations.

Under the Integrated Planning Act 1997, BCQ is also responsible for the Building and Development Tribunals. These tribunals hear appeals against building code assessments by local governments and private sector certifiers. The matters relate mainly to the interpretation of technical requirements.

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 (Building Act 1975). Professional misconduct includes:

- ❑ Seeking or accepting benefit to act outside or contrary to the Act.
- ❑ False claims about qualifications, experience or accreditation.
- ❑ Acting outside the Building Certifier's powers.
- ❑ Contravening the Code of Conduct.
- ❑ Acting negligently or incompetently in relation to the certifier's practice.

### 2.3.2 Building Surveyors and Allied Professions Accreditation Board

*BSAP has responsibility for assessing the technical skills of building certifiers. BSAP is wholly owned by the Australian Institute of Building Surveyors.*

The Building Surveyors and Allied Professions Accreditation Board (BSAP) is responsible for assessing the technical skills and experience of applicants who wish to become accredited building certifiers. BSAP is wholly owned by the Australian Institute of Building Surveyors (AIBS) and was established for the purposes of assessing competencies of building surveyors. The Board members comprise members of the Council of AIBS, a member nominated by the Australian Building Codes Board, a member nominated by the Australian Local Government Association and any members nominated by other bodies granted representation by the Board.

*BSAP has considerable discretion in setting prescribed requirements*

Under the Standard Building Regulation 1993, BSAP has the ability to set “prescribed requirements” for accreditation. It has considerable discretion in setting the prescribed requirements. It currently specifies educational and experience requirements for building surveyors, assistant building surveyors and building surveying technicians. It also requires that the continuous professional development criteria, specified by the Australian Institute of Building Surveyors, are complied with. More details about the accreditation requirements are provided in Section 2.5.1.

The accreditation of building surveyors is a two stage process. In the first stage an applicant’s qualifications and experience are assessed by BSAP to establish the particular level of accreditation. In the second stage the applicant submits the evidence of compliance with the prescribed qualifications to the authorised accrediting body which is currently the Queensland Building Services Authority (QBSA).

### **2.3.3 Queensland Building Services Authority**

*QBSA has responsibility for accrediting building certifiers and maintaining proper standards of professional practice*

The Building Act provides for more than one incorporated or statutory body to be authorised as an accrediting body. However, the Standard Building Regulation currently only authorises the QBSA to accredit building certifiers.

The QBSA is responsible for helping to maintain proper standards of professional practice under the Building Legislation, including the accreditation and monitoring of building certifiers and ensuring interests of the community are met.

The QBSA has the power to investigate and to make decisions about a complaint and to impose penalties including cancellation or suspension of a certifier’s licence or the imposition of a wide range of conditions.

The building certifier can appeal QBSA’s decision to the Chief Executive of the Department of Local Government and Planning. If the building certifier is dissatisfied with the Chief Executive’s decision, an appeal can be lodged with the Planning and Environment Court. The Court was constituted in 1990 by the Local Government (Planning and Environment) Act, replacing the Local Government court.

### **2.3.4 Local Councils**

*Local councils have responsibility for town planning issues and for providing relevant information to certifiers*

Local councils have responsibility for town planning issues. Under the Integrated Planning Act, Councils have to prepare planning schemes that apply to their local government area. All councils are required to prepare new planning schemes by 2003. Under the Standard Building Regulation Schedule 6, councils are also required to make determinations in relation to various ‘siting, amenity, aesthetic and occupation’ matters. Councils also provide information to private sector certifiers regarding –

- ❑ The location of sewers
- ❑ Flooding information
- ❑ Land slip information
- ❑ Stormwater connections
- ❑ Contours
- ❑ Nominated building areas
- ❑ Building height restrictions
- ❑ Boundary clearances and
- ❑ Other planning restrictions, e.g. heritage.

Certifiers are required to take into account town planning requirements if there are deviations from the town planning schemes.

Councils are able to offer commercial certification services in competition with building certifiers in their own and in other council areas. They are required to offer certification services in their areas but may contract private sector certifiers to undertake this work on their behalf. A number of councils set up commercial building certification units to compete for work in their areas and in other Council areas.

Councils need to retain copies of the documentation associated with the approval process (provided by building certifiers) in respect of all work approved in their area and provide details to the Australian Bureau of Statistics on a regular basis.

## 2.4 THE REGULATED PRACTITIONERS

### 2.4.1 Building Certifiers

*There are currently 373 building certifiers in Queensland*

Currently there are 373 building certifiers in Queensland (Table 2.1). The majority of the building certifiers have approval to operate as private sector certifiers. They can work independently or for local governments.

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 effect notices for work within the jurisdiction of the certifier.

Under the Queensland Building Services Authority Act (Section 68) an assessment manager or a private certifier cannot grant a building approval for residential construction work, unless evidence has been sighted that the appropriate insurance premium has been paid or that an owner-builder permit has been issued.

Under the Building and Construction Industry (Portable Long Service Leave) Act 1991-1994 an assessment manager or a private certifier must not accept a development application for building work where the cost exceeds a nominated amount, until evidence has been sighted that the portable long service leave levy and the workplace health and safety fee have been paid.

TABLE 2.1 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
<b>Total</b>	<b>373</b>	<b>200</b>	<b>173</b>

Source: QBSA (2002)

*The responsibilities of building certifiers depend on their qualifications and experience. There are three occupational levels*

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 2.2). 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 2.2 BUILDING CERTIFICATION ROLES – BY LICENCE CATEGORY

Level	Can certify	Can, under supervision, assist and inspect:
Building surveyor	All classes of building and structures (including residential units and flats)	Not applicable
Assistant building surveyor	Buildings and structures up to 3 storeys and total floor area of no more than 2000m <sup>2</sup> .	All classes of buildings and structures
Building surveying technician	<b>If employed by a Local Government</b> – Buildings and structures up to 2 storeys and total floor area of no more than 500m <sup>2</sup> .	<b>If not employed by a Local Government</b> – Buildings and structures up to 2 storeys and total floor area of no more than 500m <sup>2</sup> .

Source: LGAQ (2001)

### 2.4.2 Development Applications

*Building certifiers have to ensure the relevant development approvals have been issued before issuing a development permit for building work*

Building certifiers have to ensure the relevant development approvals have been issued before issuing a development permit for building work. They must also refer certain aspects (e.g. siting, amenity and aesthetic impacts) of a proposal to the Local Government for advice under the Building Act.

In addition, building certifiers must ensure the work being approved is consistent with the development permit authorising the work. However, responsibility for complying with conditions of the permit (when these conditions specifically relate to the nature of building work being approved by the certifier) is the responsibility of the applicant.

Building certifiers are not required to carry out site inspections before they assess a development application. Instead, the certifier can solely rely on information supplied by the applicant. However, building certifiers need to be familiar with the site and the associated planning schemes and codes. It is part of the Code of Conduct for Building Certifiers to ascertain all available facts relevant to the performance of their duties. The key information required includes location of sewers, flooding information, land slip information, stormwater connections, contours, building height restrictions, boundary clearances and other planning restrictions such as heritage.

### 2.4.3 Building Inspections

*Building certifiers are also responsible for inspecting building work*

Building certifiers are also responsible for inspecting building work. In addition, to these buildings inspections, there are also mandatory plumbing and drainage inspections. The builder must notify the building certifier when the building work is ready for inspection.

The stages at which inspections of buildings classified in classes 2-9 (i.e. office blocks, warehouses, factories, etc.) are performed are at the discretion of the building certifier and depend on the complexity of the building.

Building certifiers can personally inspect the building work or accept a certificate of inspection by a competent person. The building certifier is responsible to determine whether a person is competent to carry out a particular inspection. It is common for a building certifier to rely upon competent persons to inspect aspects of the work that are outside the competence of the certifier, for example, a structural engineer may perform inspections on a suspended concrete floor slab.

#### **2.4.4 Certification**

Where inspections indicate that the building work is in compliance with the Act, the building certifier must issue a certificate or a statement of classification (only class 2-9 buildings) before a building is occupied.

### **2.5 THE LEGISLATED RESTRICTIONS ON COMPETITION**

This Public Benefit Test is to examine the restrictions to competition in the legislation relating to –

- ❑ accreditation
- ❑ character test
- ❑ accreditation fees
- ❑ treatment of building surveying technicians
- ❑ charges for statutory functions
- ❑ compulsory insurance
- ❑ disciplinary processes
- ❑ conflict of interest

#### **2.5.1 Accreditation**

*Building certifiers must be accredited as a building certifier for a particular level*

Building certifiers must be accredited as a building certifier for a particular level (building surveyor, assistant building surveyor or building surveying technician). Private building certifiers must be accredited as well as endorsed by the accrediting body (QBSA) as a private certifier. Building surveying technicians cannot be endorsed as private sector certifiers and they cannot approve building work unless they are employed by the local government.

Table 2.3 summarises the prescribed education and experience requirements for the various building certification levels.



TABLE 2.3 PRESCRIBED QUALIFICATIONS AND TRAINING FOR BUILDING CERTIFIERS

Level	Education requirements	Experience requirements
Building surveyor	Degree or Post-Graduate qualification in building surveying	3 years
Assistant building surveyor	Advanced diploma in building surveying	1 year
Building surveying technician	Diploma in building surveying	Nil

Source: LGAQ (2001)

Applicants in all categories need to provide evidence of the successful completion of a training course approved under the Integrated Planning Act 1997 and the prescribed qualifications.

*BSAP has the authority to set the prescribed requirements for accreditation and also requires building surveyor to undertake CPD in order to continue to be accredited as a building surveyor*

As already noted BSAP has the authority to set the prescribed requirements for accreditation and also requires building surveyors to undertake Continuing Professional Development (CPD) in order to continue to be accredited as a building surveyor. BSAP assesses the CPD points obtained by building surveyors and in doing so it relies upon the AIBS CPD scheme. Non-members are also assessed by AIBS, albeit for a fee (\$250 + GST per year). AIBS members do not pay any fees for the assessment of their CPD points, as this is covered in their yearly membership fee of \$220 + GST.

The AIBS CPD scheme is based on a triennium in which members are encouraged to participate and obtain a minimum number of points during that period (refer Table 2.4).

TABLE 2.4 MINIMUM CPD POINTS REQUIRED BY BSAP

Employment status of building surveyors	Minimum CPD points required
Full-time	90 points over the three years (and a minimum of 40 points over any 2 years).
Part-time	115 points over the three years.

Source: AIBS, "Continuous Professional Development Scheme", 2001.

*CPD points can be obtained by attending AIBS conferences and seminars or similar conferences and seminars offered by other organizations*

Points are allocated on time spent in active participation at conferences and seminars and generally it is one point per hour of participation. CPD points can be obtained by attending AIBS conferences and seminars, or similar conferences and seminars offered by other organizations. The Board and the Chief Executive determine which conferences should be recognised under the CPD scheme. In addition, the recognition of training provided by other organizations (e.g. BCQ, HIA, QMBA) is determined by the individual chapter CPD convenor.

*The CPD arrangements appear to favour conferences and seminars run by the AIBS*

It seems that the Board has a fair amount of discretion in setting the prescribed requirements and in selecting appropriate conferences and seminars. In addition, AIBS training is given a higher weighting than other training. Appendix A of the AIBS document “Continuing Professional Development Scheme” shows that a maximum of 50 points per year can be collected from AIBS conferences. In contrast, a maximum of 20 points per year can be obtained by attending conferences run by other organizations (e.g. Australian Building Codes Board).

Seminars and conferences run by AIBS can also be accessed by non-members. There is, however, a surcharge for non-members as they are not on the institute database and their full details have to be imputed each time they are entered into the computer. There does not seem to be a fixed fee structure and fees depend on the length of the conference, whether meals are provided for, the cost of guest speakers etc.

As an example, AIBS provided us with the fees for the 2001 State Conference held in Longreach:

Full Conference	Members	\$390 + GST
	Non-members	\$440 + GST
Day Rate	Members	\$150 + GST
	Non-members	\$180 + GST

According to the AIBS, there is generally no significant price difference between members and non-members for seminars run by Regional Branches. However, we have been advised by industry participants that the price difference between members and non-members can be quite large, up to double the amount paid by AIBS members. In addition, it was argued that AIBS training is often too basic and hence considered to be of little real benefit.

### 2.5.2 Character Test

*In order to be accredited, the applicant must pass the “fit and proper person” test*

In order to be accredited, the applicant must pass the “fit and proper person” test. According to Section 113(2) of the Standard Building Regulation 1993:

“113. (2) In deciding whether the applicant is a fit and proper person to be accredited as a building certifier for the level, the accrediting body may consider —

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

Apart from the broad criteria set out in the legislation, there are no set guidelines which are applied when determining whether a person is “fit and proper” to be licensed. This has resulted in various interpretations of the phrase “fit and proper”.

### 2.5.3 Accreditation Fees

*The application fee for accreditation as a building certifier is \$100, while the annual fee for accreditation is \$500*

The application fee for accreditation with the Building Services Authority as a building certifier is \$100, while the annual fee for accreditation is \$500. The requirement for continuing professional development involves other fees including annual accreditation fees with the Building Surveyors and Allied Professions Accreditation Board raising the total cost of accreditation.

### 2.5.4 Building Surveying Technicians

*Building surveying technicians not employed by local governments are not allowed to undertake any building certifying functions*

The Standard Building Regulation allows local government employed building certifiers at the lowest accreditation level (building surveying technician) to approve of the most common sizes of buildings. Building surveying technicians not employed by local governments are not allowed to approve any buildings. They can only assist in assessing and inspecting buildings.

### 2.5.5 Charges for Statutory Functions

*Local governments act as assessment managers and as such charge a fee for performing the statutory function of receiving and processing documentation received by private sector certifiers*

Local governments act as assessment managers and as such charge a fee for performing the statutory function of receiving and processing documentation received by private sector certifiers. There is no uniform system for fees charged by local governments and fees are supposed to be determined on a reasonable basis.

Section 130 of the Standard Building Regulation specifies that fees for services provided by Local Government must be reasonable and fixed by resolution of the Local Government. Section 6 (6) specifies that the Local Government or assessment manager may charge a reasonable fee for making documents available for inspection or providing copies of such documents.

Certification fees are payable by the applicant. This can either be the owner or an agent of the owner (e.g. architect or builder). It is, however, the owner who is ultimately responsible for complying with the legislation.

### 2.5.6 Compulsory Insurance

*The Standard Building Regulation requires that private building certifiers have a minimum level of professional indemnity insurance (of \$1 million)*

The Standard Building Regulation requires that private building certifiers have a minimum level of professional indemnity insurance (of \$1 million) to protect consumers against incompetence of and negligence by the building certifier. The legislative provision states a number of requirements of the insurance including that there be a run-off provision for 10 years after the private certifier ceases to be accredited as a private certifier.

Local government building inspectors do not need specific professional indemnity insurance but under the Local Government Act local governments are required to have a minimum of \$10 million of professional indemnity insurance and \$30 million of public liability insurance. There is no requirement in the legislation under review for public liability insurance for private sector certifiers.

### 2.5.7 Disciplinary Processes

*The QBSA can investigate complaints against building certifiers*

The QBSA can investigate complaints against building certifiers. If the building certifier is found guilty of misconduct, the QBSA can reprimand, impose conditions (e.g. compulsory education courses) or suspend or cancel accreditation.

*Decisions can be appealed to the Chief Executive of the Department of Local Government and Planning and the Planning and Environment Court*

Decisions can be appealed to the Chief Executive of the Department of Local Government and Planning and the Planning and Environment Court.

### 2.5.8 Conflict of Interest

Building certifiers are not allowed to carry out their functions if there is a conflict of interest. The Standard Building Regulation defines the requirement as follows:

“128.(1) A building certifier must not carry out building certifying functions if the certifier has a conflict of interest.

(2) For IPA, section 5.3.10 and for subsection (1), a private certifier or building certifier has a conflict of interest if the private certifier or building certifier —

*Building certifiers are not allowed to carry out their functions if there is a conflict of interest*

- (a) for building work —
  - i. carries out the building work; or
  - ii. is employed by the owner or person who carries out the building work; or
  - iii. is engaged to carry out functions (other than certifying functions or giving regulatory advice about any matter) by the owner or person who carries out the building work; or
  - iv. has a direct or indirect pecuniary interest in the building work or in an entity carrying out the building work; and
- (b) for a building or structure – has a direct or indirect pecuniary interest in the building or structure.

(3) In this section —

**“building work”** includes —

- (a) the preparation of the design of the whole of part of a building or structure; or
- (b) carrying out all of part of the building work.”

## 3

## A GENERAL RATIONALE FOR THE REGULATION OF BUILDING CERTIFICATION WORK

*Information problems and third party effects are the main rationale for regulation*

From an economic efficiency perspective the main rationale for government intervention in markets is to address market failures. The main forms of market failure that are relevant in relation to building work are based on the scope for information problems, known as information asymmetries and the scope for third party effects, known as negative externalities. Essentially the information problem is that users of buildings are at a severe information disadvantage compared with those involved in the construction and maintenance of buildings. The third party effects arise because defective building work can impact adversely on the general community.

*The nature of the problem is such that it is too costly for individuals to overcome the information problems and third party effects without some form of government intervention*

The nature of the problem is such that it is too costly for individuals to overcome the information problems and third party effects without some form of government intervention. Most buyers or users of services are likely to have difficulty in assessing in advance of purchase or leasing decisions whether building work meets safe standards. In many cases it may not be feasible to readily evaluate quality after purchase.

It could be argued that as long as users were aware of such risks and their implications that they should be free to choose whether to assume the risk or take their own action to reduce such risks. However this consideration ignores the extent of transactions costs that need to be incurred in overcoming the information problem relative to the efficiency of some form of government intervention. In these situations the market cannot effectively deal with the transactions costs whereas the government can because of its ability to regulate activity or intervene in other ways that are efficient, e.g. the public provision of relevant information.

In addition there would still be adverse third party effects (negative externalities) where individuals who are not party to such decisions could be affected. The existence of information asymmetries may hide risks to public safety, as poor building work could lead to death or serious injury. Public amenity objectives could also be compromised without some form of effective government intervention in setting and enforcing building standards. Some form of regulation is often perceived as the most effective form of addressing these problems.

Although the strongest rationale would relate to public safety concerns there could also be information failures in relation to other aspects of quality such as the basic amenity and functionality of buildings. First time purchasers are unlikely to have the experience to deal adequately with amenity aspects of building design which can also create a role for some form of basic regulation or other government intervention to facilitate adequate amenity in the design and construction of buildings.

It is likely to be the case that some form of licensing or similar regulation will be required to effectively address the problem faced by users of buildings in obtaining adequate information. Licensing of building certifiers provides a signal of quality, an indication that a supplier has been confirmed as holding the skills required to undertake certain certification work. This helps a buyer choose between good and poor quality service providers. Given the public health concerns, technical standards and some form of government-supervised inspection are also likely to be necessary to deal efficiently with the problem. Although it may be possible to develop other mechanisms to address the information problem, regulation provides greater certainty than most other arrangements and this is likely to be important given the public safety issues.

*In summary, the transactions costs of identifying quality and rectifying problems can provide an important efficiency argument for some form of regulation of technical standards and service providers in relation to building certification*

In summary, the transactions costs of identifying quality and rectifying problems can reduce the effectiveness of market mechanisms and provide an important efficiency argument for some form of regulation of technical standards and service providers in relation to building certification. Given the public health concerns and the nature of the information problems, there are issues as to the optimal level and mix of regulation and how specific regulations complement each other.

Although a strong economic rationale can be developed for some form of regulation of building work to address public safety issues, it is more difficult to determine the exact nature and scope of relevant regulation or other government intervention. A key principle is to design the intervention so that it most effectively focuses on addressing the market failure, with minimal spillover effects in terms of restricting competition or otherwise imposing costs on the community. As well as considerations of the impact on competition it is necessary to keep administrative and regulatory costs as low as feasible given the objectives. It is also important to avoid serious conflicts of interest as these can reduce overall regulatory effectiveness and compromise the focus on addressing the key problem.

*The form of government intervention should focus as much as possible on the specific problem and try to minimise regulatory costs and conflicts of interest*

*Appropriate roles should be defined for the government and the private sector*

These considerations also raise the issue as to what are the appropriate roles for government and the private sector. It will not normally be appropriate for the private sector to undertake legislated regulatory functions. However the private sector is likely to be more effective at commercial functions so that careful consideration should be given to developing arrangements that clearly separate the two roles.

## 4

## KEY ISSUES RAISED IN PUBLIC CONSULTATION

This section discusses key issues raised through our research and from the public consultation process.

#### 4.1 COMPLAINTS ABOUT PRIVATE SECTOR CERTIFIERS AND THE PERFORMANCE OF THE CURRENT PRIVATE CERTIFICATION SYSTEM

*The number of complaints about private sector certifiers since private certification was introduced is small*

Complaints about private sector certifiers to the QBSA, since 1998 when building certification was introduced, are summarised in Table 4.1. The number of registered complaints is very small in relation to the number of building certifications undertaken in the same time period.

TABLE 4.1 RESULTS OF CERTIFIER COMPLAINTS (SINCE 1998)

	1998-99	1999-00	2000-01	2001-02 <sup>a</sup>	Total
No. of complaints received	62	67	101	35	265
Number of complaints closed	62	64	68	26	220
Complaints withdrawn or not guilty	38	30	23	4	95
Guilty, no further action	13	6	3	5	27
Guilty, reprimanded	2	15	24	11	52
Guilty, cautioned	6	7	15	5	33
Guilty, other	3	6	3	1	13

Note: a) preliminary data only up to 14 May 2002

Source: BSA 2002

There are approximately 18,000 building applications made per year in the Brisbane City Council area, 7,000 to 8,000 of which relate to new homes. The council area typically accounts for around 25 per cent of new homes built in Queensland. Assuming that the council accounts for 25 per cent of all building applications, there would be in the order of 70,000 building applications in Queensland each year. It is estimated that around 60 per cent<sup>1</sup> of those applications are currently being approved by private sector certifiers.

Assuming 100 complaints for a full year and 70,000 building applications, with 60 per cent being authorised by private sector certifiers the complaint rate is less than 0.2 per cent. Given that 36 per cent of complaints were withdrawn or found not

<sup>1</sup> Information provided by the Department of Local Government and Planning indicates that in June 2001 61 per cent of all building approvals were issued by private sector certifiers.



guilty in the past few years, this implies a detected error rate of 0.15 per cent for private sector certifiers.

It is evident, that the number of registered complaints against private sector certifiers in comparison to the number of building approvals issued by private sector certifiers is very low. It is also relevant to note that a substantial proportion of the complaints were either withdrawn or the certifier was found not guilty. Several submissions acknowledged this low detected error rate but also noted that a similarly low rate applies to local government certifiers.

*The majority of complaints received by the QBSA relate to town planning issues*

The majority of complaints received by the QBSA relate to town planning issues. In general, the issues are that approvals relating to planning schemes are not being obtained or that interpretations of the schemes are incorrect.

The majority of complaints are received from local governments with a small number of local governments responsible for a significant proportion of complaints.

In addition to complaint investigation, the QBSA has a statutory obligation to carry out audits of work by all building certifiers. Audits are either undertaken randomly or are a result of a proven complaint. Since May 1998, QBSA has completed 204 audits.

Several submissions noted that the above statistics may not be an accurate reflection of the performance of private certifiers. It was claimed that there is likely to be a significant number of complaints that do not reach formal BSA processes and are therefore not counted in the official complaint statistics. It was also noted that consumers may not be aware that a private certifier had been engaged to undertake building certification and complaints may therefore be directed to the Local Governments only.

*The relatively low number of complaints against private sector certifiers may reflect the fact that there are no meaningful technical audits performed*

Furthermore, it was suggested in submissions that the relatively low number of complaints against private certifiers may reflect the fact that there are no meaningful technical audits performed (unless complaints driven). BSA audits are focussed on procedural issues (such as document lodgement and timeframes) and planning matters. This, in turn, provides an explanation for the relatively high number of complaints regarding planning issues. It has also been claimed that many private certifiers certify building approvals in areas where they are not familiar with the planning scheme and the relevant codes.

*There does seem to be a consensus that private certification has generally proven to be an improvement over the previous arrangements where only certification by Councils was available*

Although there may be some concerns that the formal complaints that have been registered do not reflect all the problems with the current system, there does seem to be a consensus in the industry that private certification has generally proven to be an improvement over the previous arrangements where only certification by Councils was available. This was also a finding of the LGAQ (2001) Review into Building Certification in Queensland.

## 4.2 STATUTORY CHARGES

*Local Governments charge a fee for the statutory function of receiving and processing documentation provided by private sector certifiers*

Local governments act as assessment managers and as such charge a fee for performing the statutory function of receiving and processing documentation provided by private sector certifiers. Under section 130 of the Standard Building Regulation 1993, these fees need to be reasonable and fixed by resolution of council.

*“130 (1) A local government may fix fees payable to it for services it provides under the Act (including this regulation).<sup>2</sup>*

*(2) Fees for providing a service, that can not be provided by a private certifier, must be reasonable and fixed by resolution of the local government.”*

*Section 6 (6). “The local government or assessment manager may charge a reasonable fee for either or both of the following –*

- (a) Making the document available for inspection.*
- (b) Making and giving the person the copy.”*

On 19 December 2001, section 46A was introduced into the Act,

*“46A Fees for statutory functions*

- (1) A local government may, by local law or resolution, fix a reasonable fee in relation to the performance of a function imposed on the local government under this Act.*
- (2) The local law or resolution must prescribe the person liable to pay the fee.*
- (3) A local government is taken to have always had power, by local law or resolution, to fix a fee mentioned in subsection (1).*
- (4) Subsection (3) does not affect a decision of a court made before the commencement of this subsection in relation to a particular action about the validity of a fee mentioned in subsection (1) fixed by local law or resolution and imposed on a particular person.”*

Private sector certifiers can seek a declaration of the Planning and Environment Court as to the reasonableness of the fees in relation to the cost of providing the service.

“Reasonableness” had been addressed by the Ombudsman dealing with the Caloundra City Council. The Ombudsman stated that if Councils charged a fee for a “service”, then that fee was not meant to be higher than needed to cover the

*The Ombudsman has stated that if Councils charge a fee for a certification service then that fee was not meant to be higher than needed to cover the costs of the service*

<sup>2</sup> Fees for making a document available for inspection and for making and giving a person a copy are authorised by section 6(6).

costs of the service, nor was it meant to be higher in order to subsidise other local government activities or services (advice of a private certifier).

Councils generally charge two types of statutory fees (in addition to the actual permit fees):

- ❑ Archiving fees.
- ❑ Information fees.

Archiving fees refer to the charges involved in lodging building permits. Under sections 26 and 103 of the Standard Building Regulation, private sector certifiers must give copies of documents<sup>3</sup> to the council within 5 days<sup>4</sup> of approving an application or issuing a certificate. The council is then required to keep these documents on file for 10 years (for homes and sheds) or until the building is demolished (for commercial buildings). This requirement is set out in section 28 of the Standard Building Regulation 1993.

Information fees refer to the charges involved in obtaining information from the councils. Information is needed by private sector certifiers to determine assessment factors in development applications for building work, such as:

- ❑ Property ownership, lot number, registered plan number, location details.
- ❑ Location of sewerage mains, water mains and stormwater drainage easements.
- ❑ Flood prone areas, bushfire prone areas, contaminated land, mines subsidence areas.
- ❑ Planning scheme requirements (e.g. heritage, landslip and development control plan areas).
- ❑ Obstacle limitation surfaces, explosives limitation zones and radio frequency areas.

*Private sector certifiers have advised that archiving and information fees vary considerably between local governments, raising concerns that they may not appropriately reflect costs*

Private sector certifiers have advised that archiving and information fees vary considerably between local governments, raising concerns that they may not appropriately reflect costs.

<sup>3</sup> Section 26(1) of the Standard Building Regulation 1993 prescribes that private sector certifiers need to provide the documents listed below to the assessment manager.

1. a copy of the plans, drawings, specifications and other documents and information lodged by the applicant, stamped and approved or otherwise endorsed by the building certifier.
2. a list of required fire safety installations and required special fire services applying to the building work.
3. copies of certified information given by competent persons and relied on by the private certifier.
4. a copy of the private certifier's accreditation as a private certifier.
5. a list of reasons for giving the approval sufficient to respond to a request for reasons for giving the approval under the Judicial Review Act 1991.

<sup>4</sup> Section 3.5.15 of the Integrated Planning Act 1997

*It has also been claimed that many councils charge higher fees to cross-subsidise the pricing of related services*

Private sector certifiers have also advised that fees have generally increased significantly in the years since private certification was introduced.

It has also been claimed that many Councils charge higher fees to cross-subsidise the pricing of related services.

*Private sector certifiers claim that many Councils seem to routinely charge private sector certifiers significantly more for approvals, information and lodgement of documents than they charge their own clients*

It has been claimed that councils may confer an unfair advantage on their own clients vis-à-vis the clients of private sector certifiers. Private sector certifiers who were consulted claim that many Councils seem to routinely charge private sector certifiers significantly more for approvals, information and lodgement of documents than they charge their own clients.

For a private sector certifier, the approval process includes the following:

- Receive application from client for approval on a minor structure. Check for relevant information at the counter.
- Enter all information & scan plans into computer system.
- Generate Engagement Notice and fax to the council.
- Begin plan check.
- Create Development Permit with conditions and sign off plans.
- Make several copies for council & client.
- Submit lodgment to council.
- Release approved plans to builder/client.
- Carry out Final Inspection.

It has been claimed that some Local Councils undertake all of the above functions for a price that is well below what a private sector certifier charges and that in some cases for a price similar to what Local Councils charge private sector certifiers to perform only a small part of the approval process i.e. in lodging the relevant documents.

One Council submission noted that Local Governments often provide subsidised fees to community organizations using their building certification services to meet community service obligations.

An additional problem with statutory fees charged by councils is that the fee structures are not transparent. During consultation it has been established that some Councils are charging private sector certifiers archive and information fees, however, they are not transparently and separately charging council clients the same fees.

*One option of addressing competitive neutrality issues in relation to fees is to regulate the fees at reasonable levels in the legislation.*

One option of addressing competitive neutrality issues in relation to fees is to regulate the fees at reasonable levels in the legislation. This would allow local governments to recover their costs without discriminating against private sector certifier clients as compared to local government clients. Regulated fees would also provide consistency of charges across local governments and not provide unfair advantages to local government clients at the expense of private certifier clients. To address the problem effectively, all fees charged by local governments, including fees for certification services, would need to be legislated rather than simply the archive and information fees.

Based on the submissions received, it is clear that Councils generally agree that fees should be transparent and based on full-cost pricing of services, however, the regulation of fees is strongly opposed by many but not all Councils, based on the following arguments:

*Most Councils strongly oppose the formal regulation of their fees*

1. Most councils currently use full-cost pricing in setting fees.
2. Councils have different cost structures for collecting, archiving and providing information and no prescribed regime can fairly compensate in each case.
3. Prescribed fees are difficult to set for all situations and quickly become out of date.
4. Problems with uncompetitive fees are better addressed through encouraging and supporting competitive behaviour rather than through prescribed fees.

However many private submissions challenged the contention that full cost pricing was being effectively applied and called for formal, independent and transparent regulation of statutory charges. One submission by a certifier employed by a Local Government agreed that fees for information services do need some monitoring or review by an independent body.

*Our research and the consultation process have highlighted the difficulties that private sector certifiers have in obtaining information to validate their claims*

Our research and the consultation process have also highlighted the difficulties that private sector certifiers have in obtaining information to validate their claims. It has been pointed out that the Judicial Review Act and the Freedom of Information Act enable Local Governments to avoid disclosing financial decisions and the basis for the calculations of their fees.

*We consider that overall there is sufficient information available to confirm that there are important competitive neutrality issues that have not been effectively addressed by a significant number of Councils*

We have also identified problems in the complaints mechanism in relation to competitive neutrality issues as described in the following section.

### 4.3 OTHER COMPETITIVE NEUTRALITY ISSUES

Private sector certifiers consulted for the PBT pointed to many areas where they consider competitive neutrality does not apply. The private sector certifiers identified the key factors contributing to the lack of competitive neutrality as a

negative attitude by some Local Governments to private certification and an unwillingness to fully accept the 1998 reforms.

Submissions made by Councils rejected many of the claims made by private sector certifiers. However we consider that overall there is sufficient information available to confirm that there are important competitive neutrality issues that have not been effectively addressed by a significant number of Councils including some larger Councils.

*A key issue is the responsibility for defective work*

There is also an important design weakness in the regulatory regime relating to the responsibility for defective work. It is understood that under the Building Act, the onus is on a building owner to correct any defective work undertaken by a building certifier. However, the BSA has advised that owners are able to make a claim against a building certifier or a builder for defective work or seek to have these parties correct any defective work.

*Local Governments may be reluctant to identify errors in the work of their own certifiers*

A competitive neutrality issue arises because a Local Government may be reluctant to identify errors in the work of their own building certifiers as this could expose the council to a claim for costs. It is even possible that some Local Governments may see an incentive to overlook any errors arising from their own work. In the event that a building owner separately identifies an error in the work of a Local Government certifier in relation to a planning matter, and makes a complaint against the certifier, the Local Government may be required to judge the adequacy of their own certifier. There is a conflict of interest that may prevent Local Government and private sector certifiers being treated equally.

Some Local Governments may also have an incentive to overlook or treat leniently any errors arising from the work of a builder on a project a Local Government has certified. This may be the case if there is a risk that some liability may be borne by their certifier. This is a clear example of the conflict of interest between regulatory and related commercial responsibilities.

At the same time we consider that Local Governments competing with private sector certifiers have a commercial incentive to actively identify errors in the work of private sector certifiers.

*Councils have not made any complaints to the QBSA about their own certifiers but one submission pointed out that they have complained about other Councils*

Of the 218 complaints made by Councils against building certifiers from June 1998 to March 2002, we understand that **none** have been made by a Council against a Council's own certifier. This may indicate that Council certifiers achieve much higher standards of work than private sector certifiers or that many problems are sorted out internally. Or it may indicate an imbalance in the monitoring and compliance checks of Councils of their own certifiers versus private sector certifiers. In support of this interpretation it is worth noting that one submission pointed out that some Councils have lodged complaints about other Councils. However submissions received from Local Governments have contended that Councils have traditionally rectified their own mistakes at their

own costs and that they continue to address issues that arise with their own certifiers through internal management processes.

*Private sector certifiers argued that the role of Local Governments should be restricted to policy and regulatory functions*

Many submissions received expressed strong views with regard to the apparent conflict of interest faced by Councils engaged in building certification. Generally, private sector certifiers argued that the role of Local Governments should be restricted to policy and regulatory functions, unless a transparent process of maintaining an effective distinction between the roles can be established. However, it was also conceded that it is difficult to see how strict separation of functions can work with the Chief Executive Officer of the Local Government “wearing two hats” at any one time. However, some private sector certifiers acknowledged that Local Government should continue to be allowed to provide certification services in remote and rural areas, where such services would not be provided otherwise.

The consultation process and submissions confirmed that while some Local Governments have gone to great lengths to separate the statutory and certification functions, others have certifiers co-located with statutory officers and the plumbing and drainage section. Furthermore, in some cases all of these functions may be found under the commercial certifiers trading name.

Council submissions indicated that many Councils have effectively separated their commercial functions from their regulatory functions. However, the Local Government Association of Queensland conceded that Councils have faced difficulties in separating their functions, including with the implementation of full cost pricing and the removal of accounting advantages.

*Most Local Governments outside South East Queensland do not have adequate resources to separate regulatory and certification functions*

Several Councils submitted that most Councils outside South East Queensland do not have adequate resources to separate regulatory and certification functions. It is claimed that in some Councils the staffing levels are such that one person is required to fulfil both statutory roles and certification roles and that limiting the role will affect the viability and funding of both regulatory and certification services. It may even lead to certification services not being available in some areas which are not considered remote, as it may not be viable for a private sector certifier to service an area that has only a limited market.

*It seems that private sector certifiers may overlook minor defects by builders in order to keep their business.*

Several submissions made to this review have also identified a conflict of interest for private sector certifiers. It was claimed that private sector certifiers may overlook minor defects by builders in order to keep their business. This is one of the reasons for having the conflict of interest provision in Section 128 of the legislation. It also highlights the need to have an effective audit and enforcement mechanism in relation to the work of private sector certifiers. However while such mechanisms are targeted at private sector certifiers they do nothing to address conflict of interest issues for Local Government certifiers, and it is considered that this is currently a much bigger weakness in the existing arrangements.

*Some private sector certifiers have pointed to delaying tactics, particularly with regard to plumbing approvals*

Some private sector certifiers pointed to situations where Local Governments have engaged in unnecessary and unfair delaying tactics when dealing with private sector certifiers. In particular, it was argued that plumbing and drainage approvals have been held back for no reason other than to inconvenience the private sector certifiers. The Integrated Planning Act requires, in other than sewerage areas, that building permits cannot be issued by private certifiers until all necessary approvals under the Standard Water Supply Law and the Standard Sewerage Law have been issued by Local Governments (section 5.3.5(4)). We have been advised in submissions, that Local Government certifiers are not subject to this clause and that there are no time limits under the Standard Sewerage Law for the provision of those approvals.

Other submissions, including two from Local Governments, have confirmed that the plumbing approval process provides many barriers to timely building certification and that some Local Governments are withholding the plumbing approval pending other unrelated approvals e.g. driveway approval or nomination of road boundary frontage. Submissions contended that these delays may affect both private sector certifiers and Council certifiers. The consultation process also revealed claims that some Local Governments have used the plumbing approvals process to secure work for and/or subsidise their certification services businesses. It has also been suggested that there are numerous instances of applicants seeking planning approvals or information being effectively coerced into using a Council's own building certifier.

Some private sector certifiers also suggested that the delaying tactics are employed with regard to the provision of information. To determine assessment factors in development applications for building work, private sector certifiers need information such as property ownership, lot numbers, registered plan numbers, location details, planning scheme requirements, and information on whether an area is prone to flooding, bushfires, contaminated land and mines subsidence. They generally rely on the local government to obtain this information.

It was suggested by some private sector certifiers that Local Governments are not always forthcoming with the required information, thereby delaying the approval process for the clients of private sector certifiers. It was also suggested that the information provided by Local Government is often incomplete and misleading. Furthermore, it was argued that Local Governments charge private sector certifiers for the provision of information, while the clients of Local Government certifiers often receive the information free of charge or at a lower price.

Various Councils indicated in their submissions that they do not always have the information available or in a form to be able to provide it to private certifiers. They noted that to provide this information often involves major system development effort and costs.



*It is claimed that the Judicial Review Act and the Freedom of Information Act protect Local Governments*

Consultation with private sector certifiers also highlighted their concerns about the lack of an effective complaints mechanism for private certifiers to lodge complaints against Local Governments. It was claimed that the Judicial Review Act and the Freedom of Information Act protect Local Governments by prohibiting private certifiers from obtaining relevant financial information to be able to effectively lodge complaints against Local Governments.

It is also worth noting that the LGAQ (2001) review proposed a fair trading policy for councils to facilitate fair competition between local council certifiers and private sector certifiers. This also suggests a concern that there are competitive neutrality issues that still need to be addressed.

*Some claim there is a problem in the provision of information*

It also needs to be recognised there is already a Code of Competitive Conduct specified under the Local Government Act 1993 or when council business activities are formally commercialised or corporatised. Under the Code, Local Governments are required to implement a form of full cost pricing of their commercial services. However an election to implement the Code is at the discretion of the Local Government, unless entities are formally commercialised or corporatised which is also a policy matter for Local Governments.

*The question needs to be asked as to why a separate fair trading policy is needed if there is already a Code of Competitive Conduct and associated full cost pricing requirements that are relevant for Local Governments*

The question needs to be asked as to why a separate fair trading policy is needed if there is already a Code of Competitive Conduct and associated full cost pricing requirements that are relevant for Local Governments. As noted, the consultation process revealed widespread complaints that the Queensland Government's full cost pricing guidelines were not being applied in a meaningful way by many Local Governments. This could be because Local Governments have not elected to implement the code or because their certification services are not formally commercialised or corporatised or it could be simply that they are not adhering to the code or that the code itself does not adequately address the issues.

A critical issue in relation to the Code of Competitive Conduct is the complaints process. In the first instance, complaints are required to be resolved at the local level, between the Local Government and the complainant. If a complaint is unable to be resolved during preliminary procedures, a formal complaint is lodged and a referee is appointed by the Local Government to investigate the complaint. A referee can be a Local Government employee not involved in the particular business activity, an independent person or another Local Government. The referee subsequently investigates the complaint and reports to the Local Government. The Local Government may then decide whether or not to implement the recommendations of the report.

Complainants not satisfied with the recommendations cannot appeal the decision, however, they can take the matter to Ombudsman. The Department of Local Government and Planning has advised that complaints are generally resolved at the Local Government level and that only one formal complaint has been lodged to date. This complaint is currently under investigation. However, as noted private

*The current arrangements and the complaints process provide too much discretion to Local Authorities in relation to conflict of interest and competitive neutrality issues*

*If Government certifiers continue to provide certification services in competition with private sector certifiers, it is critical to develop improved arrangements for ensuring effective adherence with competitive neutrality principles. The most critical change would be to allow independent reviews of complaints*

*But even if there was strict regulation of fees and charges Local Governments would still have incentives to assist their business units*

*The consultation process and our research have confirmed general agreement that the entry criteria for accreditation are reasonable. However, two key issues that were raised were the role and scope for a conflict of interest in relation to BSAP and the AIBS and the need for CPD*

*The setting of prescribed accreditation requirements should not be at the discretion of an industry entity*

sector certifiers have claimed that it is difficult to obtain the relevant financial information from Local Governments to effectively lodge a complaint because of the operation of the Judicial Review Act and Freedom of Information of Act.

It is considered that this complaints process in combination with the lack of formal regulation of charges and associated service levels is inadequate for dealing effectively with competitive neutrality issues. Overall, we consider that it provides too much discretion to Local Governments in relation to conflict of interest and competitive neutrality issues.

Given the extent of competitive neutrality issues raised by this review, we consider that if Local Government certifiers continue to provide certification services in competition with private sector certifiers that it is critical to develop improved arrangements for ensuring effective adherence with competitive neutrality principles. In this respect, the most critical change would be to allow independent reviews of complaints, with power to obtain all relevant information (including financial information) and power to ensure adherence to competitive neutrality principles. However we consider that it would be very difficult to resolve all competitive neutrality problems because Local Governments would still face a conflict of interest where they undertook both commercial and regulatory functions that affected those commercial functions. Even if there was strict regulation of fees and charges Local Governments would still have incentives to assist their business units in the provision of information in a timely manner giving them an advantage over private sector certifiers.

#### 4.4 ACCREDITATION

The consultation process and our research have confirmed general agreement that the entry criteria for accreditation are reasonable. However two key issues that were raised were the role and scope for a conflict of interest in relation to BSAP and the Australian Institute of Building Surveyors and the need for compulsory continuing professional development.

Under the current legislation BSAP, which is wholly owned by the Australian Institute of Building Surveyors, has the legal authority to set prescribed requirements for accreditation and also requires building surveyors to undertake Continuing Professional Development to continue to be accredited. We consider that it is not appropriate for an industry body to have the legal authority to set prescribed requirements for accreditation. This is a regulatory function that defines entry requirements and affects competition and should not be at the discretion of an industry entity. Our review of the process for meeting CPD requirements also raises concerns that AIBS has effective control over the CPD process. Consultation confirmed that this was a concern of many private sector certifiers.

*The current CPD system may be too stringent and a review of the system is warranted*

Several submissions proclaimed their general agreement with the current CPD system, but noted that the current system may be too stringent and a review of the system is warranted. In particular, it is claimed that there should be greater recognition given to programs provided by groups other than the AIBS.

*The compulsory nature of CPD was supported in many submissions, based on the need for industry to continually upgrade their knowledge and skills*

The compulsory nature of CPD was supported in many submissions, based on the need for industry to continually upgrade their knowledge and skills, particularly in light of constantly changing codes and standards, legislation, building technology and building methodology, in order to protect community interest.

*In contrast, other submissions indicated that compulsory CPD is not necessary as competition, regulation and enforcement will drive certifiers to further their own professional development if they are to remain competitive in the workplace*

In contrast, other submissions indicated that compulsory CPD is not necessary as competition, regulation and enforcement will drive certifiers to further their own professional development if they are to remain competitive in the workplace. Furthermore, it was claimed that the mandatory CPD requirement is an imposition on building certifiers.

It was noted that upon completion of the study programme (when degree course points can no longer be used for CPD purposes), it becomes increasingly difficult and costly to attend enough training sessions to obtain the necessary CPD points for accreditation, particularly in remote and rural areas. This concern was expressed by some Local Government certifiers as well as private sector certifiers.

It is also worth noting that points are given for attendance at relevant courses but there is no test to determine the effectiveness of any knowledge transfer.

The relevance of compulsory CPD was also questioned if an improved audit and enforcement program was implemented, particularly in relation to planning competencies.

During the course of this review the Department of Local Government and Planning proposed that there be additional planning competency requirements for accreditation. They considered this to be necessary given that most of the complaints about private sector certifiers relate to planning matters. Private sector certifiers also noted that it is often difficult to interpret planning requirements of Councils. However some private sector certifiers argued that Councils did not make reasonable efforts to clarify their planning requirements.

*Consultation has confirmed the widespread support for the inclusion of the 'fit and proper person' test. However, suggestions were made that the current criteria should be expanded to take account of financial and disciplinary criteria*

## 4.5 CHARACTER TEST

Under the legislation, the applicant must pass a “fit and proper person” test.

Consultation has confirmed the widespread support for the inclusion of the ‘fit and proper person’ test. However, suggestions were made that the current criteria should be expanded to take account of financial and disciplinary criteria.

*The main issue in relation to accreditation fees is ensuring competitive neutrality for Local Governments*

## 4.6 ACCREDITATION FEES

Many submissions pointed to the high cost of accreditation fees relative to other professions. However the main issue is the extent to which accreditation fees and all other costs are appropriately reflected in the fees the Local Governments set for their business certification services.

*A Local Government building surveying technician may perform certification functions while a building surveying technician not working for the Local Government may not*

## 4.7 BUILDING SURVEYING TECHNICIANS

Under section 124(3) of the Standard Building Regulation, a Local Government building surveying technician may approve building work while a building surveying technician not working for the Local Government may not.

Councils claim that the provision to allow council building surveying technicians to certify common buildings was included to assist councils to provide low-cost certification services. They argue this is necessary in rural and remote areas where councils could not justify the cost of a higher qualified person and there is no alternative service in the private sector.

This is a direct breach of competitive neutrality and submissions have been received in support of this interpretation. The issue could be addressed by allowing private sector certifiers the same responsibilities as Local Government certifiers, provided more effective regulation of private certifiers can be reasonably achieved or by removing the advantage that building surveying technicians have when they work for Local Governments. The Australian Institute of Building Surveyors claims that this will have the benefit of allowing private certifiers to access low cost certifiers and give current local government building surveying technicians a greater ability to work for and gain experience from a private sector certifier, while offering another entry point to new entrants to the profession.

An alternative that was canvassed would be to allow the practice to continue in remote regions or in small Councils.

## 4.8 PROFESSIONAL INDEMNITY INSURANCE

Under the Standard Building Regulation, private certifiers have to have a minimum level of professional indemnity insurance of \$1 million. Local Government certifiers do not need individual professional indemnity insurance, however, Local Governments must have a minimum of \$10 million of professional indemnity insurance to cover all their operations and \$30 million of public liability insurance.

*The consultation process has indicated that the mandatory nature of professional indemnity insurance does not appear to be a major issue for most industry participants.*

The consultation process has indicated that the mandatory nature of this requirement does not appear to be a major issue for most industry participants. Some submissions argued that the compulsory burden should be reviewed and consideration given to a requirement to make it compulsory for certifiers to disclose the limit and type of cover that they hold (if any) to a client. However the majority of submissions seemed to support the need for compulsory professional indemnity insurance, based on consumer protection. However, AIBS acknowledged that this requirement should be reviewed in the future, depending on the results of an increased audit program.

## 4.9 DISCIPLINARY PROCESSES

The LGAQ review has made a number of useful recommendations in relation to disciplinary processes. They include: mandatory mediation before a complaint can be submitted to the BSA; a revised definition of professional misconduct to distinguish clearly between administrative and minor mistakes and more serious technical breaches; and developing a system of demerit points and penalties. The consultation process revealed general support for these recommendations.

*The LGAQ review has made a number of recommendations in relation to disciplinary processes. They include: mandatory mediation before a complaint can be submitted to the BSA; a revised definition of professional misconduct to distinguish clearly between administrative and minor mistakes and more serious technical breaches; and developing system of demerit points and penalties*

The LGAQ review also recommended that the current provision for appeal to the Chief Executive of the Department of Local Government and Planning be replaced with an appeal against the BSA disciplinary decisions being made directly to the Court. The relevance of separating policy and regulatory roles would provide support for this option. However it is considered that it would be more effective if an intermediate low cost step was still retained but not through the Chief Executive of the Department of Local Government and Planning.

Several submissions agreed with the LGAQ recommendations. One submission questioned compulsory mediation, on the grounds that it may restrict the public from lodging a complaint if they may not wish to go through mediation. It was suggested that the BSA could possibly identify if mediation is necessary and have the power to order mediation.

*Procedural fairness and natural justice need to be introduced before the mediation stage*

Another submission claimed that procedural fairness and natural justice are needed before mediation is introduced. The person wishing to lodge a complaint against a building certifier should have to contact the building certifier first, giving the certifier the opportunity to rectify the problem and resolve the matter. This

process (if unable to resolve the matter) should be followed by mediation and subsequent appeals to the Building Tribunal, the Planning and Environment Court and ultimately the Queensland Court of Appeal and the High Court of Australia.

#### 4.10 CONFLICT OF INTEREST

*The consultation process and our research identified several conflicts of interest.*

As noted, private sector certifiers have widespread concerns about conflicts of interest for Local Governments that are related to their responsibilities for commercial functions and regulatory functions that have a direct bearing on those commercial functions.

The issue of a conflict of interest for BSAP and AIBS in the discretion BSAP has in relation to accreditation standards and the effective control of AIBS over the process was also raised as an issue.

Some submissions also pointed to the conflict of interest that private sector certifiers may have in their relationship with builders. In this respect there was general agreement that the existing conflict of interest provisions (Section 128 of the Standard Building Regulation) that relate to private sector certifiers should be retained. However private sector certifiers did point to the anomaly that there was no such provision for Local Government certifiers.

## 5 THE ASSESSMENT OF BROAD REGULATORY OPTIONS

*This section provides an assessment of broad regulatory options in relation to relevant aspects of Building Legislation*

This section provides an assessment of broad regulatory options and discusses the appropriate roles of various government and private entities in relation to relevant aspects of Building Legislation.

This section establishes a preference for some form of licensing of certification services combined with appropriate monitoring and disciplinary processes. Section 6 assesses various broad options for implementation of licensing, monitoring of work and disciplinary processes. Section 7 assesses various supporting regulatory options. Given the wide range of possible options that could be developed this two-stage approach is considered the most suitable approach for evaluating the options. Section 8 summarises the conclusions.

### 5.1 DEREGULATION

Deregulation refers to the removal of accreditation requirements for building certifiers. It is assumed that there is a need for a building code and for compliance with that code.

*Recognising the public safety concerns and third party effects and the efficiency of some form of licensing, deregulation of licensing would not be effective*

The information problems, public safety concerns, and third party effects in a deregulated market are considered to provide a strong rationale for specifying building standards and for some form of licensing or regulatory requirements for building certification services as an efficient mechanism to deal with the problem. The general rationale for such arrangements was presented in the previous section. Taking account of this rationale it is considered that the removal of accreditation requirements for building certifiers is not warranted.

### 5.2 NEGATIVE LICENSING

A negative licensing scheme is normally one which allows anyone who meets a minimum qualification to practise but provides the Government with the authority to withdraw the right to practise if an individual fails to perform to certain specified standards. Appropriate inspection and approval of the work would still apply.

Negative licensing could take the form of no formal qualifications, or some minimal restrictions on entry such as criminal convictions or certain educational requirements.

Negative licensing will entail lower compliance and administrative costs than positive licensing but a likely greater risk of compromising the public safety and

amenity objectives. Under negative licensing the number of inappropriate participants entering an industry will be higher than under a licensing process, entailing greater risks of defects. To attempt to achieve the same level of effectiveness as licensing there would have to be a more rigorous and more comprehensive monitoring process of the work of building certifiers.

*Concerns about compromising public health, safety and amenity and increased monitoring costs suggest that negative licensing would also be inferior to positive licensing*

Concerns about compromising public health, safety and amenity and increased monitoring costs suggest that negative licensing would also be inferior to positive licensing i.e. only allowing individuals who have met certain prescribed standards from undertaking specified building certification functions.

### 5.3 CODE OF CONDUCT SUPPLEMENTED BY MINIMUM LICENSING REQUIREMENTS

This option is a form of self-regulation with minimum legislated standards. Appropriate inspection and approval of the work and controls on materials used would still apply.

It is difficult to characterize this option as it depends on the extent of licensing requirements that are specified. These could be as high as the current accreditation requirements or they could merely relate to certain requirements in relation to a 'fit and proper person test' or even no requirements at all. Alternatively they could encompass arrangements for voluntary licensing where anyone can practise but certificates of competency are provided to people who meet specified requirements.

However a key characteristic of code of conduct arrangements is that the industry has a large role in designing and policing adherence to an appropriate standard. There are likely to be many options for policing, disciplinary and appeals processes.

The greater involvement of industry in a code of conduct is likely to facilitate the development of efficient processes but face greater conflict of interest issues, a weaker enforcement mechanism, inadequate transparency, greater scope for inconsistent standards and a likely greater risk of compromising the public safety and amenity objectives when compared to a licensing regime. A key weakness is in ensuring that self-regulation will be in the interest of the public rather than the industry.

*A key weakness is in ensuring that self-regulation will be in the interest of the public rather than the industry*

In relation to voluntary licensing (also known as certification) it is considered that this option would not adequately address the information problems and public safety risks relative to the use of positive licensing.



## 5.4 POSITIVE LICENSING AND AUDITING OF OUTPUTS

*It is considered that a mix of positive licensing and some form of checking on outputs will be required to ensure the objectives of the legislation are effectively achieved*

Given the foregoing considerations, it is considered that a mix of positive licensing and some form of checking on outputs will be required to ensure the objectives of the legislation are effectively achieved.

Section 6 specifies and assesses a number of options for licensing of certification services including options for structural/administrative arrangements. Section 7 specifies and assesses relevant supporting regulatory options.

## 5.5 ROLES OF VARIOUS ENTITIES

If a decision has been made that formal licensing arrangements and inspection services are required, it then has to be decided who should be responsible for these requirements and services.

*It is best if policy, regulatory and commercial functions are separated*

It is normally the case that regulatory and policy functions are the responsibility of government and that commercial functions are best suited to the private sector. Furthermore, the application of well accepted economic and governance principles emphasises the need for the separation of policy, regulatory and commercial functions to provide clarity, avoid conflicting objectives and conflicts of interest and help ensure effective accountability.

For example, the policy principles in relation to corporatisation and commercialisation of government functions are also highly relevant here. It is well accepted that there needs to be clear separation of policy, regulatory and commercial functions to provide clarity and avoid conflicts of interest for corporatisation or commercialisation to be effective.

By the same token it is also important to avoid conflicts of interest in undertaking commercial functions.

*It is considered that many of the potential conflicts of interest, competitive neutrality issues and inefficiencies that arise with the current arrangements relate to the issue of defining appropriate roles and ensuring effective accountability*

It is considered that many of the potential conflicts of interest, competitive neutrality issues and inefficiencies that arise with the current arrangements relate to the issue of defining appropriate roles and ensuring effective accountability for the various entities in the context of addressing a fundamental market failure problem.

There is a need to recognise these principles in considering the respective roles of Local Governments, the Department of Local Government and Planning and the Building Services Authority.

Ideally, the Department of Local Government and Planning should be responsible for policy matters and the overall performance of the regulatory regime for certification services. In relation to regulatory matters, this means that it can have responsibility for establishing and assessing the broad regulatory regime and its

performance, but should not be responsible for day-to-day regulatory matters which should be the responsibility of a separate regulatory entity. It is considered that to achieve clarity and consistency in decisions and avoid conflicts in decision making that mediation and disciplinary functions should also be effectively separated from the policy functions.

*There is not a clear and persuasive rationale as to why the Chief Executive of the Department of Local Government and Planning hears appeals in relation to BSA decisions on private sector certifiers*

In this respect there is not a clear and persuasive rationale as to why the Chief Executive of the Department of Local Government and Planning hears appeals in relation to BSA decisions on private sector certifiers that can subsequently be heard by the Planning and Environment Court. Although there is clearly merit in a low cost intermediate step before appeal to the Court, it would not seem to be an appropriate role for the Chief Executive of a Department.

One problem in trying to redefine the roles of the Department of Local Government and Planning and the Building Services Authority to achieve more effective accountability arrangements is that the Building Services Authority is formally responsible to the Minister for Housing. This is related to the issue of whether one centralised state authority reporting to one Minister, should be responsible for all occupational and business licensing for building and related activities.

The options for the appropriate regulatory authority also need to consider such issues as whether the responsibility should be at the State or Local Government level and where best to place occupational licensing of building certifiers from a regulatory/administrative perspective.

*In relation to checking compliance with local building and planning codes, it is considered that Local Councils should retain a prominent role given their location, expertise and that they represent local communities where the building work occurs*

In relation to checking compliance with local building and planning codes it is considered that Local Councils should retain a prominent role given their location, expertise and that they represent local communities where the building work occurs. It is considered that, irrespective of the detailed options, they would need to have authority in monitoring compliance with their local building and planning codes. However this does not necessarily mean that their current responsibilities should not change, particularly in relation to the extent to which they undertake commercial services in competition with the private sector. Various options for redefining the roles of Local Government and modifying the current arrangements in relation to building certification are considered in more detail in Section 6.

*It is considered that it would not be appropriate to provide Local Governments with the responsibility for occupational or business licensing of building certifiers*

Although Local Governments would need to retain certain building regulatory functions, it is considered that it would not be appropriate to provide Local Governments with the responsibility for occupational or business licensing of building certifiers. There are likely to be important cost efficiencies in a centralised government entity having responsibility for either or both occupational licensing and business licensing. There would also be a greater risk of issues arising with discretionary and inconsistent standards if the responsibilities for occupational licensing of building certifiers rested with Local Governments.

It is also recognised that there are already a range of conflict of interest and competitive neutrality problems that arise for many Local Governments who have involvement in both regulatory and commercial functions. It is considered likely to be the case that these problems would be exacerbated if Local Governments were also to be given responsibilities for licensing building certifiers.

*If a centralised State government entity is to have responsibility for occupational and/or business licensing there is a need to consider whether it should have responsibilities for both for one or more occupations*

If a centralised State government entity is to have responsibility for occupational and/or business licensing there is a need to consider whether the one entity should have responsibilities for both for one or more occupations. A full examination of this issue is beyond the scope of this review, however some basic options are presented in Section 6. At this point it is worth noting some key advantages and disadvantages of some basic options.

*An entity with responsibility for licensing of a single occupation is considered to run a significant risk of “regulatory capture” by members of the occupation it is regulating*

The main advantage of a single occupational licensing entity is in being focussed on the requirements for a particular occupation. The role often extends to one of co-ordinating occupational development and is often favoured by participants in the industry. However an entity with responsibility for licensing of a single occupation is considered to run a significant risk of “regulatory capture” by members of the occupation it is regulating. It is often claimed that this problem can be addressed by ensuring wide representation on the board of the regulatory entity but such representation often means that expertise of the industry is compromised. There is a need to ensure an appropriate balance between expert and broader community perspectives.

*Another option is to house occupational licensing for several occupations in the one entity. This is more likely to avoid the likelihood of “regulatory capture”. It would probably also entail cost efficiencies relative to separate occupational licensing*

Even if individuals with wider interests but appropriate expertise can be found it is considered there is still a tendency for regulatory capture because of the close and regular interaction with participants in the industry and the likelihood that the regulatory entity would have responsibilities for training and other industry development functions. There is essentially a conflict in being an effective and impartial regulator and having industry development functions. When there is such a mix of functions and when regular interaction with the one occupation occurs there is an incentive by the regulator to maintain a friendly and supportive stance which can conflict with the role of impartial monitoring and enforcement.

Given these considerations another option is to house occupational licensing for several occupations, for example for all building trade occupations, in the one entity. This is more likely to avoid the likelihood of “regulatory capture”. It would probably also entail cost efficiencies relative to separate occupational licensing.

*There could be significant cost savings if the BSA was responsible for occupational and business licensing for all building related activities*

In considering this option there is also a need to consider whether such an entity should have business licensing responsibilities as is currently the case for the Building Services Authority for building certifiers. This then raises the issue of the role of the Building Services Authority and whether it should be the entity with

responsibility for both occupational and business licensing for the entities that are currently required to have business licenses. It is considered that there could be significant cost savings with such a model as well as greater scope to improve the effectiveness of monitoring and enforcement mechanisms. However it is also considered likely that such an approach would be greatly resented by some occupations that could be part of such an option. It is not possible to definitively determine which is the best option for occupational licensing in this review at this stage, however Section 6 specifies the options with more context and detail.

A major issue in building certification that is particularly relevant when clarifying the appropriate roles of various entities arises because Local Governments are involved in both regulatory and commercial activities. Although various policies and codes have been developed to address the potential conflict of interest and competitive neutrality issues, basic economic and governance principles suggest that the problem is very difficult to resolve effectively.

*The consultation process identified numerous instances of conflict of interest and competitive neutrality problems associated with Local Governments who are involved in both the regulation and commercial provision of certification services*

The consultation process identified numerous instances of conflict of interest and competitive neutrality problems associated with Local Governments who are involved in both the regulation and commercial provision of certification services. This is relevant to the review because one of the specific restrictions is statutory charges and apart from this, the PBT must consider if there are better options for addressing the basic objectives of the legislation than the current legislative arrangements. By definition this extends the assessment to a broad range of regulatory and administrative options. The aim is to identify the option that is of maximum public benefit to the community as a whole.

## 6 THE ASSESSMENT OF SPECIFIC OPTIONS FOR CERTIFICATION SERVICES, LICENSING AND REGULATORY ENFORCEMENT

### 6.1 OVERVIEW OF OPTIONS

The previous section assessed the broad regulatory options and determined a preference for some form of positive licensing and some form of checking on outputs of building certifiers. This section specifies and evaluates the key options for implementing this approach.

A stylised representation of regulatory options and government and private roles is depicted in Figure 6.1. Once a decision has been made with regard to the need for **formal certification approvals** (and accepting the broad assessments provided in Section 4) **the specific options for providing formal certification services** are —

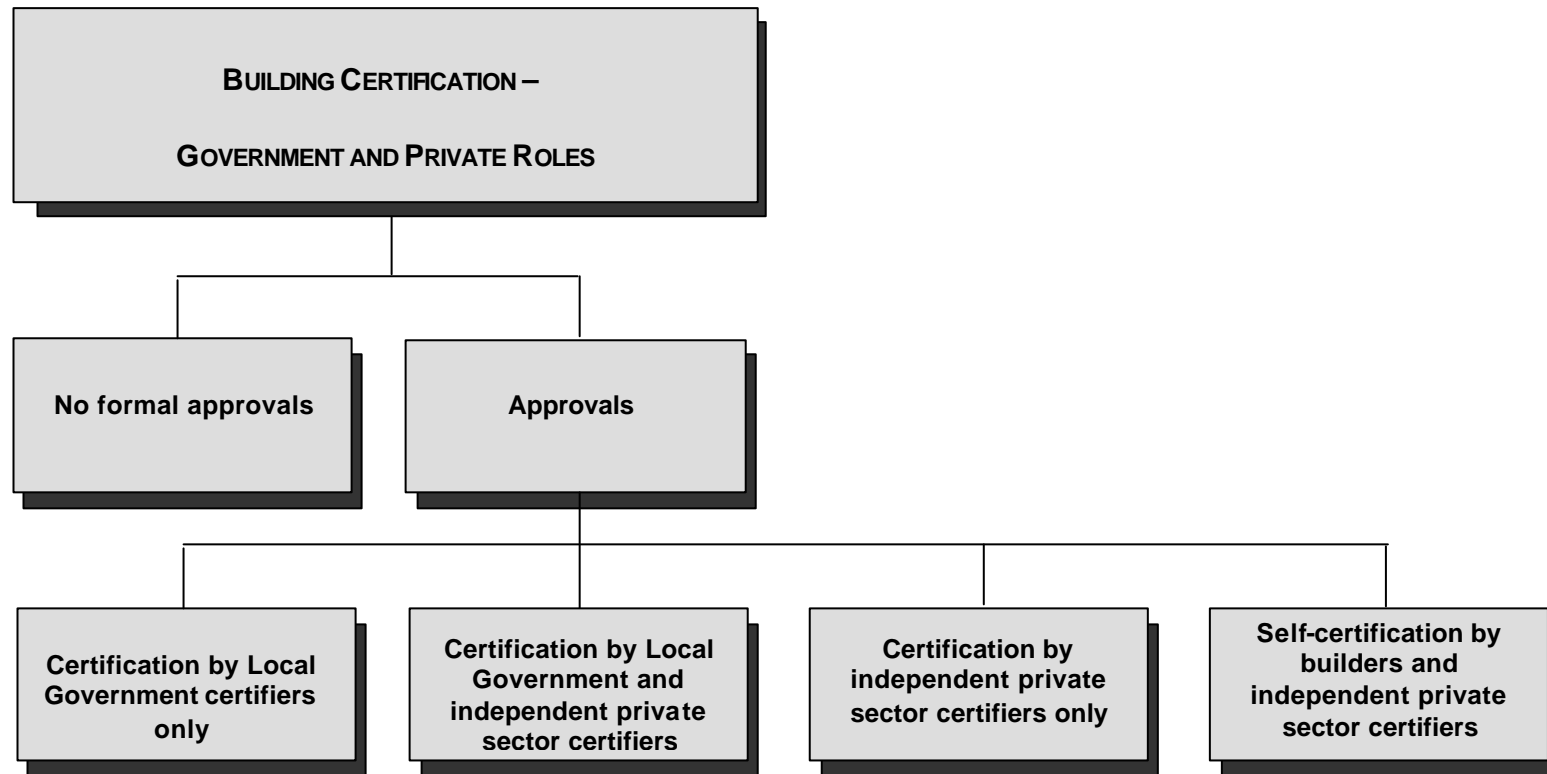
*The options for providing commercial certification services include: retain the current arrangements, allow only private sector certifiers or self-certification*

1. Retain the current arrangements where both Local Government and independent private sector certifiers can provide certification services (with certain modifications to improve the performance of private sector certifiers and Local Governments).
2. Certification by independent private sector certifiers only (with Local Governments not being allowed to provide any commercial certification services except in remote regions).
3. Self-certification by suitably qualified builders supplemented with the freedom to use independent private sector certifiers.

Note that an option to allow only Local Governments to provide certification services is not assessed because it is considered that it would be more restrictive to competition than the current arrangements. The Queensland Government's *Public Benefit Test Guidelines* do not allow the consideration of options that would be more restrictive than the current arrangements.

Once a decision has been made on who can undertake certification services and who undertakes the licensing and enforcement functions there is a need to consider a number of specific supplementary options. These specific supplementary options are more directly related to the identified restrictions on competition and they are considered separately in Section 7.

FIGURE 6.1 BUILDING CERTIFICATION – GOVERNMENT AND PRIVATE ROLES



## 6.2 OPTIONS FOR PROVIDING FORMAL CERTIFICATION SERVICES

### 6.2.1 Local Government and independent private sector certifiers to provide certification services with modifications to the current arrangements to address identified problems

*The arrangements would be similar to those that currently apply but with enhancements in relation to monitoring private certification*

*There would also be a need to implement more effective arrangements for dealing with conflicts of interest and competitive neutrality issues for Local Governments*

*The public consultation process raised a number of concerns about the performance of Local Governments and associated conflict of interest and competitive neutrality issues*

Under this option the arrangements would be similar to those that currently apply with local government and private sector certifiers. There would be a need for some modifications to be incorporated including effective audits and more effective disciplinary processes than currently apply.

There would also be a need to more fully investigate and develop options for effectively dealing with conflict of interest and competitive neutrality issues that relate to the fact that Local Governments undertake both commercial functions and regulatory functions that affect the performance of those commercial functions and the performance of private sector competitors.

The consultations that were undertaken in the course of preparing this draft report raised a number of concerns about the performance of Local Governments and associated conflict of interest and competitive neutrality issues. Although many Local Governments may have made significant efforts to address conflict of interest issues and implement competitive neutrality, our assessment of the submissions as-a-whole is that further reforms are required to address these issues.

It is well recognised in both the economic literature and from practical experience that improving the performance of local councils and the public sector generally is a major ongoing issue and that a major weakness in the public sector is the absence of rivalry, competition and the discipline of the market place that applies in the private sector. In this respect the introduction of competition into certification services is considered likely to have improved the performance of Local Governments in this area. However for many Local Governments it appears that conflict of interest and competitive neutrality issues are not allowing the full benefits of competition to be realized.

The competitive neutrality issue is not simply one of setting fees but also of dealing with the scope for Local Governments in relation to the incentives they have to provide a better service to their own business units and to make it difficult for private sector certifiers to compete on equal terms. There is fundamental conflict of interest in the one local public entity undertaking both commercial functions and regulatory functions that affect those commercial functions and the performance of private competitors. It is considered that in order to more effectively deal with this problem the following arrangements would need to apply.

*Recommendations include: a) improved guidelines to comply with full cost pricing and competitive neutrality principles; b) private sector certifiers to have access to an independent and effective complaints mechanism; and c) powers of an independent reviewer or similar means to ensure full cost pricing and competitive neutrality issues are effectively resolved*

- 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.
- c) Powers of an independent reviewer or similar means to ensure the full cost pricing and competitive neutrality issues are effectively resolved.

If these arrangements prove to be ineffective, there would be a need to consider formal, independent and transparent regulation of all statutory charges, associated service levels and all commercial fees levied by Local Governments, in relation to building certification.

There would also be a need for an entity to organise and monitor an effective audit program and coordinate an effective disciplinary process in relation to certification services. The evaluation of broad roles has determined that it would be best if a centralised State authority was responsible for licensing and that it is best if such an entity was responsible at least for occupational licensing in a number of occupations to avoid the potential for 'regulatory capture' by the occupations being licensed and to achieve cost efficiencies. If such an approach was adopted, this entity could also be responsible for co-ordinating audit work of the occupations and managing disciplinary processes.

*There would be a need for an entity to organise and monitor an effective audit program and coordinate an effective disciplinary process*

The funding for such an entity could come out of accreditation fees and fines for certification errors or separate audit fees. We consider that there would be a public benefit that would justify levying accreditation fees, fines or audit fees to cover monitoring costs for such an entity but have not determined the best specific option.

*At this stage it would seem appropriate to have local Governments focus on compliance with planning matters and the centralised State government agency focus on technical and professional misconduct matters.*

In the case of building certification there would need to be a clear definition of the role and responsibilities and processes of Local Governments in auditing the work of certifiers and the role of the centralised State government agency. At this stage it would seem appropriate to have local Governments focus on compliance with planning matters and the centralised State government agency focus on technical and professional misconduct matters. It is also considered that a State agency would achieve greater cost efficiencies and greater consistency in managing an appropriate enforcement process for both technical and planning matters. Local Governments would be required to register complaints about private sector certifiers with the State agency as is the case now. However some modifications are considered necessary to ensure natural justice and avoid frivolous or vexatious complaints.



The major advantage of this option compared with the current arrangements would be in securing and enhancing the benefits in terms of reduced time required for building approvals and better certification services.

The major disadvantage with this option relates to the effort that would be required to better resolve the conflict of interest and competitive neutrality issues. We consider that these are still a major problem for many local governments in relation to building certification and that they are not likely to be most effectively resolved while Local Governments undertake both regulatory and commercial functions. The foregoing recommendations would however lead to a big improvement relative to the current arrangements.

*This option is considered to be an improvement over the current arrangements but entails significant competitive neutrality problems that would be extremely difficult and costly to resolve*

In summary, while this option is considered to be an improvement over the current arrangements, it entails significant competitive neutrality problems (and associated costs) that would be extremely difficult and costly to resolve.

### **6.2.2 Certification by only independent private sector certifiers with modifications to the current arrangements to address identified problems and with an exception for remote regions where Local Governments would still be able to provide certification services**

*Under this option, only independent private sector certifiers would provide all certification services that can be commercialised, with the exception of remote regions*

Under this option, only independent private sector certifiers would provide all certification services that can be commercialised except in remote regions that they would be unlikely to service. Local Governments would be able to provide certification services in such remote regions. There would be a need for some modifications to be incorporated including effective audits and more effective disciplinary processes than currently apply.

*Local Governments would continue to decide matters under Schedule 6 of Standard Building Regulation 1993 and would have the authority to undertake audits in relation to building and planning codes in their Local Government area*

Local Governments would not undertake certification services in competition with private sector certifiers except in remote regions. Local Governments would not issue building approvals based on the work of private sector certifiers. However, under this option, Local Governments would continue to decide matters under Schedule 6 of Standard Building Regulation 1993. Private sector certifiers would be required to certify work in accordance with relevant local building and planning codes. Local Governments would have the authority to undertake audits in relation to building and planning codes in their local government area.

This option would mean that there was more effective competition in the provisions of certification services. This is because the withdrawal of the local governments from providing certification services would provide more opportunities for private sector certifiers in each local area (providing more scope for new entry as well as growth of existing private sector certifiers) and the elimination of competitive neutrality problems would mean a more efficient service.

*Concerns have been raised that private sector certifiers may not act in the public interest in the same way that Local Councils do*

Concerns have been raised that private sector certifiers may not act in the public interest in the same way that Local Councils do under the current arrangements. This concern is related to the fact that certification entails a quasi-regulatory function and that market mechanisms that work well in normal competitive markets do not apply in the same way for private sector certifiers. This is why there needs to be effective, formal (public) monitoring and enforcement processes in relation to the work of private sector certifiers. However there are a number of specific observations that are relevant in response to this concern.

*The number of complaints in relation to building certification work is relatively small*

First the number of complaints in relation to building certification work is relatively small. It may be that there are undetected problems and complaints that do not go to the BSA. However there are concerns that some complaints are vexatious and do not adhere to principles of natural justice.

*Most of the complaints relate to town planning issues*

Second, most of the complaints relate to town planning issues. Consultation with industry participants and local government representatives confirmed there was scope for Local Governments to clarify planning requirements. It is considered that a substantial number of problems relate to Local Governments being reluctant or unable to define clearly what they require.

*At the extreme the problem can be one of Local Government entities being reluctant to provide relevant planning information to private sector certifiers with the same clarity, speed of service and cost that applies when such information is provided to Local Government certifiers*

Third, Local Governments who undertake both formal regulatory and commercial functions in relation to certification services have a very prominent conflict of interest. The conflict of interest is that they have commercial objectives and regulatory responsibilities that affect their ability to meet their commercial objectives and that could be used to hinder private sector certifiers in undertaking their business certification services. Some Local Governments may have developed reasonably effective arrangements for dealing with this conflict of interest. However the basic conflict remains while Local Governments undertake both functions.

Consultation with private sector and former local government certifiers highlighted numerous problems that private sector certifiers encounter. At the extreme the problem can be one of Local Government entities being reluctant to provide relevant planning information to private sector certifiers with the same clarity, speed of service and cost that applies when such information is provided to Local Government certifiers. This conflict of interest problem that is associated with Local Governments is considered likely to be a major factor in causing delays in relation to private certification work as well as in generating complaints by Local Governments about private sector certifiers.

*Consultation has confirmed that the introduction of private sector certifiers has led to faster approvals and better service*

Fourth, consultation has confirmed that the introduction of private sector certifiers has led to faster approvals and better service, despite the broad range of conflict of interest and other competitive neutrality problems that exist.

Fifth, it should also be recognised that the motivation and effective accountability of local government inspectors cannot be assured. It is often presumed that the

*It should be recognised that the motivation and effective accountability of local government inspectors cannot be assured*

absence of a profit incentive and specification of a public interest objective will by themselves make a big difference in ensuring an effective focus of public sector employees on the public interest. However, the economics of behaviour suggests that the starting point in assessing incentives is an assumption that most people are generally highly motivated by self-interest. This does not necessarily mean that self-interest precludes a concern about public interest but rather that there is a need to recognise the motivation associated with self interest.

*The option of having a public entity undertake a function because of a concern that the market will not work effectively is not considered by us to be the first best approach in terms of economic principles*

It has also been suggested that this option would deny the Community the right to choose a trusted public entity to undertake certification services. However the option of having a public entity undertake a function because of a concern that the market will not work effectively is not considered by us to be the first best approach in terms of economic principles. We consider that the licensing of private sector certifiers backed by enhanced monitoring processes is the better option and that the involvement of Local Government in both commercial and regulatory activities entails significant costs for the community.

To sum up it has been suggested that Local Governments are more likely to adopt a friendly, accommodative and problem solving approach if an individual has a problem with a certification issue. However, as noted the recorded error rate of private sector certifiers is low, the introduction of private sector certifiers has led to improvements in service and reduced waiting times and there is no guarantee that Local Governments will consistently perform in the desired manner. Based on the application of simple incentive principles, one cannot be sure that Local Government certifiers will provide superior services to those provided by the private sector, backed by effective regulatory mechanisms

*There would be a need for an entity to organise and monitor an effective audit program and coordinate an effective disciplinary process*

As in the case of the previous option, there would be a need for an entity to organise and monitor an effective audit program and coordinate an effective disciplinary process. The evaluation of broad roles has determined that it would be best if a centralised State authority was responsible for licensing and that it is best if such an entity was responsible at least for occupational licensing in a number of occupations to avoid the potential for 'regulatory capture' by the occupations being licensed and to achieve cost efficiencies. If such an approach was adopted, this entity could also be responsible for co-ordinating audit work of the occupations and managing disciplinary processes.

The funding for such an entity could come out of accreditation fees and fines for certification errors or separate audit fees. We consider that there would be a public benefit that would justify levying accreditation fees, fines or audit fees to cover monitoring costs for such an entity.

In the case of building certification there would need to be a clear definition of the role and responsibilities and processes of Local Governments in auditing the work of certifiers and the role of the centralised State government agency. At this stage it would seem appropriate to have local Governments focus on compliance with

*At this stage it would seem appropriate to have local Governments focus on compliance with planning matters and the centralised State government agency focus on technical and professional misconduct matters*

planning matters and the centralised State government agency focus on technical and professional misconduct matters. It is also considered that a State agency would achieve greater cost efficiencies and greater consistency in managing an appropriate enforcement process for both technical and planning matters. Local Governments would be required to register complaints about private sector certifiers with the State agency as is the case now. However some modifications are considered necessary to ensure natural justice and avoid frivolous or vexatious complaints.

*We consider that this option would represent an important advance over the current arrangements as the conflict of interest and competitive neutrality problems that greatly restrict the effectiveness of private certification would be eliminated*

We consider that this option would represent an important advance over the current arrangements as the conflict of interest and competitive neutrality problems that greatly restrict the effectiveness of private certification would be eliminated. It is considered that under this option many Local Governments would have more enhanced incentives to provide better services to private sector certifiers. When the risk of conflict of interest is removed it is likely that Local Governments would be more focussed on clarifying their planning requirements and in reducing delays in providing information for private sector certifiers and in making associated approvals.

*Provided an effective audit and enforcement program was developed, it should mean that the public welfare objective was not compromised*

Provided an effective audit and enforcement program was developed, it should mean that the public welfare objective was not compromised.

The main disadvantage with this option is the adjustment that Local Governments would have to make. However it needs to be recognised that the overall community would gain from faster approvals and cost savings for private sector certifiers as Local Governments improved their performance in the provision of relevant information needed to undertake certification.

### **6.2.3 Self certification by suitably qualified builders supplemented by the freedom to use independent private sector certifiers**

*This option entails self certification by suitably qualified builders supplemented by the freedom to use independent private sector certifiers*

This option entails self certification by suitably qualified builders supplemented by the freedom to use independent private sector certifiers. Local Governments would not undertake commercial certification services in competition with builders or independent private sector certifiers. The audit and enforcement processes and responsibilities of Local Governments and a centralised State agency would be similar as for the option of allowing only independent private sector certifiers. It is considered that there would be a need for builders to be subject to similar accreditation requirements as independent private sector certifiers.

It is considered unlikely to be the case that builders are typically equipped or interested to become certifiers so that they could self-certify. This is particularly the case for planning matters. They may be interested in self-certification if it did not require accreditation but this is not considered to be an effective option as assessed in Sections 3 and 5.

It also needs to be recognised that certification is a quasi-regulatory function so that some independence in terms of monitoring by an unrelated third party is considered to be of benefit. It is also noted that private sector certifiers have responsibilities to monitor other aspects of a builders activities other than building certification e.g. payment of portable long service obligations and home warranty insurance. It is not clear that they should have such responsibilities but removing them could have a range of implications. It is not possible to assess these implications given the scope of this review.

*It is considered that self certification would provide no meaningful advance over the option where only independent private sector certifiers were allowed to provide certification services*

It is considered that self certification would provide no meaningful advance over the option where only independent private sector certifiers were allowed to provide certification services.

## 7 THE ASSESSMENT OF SUPPORTING REGULATORY AND ADMINISTRATIVE OPTIONS FOR LICENSING, MONITORING AND ENFORCEMENT

### 7.1 ACCREDITATION

At present there are different education and experience requirements for 3 different levels. We consider that specification of a basic skills test is relevant when setting minimum licensing criteria.

*The main aspect where a clear public benefit is not apparent is in the need for compulsory continuing professional development*

The current educational and experience requirements seem reasonable as entry criteria. The main aspect where a clear public benefit is not apparent is in the need for compulsory continuing professional development. If there is an effective audit and enforcement process there should be no need to maintain a requirement that continuing professional development be compulsory. Certifiers should be free to choose the nature and extent of continuing professional development that is in their best interest. The audit and enforcement program should act as an effective accountability device and together with competitive rivalry provide appropriate incentives to undertake continuing professional development that is consistent with meeting the objectives of the legislation.

*The audit and enforcement program should act as an effective accountability device and together with competitive rivalry provide appropriate incentives to undertake continuing professional development that is consistent with meeting the objectives of the legislation*

The LGAQ review has also noted there may be merit in lowering the continuing professional development requirements for building surveying technicians in rural areas. However as noted it is considered that the requirement for **compulsory** professional development should be removed altogether.

*We also conclude that BSAP or AIBS should not have the discretion to determine accreditation requirements*

As noted earlier in the report, we have also identified a serious weakness in the current arrangements whereby BSAP which is wholly owned by AIBS has discretion over setting the prescribed requirements for accreditation. We consider that it is clearly not appropriate for an industry entity to have legislative authority to determine accreditation criteria.

During the course of this review the Department of Local Government and Planning proposed that there be additional planning competency requirements for accreditation. This was considered to be necessary given that most of the complaints about private sector certifiers relate to planning matters. Private sector certifiers also noted that is often difficult to interpret planning requirements of Councils.

*DLGP is proposing a two level accreditation scheme administered by the BSA with Local Government participation. There would be technical and planning competency requirements*

The Department of Local Government and Planning is proposing a two level accreditation scheme to be administered by the BSA with Local Government participation. Under the scheme all building certifiers would be accredited by the BSA as is currently the case. The BSA would assess their technical competency

and would be accredited in terms of technical capacity. This would enable them to assess but not approve building plans for compliance with building regulations. In order to issue approvals they would need a higher level of accreditation in relation to planning and regulatory skills. The planning competencies would be established by Regulation.

*This requirement would constitute an additional and potentially significant restriction on competition.*

We consider that this requirement would constitute an additional and potentially significant restriction on competition. The main difficulties in assessing this option are that the requirement for a planning competency is not defined in any detail and the role of Local Governments in the accreditation process is also not well defined.

It is clear that there are problems in understanding and complying with the planning requirements of many Councils. However it is not clear that this is the fault of private sector certifiers as Councils may not have strong incentives to clarify their requirements to private sector certifiers.

We are concerned that the introduction of this additional requirement could be used as an additional means to advantage Local Government certifiers at the expense of private sector certifiers. We have also not had the opportunity for consultation about this additional restriction.

We would not have significant concerns if the option of only allowing private sector certifiers was allowed as there would then be no competitive neutrality issue. However if the option of both Local Government and private sector certifiers was retained (with enhancements) we would also be concerned about the introduction of this additional restriction until it had been demonstrated that the revised arrangements with respect to addressing conflict of interest and competitive neutrality issues of Local Governments were effective.

This option should also be compared to an option of requiring Local Governments to clarify their planning requirements and ensure the same service to private sector certifiers as their own Local Government certifiers.

It is possible that the requirement for planning competencies would entail a significant public benefit. But there is also a risk of a substantial adverse impact on competition unless the competitive neutrality problems are effectively addressed. There may also 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). Given these considerations we consider that at present there is insufficient information to demonstrate that a requirement for additional accreditation requirements in relation to planning competencies is clearly justified.

*Ideally we consider that this additional restriction should be the subject of further investigation*

Ideally we consider that this additional restriction should be the subject of further consultation and investigation once the other elements of a reform package had been developed.

## 7.2 CHARACTER

Under the legislation, the applicant must pass a “fit and proper person” test. The legislation only provides broad discretion as to how the test is to be applied and assessed. In particular, section 113(2) of the Standard Building Regulation 1993 states that —

*“In determining whether the applicant is a fit and proper person to be accredited as a building certifier for the level, the accrediting body may consider  $\frac{3}{4}$*

- 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 body considers appropriate.”*

*A ‘fit and proper’ test is relevant but the criteria should be as objective as possible*

Generally, the rationale for the character test is consumer protection and there is widespread support for the inclusion of some sort of character test in the legislation. However, there is a case for making the guidelines more specific so as to adequately protect consumers while ensuring and avoiding the potential for new entrants being unfairly excluded. There is clearly a value in minimising discretion and being as specific and objective as possible about the criteria for the test.

Currently, there are no precise guidelines that are required to be applied when determining whether a person is of good character. This has resulted in various legal interpretations of the phrase “fit and proper”.

During industry consultation it was suggested that issues such as “insolvency and bankruptcy” should be included in the test, along with “criminal history”. The case for the inclusion of a “bankruptcy and insolvency” criteria needs further clarification. There is a risk that someone of good repute could be excluded from operating because of a financial failure unrelated to the building business or one that occurred a long time ago. It is appropriate that specific requirements are assessed and included in the legislation.

An assessment of the “criminal history” alone does not seem sufficient, as it would allow the licensing of demonstrated poor performers in the building industry (e.g. those who are subject to disciplinary action under a different trade). It is even possible that a person could be granted a licence or have the licence renewed despite the fact the applicant is subject to disciplinary actions for poor



building practices. It is appropriate that criteria specifically dealing with these issues be included in the legislation.

Overall, it is considered that the “fit and proper person” test results in a benefit to the public and should therefore remain part of the legislation. However, to be effective and fair the legislated guidelines need to be more specific and not enable broad discretion by the accrediting body.

An attractive option is to move towards clear criteria such as set out under section 37 of the Electricity Act 1971 in the Australian Capital Territory —

*“In determining whether a person is a fit and proper person for the purpose of section 34, 35 or 36, the Board shall have regard to whether the person <sup>3/4</sup>*

- has, during the period of 10 years that preceded the making of the application, been convicted of, or served any part of a term of imprisonment for, an offence in the Territory or elsewhere involving fraud or dishonesty;*
- was, when the application was made, subject to a charge pending in relation to such an offence;*
- has, at any time, been convicted of an offence against this Act or a corresponding law of a State or another Territory; or*
- has been refused a licence under a corresponding law of a State or another Territory.”*

In addition to the above requirements, the test could also exclude parties who are subject to certain disciplinary actions regarding a building trade in Queensland or elsewhere, and could also exclude parties who are bankrupt or subject to winding up procedures. However, detailed assessments of financial capacity are not recommended as they are considered to be too intrusive and not justified.

### 7.3 ACCREDITATION FEES

*The accreditation fees appear high relative to other professions*

The accreditation fees appear high relative to other professions. Fees paid by licensed plumbers and electricians are substantially lower. A plumber pays an initial fee of \$80 to obtain a licence, which is renewed annually at a cost of \$26. Electricians are classed under two categories, a worker or contractor. A workers license costs \$25 and is valid for 5 years. A workers license allows the electrician to operate as a self-employed electrical mechanic or under a contractor. A contractor pays an annual fee of \$200, and can employ any number of licensed worker electricians. Once an engineer has achieved qualifications they are not required to obtain a license in order to practise as an engineer unless they are managing an engineering business or unit. However many larger firms prefer employing engineers who are members of the Institute of Engineers. Annual membership fees for the Institute range from \$110 to \$444.

The cost of accreditation is further increased due to the fact that the legislation requires accreditation by BSAP prior to the BSA granting a licence. BSAP accreditation costs around \$150 and every 3 years the accreditation is assessed for an extra \$121. Furthermore, certifiers need to undertake Continuing Professional Development as specified by the Australian Institute of Building Surveyors. In order to attend these training courses, certifiers need to be either members with the Institute or pay separate course fees. Membership with the Institute was quoted as being \$220 + GST. In addition to these costs, continuing professional development is generally only provided in Brisbane. In other words, most certifiers incur significant travel costs in meeting the continuing professional development criteria.

*Unless the fees are clearly exorbitant it is considered that they will not be a major restriction on competition*

Unless the accreditation fees are clearly exorbitant it is considered that they will not be a major restriction on competition. They are costs that all certifiers face and will be recovered from fees charged just like all costs. Recovery will occur because there is a regulatory requirement for the certification function, however they do add to the costs of building so that it is important that they are set at reasonable levels.

It needs to be recognised that some reasonable accreditation fee will be required to cover the costs of the audit and enforcement program that is required for any option involving private sector certification.

If some entities do not generate enough work to cover the fees this just reflects the market is not large enough for some operators or they are not efficient but this is true in ensuring fees are sufficient to cover many government costs for many markets e.g. taxation or rates.

*It is important that the Local Governments include a cost component in their charging structure to establish cost equivalence with private sector certifiers, otherwise competitive neutrality would be compromised*

The most important issue here is to be sure that all entities doing the same work pay the same fee, assuming the associated regulatory costs are the same. It is important that the Local Governments include a cost component in their charging structure to establish cost equivalence with private sector certifiers, otherwise competitive neutrality would be compromised.

There is however a complication here in that it is argued that most of the costs of the accreditation system are expended in investigating complaints against private sector certifiers. To the extent this is true there is scope for a different fee but it needs to be emphasized that all of the hidden administrative and other certification support costs that are incurred when councils provide certification services need to be included in their fees for certification services. Consultation and inquiries undertaken during this review indicate that this is not the case and that there are widespread breaches of competitive neutrality by Local Governments in relation to certification services.

This competitive neutrality issue would not arise for the option where there were only private sector certifiers. If a mixture is retained then it is considered that it will be necessary to implement arrangements for more effectively addressing competitive neutrality issues.

*There is a need for increased funding to cover enhanced monitoring and enforcement mechanisms*

As noted, one of the recommendations of this PBT is to increase the frequency and scope of BSA and Local Government audits of building certifiers. The BSA would be focussed on technical matters and Local Governments on planning matters. This is likely to mean some increased costs and raises the issue of appropriate funding mechanisms. It is also noted that the Department of Local Government and Planning has advised that the BSA's auditors have determined that the BSA's current accreditation system is significantly underfunded.

We consider that there would be a public benefit that would justify levying accreditation fees, fines and audit fees to adequately cover monitoring costs of private 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. Note that there would also be a need for a funding mechanism for audits by Local Governments in relation to planning issues. This is considered in the section on Statutory Charges.

*We have concerns about proposals to revise accreditation fees unless more effective arrangements are implemented to deal with competitive neutrality issues*

As indicated above, we have concerns about proposals to revise accreditation fees for private sector certifiers unless more effective arrangements (consistent with our recommendations in section 6) are implemented to deal with competitive neutrality issues. However assuming that this can be effectively addressed an additional fee for private sector certifiers to cover the costs of monitoring can be justified.

*Our preference is for an application audit fee commensurate with the number of applications assessed by each certifier, supplemented by a discount and penalty system*

We consider that 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. A fixed fee would be unduly restrictive on certifiers who are not full time certifiers and a building levy would be seen as excessive and unfair by builders. Thus our preference is for an application audit fee commensurate with the number of applications assessed by each certifier, supplemented by a discount and penalty system.

*The requirement for continuing professional development raises the minimum annual accreditation costs and should be removed*

As noted another potentially anti-competitive aspect of accreditation fees is that the requirement for continuing professional development effectively requires additional membership with an appropriate industry association and seminar fees. This raises the minimum for annual accreditation to about \$1,000 and there is also the cost of time spent in complying with these requirements to be considered.

This additional cost would not be compulsorily incurred if the requirement of compulsory continuing professional development was removed as recommended.

## 7.4 BUILDING SURVEYING TECHNICIANS

*Building surveying technicians not employed by Local Governments are not allowed to undertake any building certification functions*

Building surveying technicians not employed by Local Governments are not allowed to undertake any building certification functions. They can only assist with such functions. However their counterparts in Local Governments can certify certain work based on the view that they are better supervised.

*This is a direct breach of competitive neutrality*

This is a direct breach of competitive neutrality. It could be addressed by allowing private sector certifiers the same responsibilities as Local Government certifiers, provided more effective regulation of private sector certifiers can be reasonably achieved or by removing the advantage that building surveying technicians have when they work for Local Governments. Options for enhancing the monitoring and enforcement process have been suggested in the broad options and also in the section on disciplinary processes set out below.

This competitive neutrality issue would not arise for the option where there were only private sector certifiers.

An alternative option is to allow the current arrangements to continue for remote and rural regions only. We consider this option would be justified by the associated public benefits.

## 7.5 CHARGES FOR STATUTORY FUNCTIONS

*As with accreditation fees, unless the charges are clearly exorbitant it is considered that they will not be a major restriction on competition*

As with accreditation fees, unless the charges are clearly exorbitant it is considered that they will not be a major restriction on competition. They are a cost that all certifiers face and will be recovered from fees charged just like all costs. Recovery will occur because there is a regulatory requirement for the certification function.

If some entities do not generate enough work to cover the fees this just reflects the market is not large enough for some operators but this is true of many government costs for many markets e.g. taxation or rates.

*It is important the Local Governments include a cost component in their charging structure to establish cost equivalence with private sector certifiers, otherwise competitive neutrality would be compromised*

The most important issue here is to be sure that all entities doing the same work pay the same charges. It is important the Local Governments include a cost component in their charging structure to establish cost equivalence with private sector certifiers, otherwise competitive neutrality would be compromised.

The LGAQ (2001) review proposed a fair trading policy for councils to facilitate fair competition between local council certifiers and private sector certifiers. The concerns about competitive neutrality would provide a strong rationale for such an

option. However it should be noted that this proposed requirement and many other requirements would not be necessary at all for the options where there were only private sector certifiers.

As noted in section 4.3 of this report there is already a Code of Competitive Conduct specified under the Local Government Act 1993 or when council business activities are formally commercialised or corporatised. Under the Code, Local Governments are required to implement a form of full cost pricing of their commercial services. However an election to implement the Code is at the discretion of the Local Government, unless entities are formally commercialised or corporatised which is also a policy matter for Local Governments.

*Our review of these arrangements and the associated appeals process established that Local*

*Governments have too much discretion in relation to how they can address conflict of interest and competitive neutrality issues*

Given the extent of competitive neutrality issues raised by this review, we consider that if Local Government certifiers continue to provide certification services in competition with private sector certifiers that it is critical to develop improved arrangements for ensuring effective adherence with competitive neutrality principles. In this respect, the most critical change would be to allow independent reviews of complaints, with power to obtain all relevant information (including financial information) and power to ensure adherence to competitive neutrality principles. However we consider that it would be very difficult to resolve all competitive neutrality problems because Local Governments would still face a conflict of interest where they undertook both commercial and regulatory functions that affected those commercial functions. Even if there was strict regulation of fees and charges they would still have incentives to assist their business units in the provision of information in a timely manner giving them an advantage over private sector certifiers. We have specified the arrangements that we consider are critical for more effectively addressing competitive neutrality issues in section 6.2.1.

*Given concerns about accountability and transparency we consider that it is better if there was a separate fee to cover the costs of auditing to ensure compliance with planning requirements, however we reiterate our concerns about the need to address conflict of interest and competitive neutrality problems for Councils*

This PBT has confirmed that Councils should be responsible for ensuring development in their local areas complies with their planning requirements. 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 we consider that it is better if there was a separate fee to cover the costs of auditing to ensure compliance with planning requirements. However we reiterate our concerns that new or higher accreditation fees and statutory charges should not be introduced until improved arrangements are implemented to address conflict of interest and competitive neutrality problems associated with Councils.

## 7.6 COMPULSORY INSURANCE

Compulsory professional indemnity insurance for private sector certifiers is currently reported to be about \$2,000 per certifier. Another restrictive aspect of the legislative provision in relation to professional indemnity insurance is that

there is a requirement for the insurance to cover a period for 10 years after the private certifier ceases to be an accredited certifier.

Assuming 173 private sector certifiers and some 43,000 building applications that they certify, this works out at around \$8 per building application. From this perspective, this is a relatively minor cost. However, it would make it difficult for some private sector certifiers to operate on a part-time basis depending on the number of approvals they made.

There is also a competitive neutrality issue with compulsory insurance as Local Governments do not have to take out specific professional indemnity insurance focussed on certification. However they are required to have a minimum of \$10 million professional indemnity insurance and \$30 million of public liability insurance to cover their total operations. Another aspect is that it is likely to be perceived to be much more difficult to sue effectively a local council than an individual private certifier. As is the case for a number of other restrictions this would not be a competitive neutrality issue for options that only involve private sector certifiers.

*If there was an effective licensing and monitoring system for certification services there would be less problems and less need for compulsory insurance*

If there was an effective licensing and monitoring system for certification services there would be less problems and less need for compulsory insurance. Ideally the system should be sufficiently effective to avoid the need for compulsory insurance. Recommendations are made in section 7.7 for enhancing the monitoring system for private sector certifiers.

It should also be recognised that an important “moral hazard” is introduced when compulsory insurance is introduced. The mere existence of such insurance changes incentives of both certifiers and regulators and ceteris paribus will mean a greater incidence of problems. There is a trend in society to tend to rely on insurance to address a wide range of problems and it is apparent that this can entail unforeseen costs and difficulties in insurance markets.

The main argument in support of insurance is that in the event that the certifier no longer practices or cannot be pursued for a problem that is their responsibility, then there is no means of being able to recover compensation. There are three relevant responses to this concern. First as already demonstrated the number of complaints is extremely low so that risks of a problem are also low and in our view do not clearly warrant a requirement for compulsory professional indemnity insurance. Second with a more effective audit and enforcement system the incidence of problems should diminish further. Third many practitioners are likely to take out professional indemnity insurance themselves as they may see it as relevant for their business. However this is not a reason to legislate for a minimum standard as there may be some individuals who determine that the insurance is unnecessary given their approach and skills.

*Rather than specifying a compulsory requirement for professional indemnity insurance it is considered that it would be useful to specify that certifiers should be required to advise homeowners and builders whether they have professional indemnity insurance and the nature and extent of the cover*

Rather than specifying a compulsory requirement for professional indemnity insurance, one option would be to specify that certifiers should be required to advise homeowners and builders whether they have professional indemnity insurance and the nature and extent of the cover.

Although there was some support for such an option in some submissions the predominant view was that compulsory professional indemnity insurance was a necessary check in the system, at least until there is better evidence that an enhanced audit and enforcement systems is working effectively. On balance, we support this option at this stage.

## 7.7 DISCIPLINARY PROCESSES

Issues in relation to the current disciplinary processes include ensuring natural justice, clarity in the definition of professional misconduct, adequate specific measures to address minor and major matters, overlapping responsibilities of various public entities and the role of the Chief Executive of the Department of Local Government and Planning in hearing certain appeals.

It has been suggested that there is a need to have a separate body from the accreditation body responsible for disciplinary processes. This probably reflects a concern that the accreditation entity may be reluctant to revoke licenses it granted or otherwise take appropriate disciplinary action. However provided that the regulatory entity is required to report on incidences of problems and how it dealt with them and the regulatory entity does not have the responsibility of licensing a single or very limited number of professions, this issue is not considered sufficient to warrant such a separation of roles.

The main problems with disciplinary processes normally relate to ensuring natural justice, the lack of consistent treatment and lack of transparency and accountability in the hearing of complaints and the application of sanctions. These issues can be dealt with by requirements for appropriately transparent processes and for an adequate appeal mechanism including final appeals in the normal courts.

*The LGAQ review has made a number of recommendations in relation to disciplinary processes. They include: mandatory mediation before a complaint can be submitted to the BSA; a revised definition of professional misconduct to distinguish clearly between administrative and minor mistakes and more serious technical breaches; and developing a system of demerit points and penalties*

The LGAQ review has made a number of useful recommendations in relation to disciplinary processes. They include: mandatory mediation before a complaint can be submitted to the BSA; a revised definition of professional misconduct to distinguish clearly between administrative and minor mistakes and more serious technical breaches; and developing a system of demerit points and penalties. These are considered to be useful recommendations and are consistent with the need to ensure there is effective regulation of certification services recognising that normal competitive market conditions do not apply.

The LGAQ review also recommended that the current provision for appeal to the Chief Executive of the Department of Local Government and Planning be

replaced with an appeal against the BSA disciplinary decisions being made directly to the Court. The relevance of separating policy and regulatory roles would provide support for this option. However it is considered that it would be more effective if an intermediate low cost step was still retained but not through the Chief Executive of the Department of Local Government and Planning.

*In developing specific options for hearing professional misconduct it is considered that it is likely to be most cost effective if there is an initial low cost step prior to hearing the appeal in a Court*

In developing specific options for hearing professional misconduct appeals it is considered that it is likely to be more cost effective if there is an initial low cost step prior to hearing the appeal in a Court. One option would be to use the Queensland Building Tribunal. However the Department of Local Government and Planning has estimated that this would entail additional funding through the accreditation system of \$100,000 annually.

An alternative which we consider would not be anti-competitive and which could be less costly would be to establish a Building Certifiers Disciplinary Panel. The Panel could comprise a number of appropriately qualified persons (e.g. lawyers, building certifiers, town planners, and local government representatives) from which an appropriately qualified and independent panel could be selected to hear individual disciplinary matters. Given the scope for conflict of interest issues with respect to Local Government representatives in assessing complaints about private sector certifiers the panel for each specific matter would need to be appropriately balanced.

*It is proposed to make a distinction between unsatisfactory conduct and professional misconduct and that the latter would be the direct responsibility of a Court*

The Department of Local Government and Planning has further proposed that the BSA and the Building Certifiers Disciplinary Panel or Queensland Building Tribunal would only deal with charges of unsatisfactory conduct and not the more serious charge of professional misconduct. In this respect it is presumed that there would be a revised and appropriate definitions of professional misconduct and the less serious charge of unsatisfactory conduct. This reflects a concern that a charge for the revised definition of professional misconduct would be a serious matter, outside the expertise of both the BSA and possibly the aforementioned appeal bodies and should be the direct responsibility of a Court.

*We consider that these specific options would be in the public interest but our preference would be to use the Queensland Building Tribunal*

We consider that these specific options for dealing with unsatisfactory and professional misconduct options are in the public interest. Given some concerns we have about the possibility of conflicts of interest for the Building Certifiers Disciplinary Panel our preference would be to use the Queensland Building Tribunal.

## 7.8 CONFLICT OF INTEREST

As noted, the private provision of building certification services is not subject to the normal market forces as the private sector is essentially undertaking a quasi-regulatory function. This means that there will be a need for special regulatory arrangements.



*Experience has shown that a voluntary code of conduct is generally inadequate for dealing with important potential conflicts*

Conflict of interest is a major issue in many professions and there are now major concerns for example about conflicts of interest in various accounting functions. The existing combination of self regulation and formal regulatory arrangements in the accounting profession has not been able to deal effectively with these conflicts, so that a special provision in an area of important potential conflict could well be justified. Experience has shown that a voluntary code of conduct is generally inadequate for dealing with important potential conflicts.

The LGAQ review notes there is a need for greater community awareness of building certification and recommends that certifiers be required to advise clients about who is doing their certification, what their responsibilities are and to provide copies of approvals and inspection certificates to owners. Given the information weaknesses and scope for conflicts of interest there is considered to be a strong rationale for this recommendation. In addition it is considered that the existing conflict of interest provisions in the Standard Building Regulation should be retained.

The existing requirement (see Section 2.5.8 of this Report) highlights another issue for Local Governments. It would seem that a Local Government building certifier would be defined as having a conflict of interest under this provision if they worked on building work undertaken by the Local Government. However Local Government building work is self-assessable under the Integrated Planning Act, so that this section of the legislation does not apply to Local Governments.

However, these arrangements highlight an important competitive neutrality issue. The issue is that there is a specific requirement in the legislation that was intended to address a conflict of interest arising for private sector certifiers, but in contrast there is nothing specific in the legislation to effectively address a conflict of interest arising for Local Government certifiers.

*In summary it is considered that the conflict of interest provision as it stands in Section 128 of the Standard Building Regulation should be retained for private sector certifiers. However as noted in numerous places in this report there is also a need to more effectively address the conflict of interest and competitive neutrality problems for Local Government certifiers*

In summary it is considered that the conflict of interest provision as it stands in Section 128 of the Standard Building Regulation should be retained for private sector certifiers. However as noted in numerous places in this report there is also a need to more effectively address the conflict of interest and competitive neutrality problems for Local Government certifiers.

## 8

## CONCLUSION

This section summarises key conclusions that we have made in this public benefit test. Our conclusions are based on the application of economic and governance principles and our understanding of the current arrangements and problems associated with those arrangements, based on the public consultation process and the information we have reviewed.

*We have not been able to definitively determine the best options for resolving all issues*

As this public benefit test is a minor review and qualitative in nature we have not been able to definitively resolve all issues and definitively determine the best options. In places we have presented a preference for certain options and recommendations, however we note that there is scope to take a different view.

Our key conclusions and the associated underlying rationale are outlined below, along with an indication of the key information required to establish a preference for certain options. Information and views were requested in the public consultation phase to help arrive at the best options for the community as a whole. In several cases, there was a consensus on the proposed approach. However, in several instances, there were strong opposing voices, particularly in relation to competitive neutrality issues.

*Some form of licensing is likely to be an efficient mechanism to deal with the information and public safety issues*

We consider that information problems and public safety concerns and the efficiency of some form of licensing in dealing with these effects provide a strong rationale for some form of licensing for building certification services.

*Conflicts of interest and competitive neutrality are major issues for Local Governments under the current arrangements*

We also consider that many of the potential conflicts of interest, competitive neutrality issues and inefficiencies that arise with the current arrangements relate to defining appropriate roles and ensuring effective accountability of the various public and private entities involved.

We consider that there are two basic options for providing certification services as follows:

*There are two basic options for providing certification services: (1) a modified form of the current arrangements or (2) allowing only private sector certification*

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.
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 sector certification work.

*The public benefits of these options hinge on the ability to deal effectively with competitive neutrality and implementing effective licensing and monitoring arrangements for private sector certification*

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.

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.

In relation to the specific restrictions on competition, the main issues for several of the restrictions (accreditation fees, treatment of building surveying technicians, statutory charges and conflict of interest) relate to competitive neutrality issues. Either of the above basic options would offer improvements over the current arrangements but we consider option 2 would be the more effective.

The competitive neutrality issue is not simply one of setting fees but also of dealing with the scope for Local Governments in relation to the incentives they have to provide a better service to their own business units and to make it difficult for private sector certifiers to compete on equal terms. There is a fundamental conflict of interest in the one local public entity undertaking both commercial functions and regulatory functions that affect those commercial functions and the performance of private competitors. It is considered that in order to more effectively deal with this problem the following arrangements would need to apply.

*If Local Governments continue to provide commercial certification services recommendations include: a) improved guidelines to comply with full cost pricing and competitive neutrality principles; b) private sector certifiers to have access to an independent and effective complaints mechanism; and c) powers of an independent reviewer or similar means to ensure full cost pricing and competitive neutrality issues are effectively resolved*

- 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.
- c) Powers of an independent reviewer or similar means to ensure the full cost pricing and competitive neutrality issues are effectively resolved.

The above principles are of particular importance in relation to statutory charges. At present the Local Governments have too much discretion in setting their charges for statutory functions and in addressing conflict of interest and competitive neutrality issues. In light of the strong opposition by Councils against the regulation of their statutory charges and commercial fees, we consider that the adoption of the above principles is critical.

In relation to accreditation we consider that the current educational and experience requirements for entry are reasonable. However we consider that continuing

*We consider that the current educational and experience requirements for entry are reasonable but that there is no need for compulsory continuing professional development*

professional development should be voluntary and not compulsory. We consider that an enhanced audit and enforcement program and competitive rivalry amongst certifiers in the private sector would provide sufficient incentives for certifiers in the private sector to choose the nature and extent of continuing professional development that is appropriate for their business. The removal of the requirement for compulsory continuing professional development would also reduce the cost of accreditation.

*BSAP should not have the discretion to determine accreditation requirements*

In addition, we conclude that BSAP or any industry entity should not have the discretion to determine accreditation requirements. This is a regulatory function that affects competition and this should not be at the discretion of an industry body.

*Further investigation is needed into the additional planning competency requirements*

In relation to the additional planning competency requirements for accreditation, we conclude that further consultation and investigation are needed to establish whether there is a public benefit.

*The character test should be retained but the criteria made more objective*

We conclude that the character test should be retained but that the criteria should be as objective as possible.

*Competitive neutrality issues need to be resolved for accreditation fees*

Competitive neutrality issues need to be resolved for accreditation fees. Local Governments need to include an appropriate cost component in their charging structure to establish cost equivalence with private sector certifiers, otherwise competitive neutrality would be compromised.

*Accreditation fees should not be revised unless more effective arrangements are implemented to deal with competitive*

We conclude that an application audit fee is the most appropriate option to fund the monitoring of private sector certifiers. Such a fee should not be introduced until more effective arrangements have been implemented to deal with competitive neutrality issues.

*There is a direct breach of competitive neutrality in terms of the functions performed by Local Government certifiers and private sector certifiers.*

We conclude that the fact that a Local Government building surveying technician may perform certification functions while a building surveying technician not working for the Local Government may not, is a direct breach of competitive neutrality. We consider that the continuation of current arrangements is only justified in remote regions or in small Councils.

*The competitive neutrality issues with regard to statutory charges need to be addressed*

In relation to charges for statutory functions, the main issue is the need for Local Governments to achieve competitive neutrality in their charges. Recommendations a, b and c as outlined above are critical if Local Governments continue to provide certification services in competition with private sector certifiers.

While a separate fee to cover the costs of auditing to ensure compliance with planning requirements is preferred, such a fee should not be introduced until improved arrangements are implemented to address conflict of interest and competitive neutrality problems with Councils.

*There may be a continued need for compulsory professional indemnity insurance, at least until there is better evidence that the audit and enforcement system is working effectively*

In relation to compulsory professional indemnity insurance we consider that if there was an effective licensing and monitoring system there would be no need for such a compulsory requirement. However, in the submissions received there has been strong support for the current arrangements. Submissions claimed that compulsory professional indemnity insurance is a necessary check in the system, at least until there is better evidence that an enhanced audit and enforcement system is working effectively. On balance we support the retention of compulsory professional indemnity insurance until there is sufficient evidence that an enhanced audit and enforcement system is working effectively.

*There are a number of recommendations to improve the effectiveness and fairness of disciplinary processes*

In relation to disciplinary processes, the recommendations include: mandatory mediation before a complaint can be submitted to the Building Services Authority; a revised definition of professional misconduct to distinguish clearly between administrative and minor mistakes and more serious technical breaches; developing a system of demerit points and penalties; and replacing the current provision for appeal to the Chief Executive of the Department of Local Government and Planning with appeal to an independent tribunal or similar low cost independent mechanism, with subsequent appeal to the Planning and Environment Court.

*The Queensland Building Tribunal should hear professional misconduct appeals*

We consider that it would be in the public interest to establish a low cost step prior to hearing professional misconduct appeals in a Court. We consider the use of the Queensland Building Tribunal to be most appropriate for this purpose.

*The provisions in the legislation regarding conflict of interest should be retained for private sector certifiers. It is also critical to implement arrangements that more effectively address the conflict of interest and competitive neutrality issues for Local Government certifiers*

In relation to the conflict of interest restrictions, we consider that the current provisions in the legislation should be retained for private sector certifiers. As noted above we also think it is critical to implement arrangements that more effectively address the conflict of interest and competitive neutrality issues for Local Government certifiers.

## ANNEX A PERSONS CONSULTED FOR DRAFT REPORT

The conduct of the Public Benefit Test has been overseen by a Review Committee comprising representatives from the Department of Local Government and Planning, Queensland Treasury Department, the Department of Natural Resources and Mines and the Queensland Building Services Authority.

### **Review Committee**

- ❑ Ain Kuru, General Manager, Building Codes Queensland, Department of Local Government and Planning
- ❑ Ashley Anderssen, Principal Treasury Analyst, Resources, Treasury Office, Queensland Treasury
- ❑ Bill Hastie, Acting Project Manager, NCP, Department of Local Government and Planning
- ❑ Ian White, Acting Assistant General Manager, Queensland Building Services Authority
- ❑ Ann Woolley, Manager, Urban Water Supply Services, Department of Natural Resources and Mines.

### **Queensland Government Agencies**

- ❑ Dr Ted Campbell, Director-General, Department of Local Government and Planning
- ❑ David Howe, Department of Local Government and Planning
- ❑ Kate Peters, Department of Local Government and Planning
- ❑ Barry Robertson, Department of Local Government and Planning
- ❑ Veronica Mauri, Manager Licensing, Electrical Safety Office
- ❑ Barry Dieckman, Manager Electricity Supply, Electrical Safety Office
- ❑ Gary Leis, Department of Public Works
- ❑ Steve Greenwood, Manager, Planning and Social Policy, Local Government Association of Queensland.
- ❑ Malcolm Griffin, Planning and Development Policy Officer, Local Government Association of Queensland.

### **Queensland Industry Representatives**

- ❑ Phil Breeze, Manager, Dispute Resolution, Queensland Master Builders Association.

- ❑ Bill Watson, Connector's
- ❑ Craig Loynes, D&C Services.
- ❑ Kelvin Cuskelly, Technical Advisor, Housing Industry Association of Queensland
- ❑ Warwick Temby, Executive Director, Housing Industry Association Queensland.
- ❑ Rick Wiley, Assistant Director, Planning and Environment, Housing Industry Association Queensland
- ❑ David Blake, Director, Allied Building Certification
- ❑ Stacy Kennedy, Express Plan Approval Services Pty. Ltd.
- ❑ Ken Murray, Director, AAA Building Consultants
- ❑ Elizabeth Hopkins, Coastline Building Approvals
- ❑ Alan Greet, Managing Director, Queensland Building Consulting Group.
- ❑ Peter Birkhard, Queensland Building Consulting Group
- ❑ Ken Wilcox, Operations Manager, Queensland Building Consulting Group
- ❑ Neil Middleton, Quality Assurance Manager, Ramtaps
- ❑ Craig Holmes, Saxon Water Heaters
- ❑ Brien Wilkins, Coastline Building Approvals
- ❑ Bruce Leese, Tropical Coast Certification Group

#### **Queensland Local Councils**

- ❑ Stan Spyrou, Logan Development Services Manager, Logan City Council.
- ❑ Bob Wallis, Manager, Development and Regulatory Services, Brisbane City Council.
- ❑ David Kay, Supervisor, Building Certification Unit and Plumbing Services, Ipswich City Council

#### **Interstate Agencies**

- ❑ Australian Building Codes Board
- ❑ Department of Industry, Tourism and Resources
- ❑ Institution of Engineers, Australia
- ❑ Master Builders Association of New South Wales
- ❑ Master Builders Association of Victoria
- ❑ New Zealand Building Industry Authority
- ❑ New Zealand Registered Master Builders Federation

- ❑ Planning NSW
- ❑ Productivity Commission
- ❑ Victorian Building Industry Commission
- ❑ Victorian Department of Treasury and Finance



## ANNEX B PERSONS CONSULTED FOR FINAL REPORT

### Focus Forum held 18 April 2002

- ❑ Ian White, Queensland Building Services Authority
- ❑ Geoff Mitchell, Australian President, Australian Institute of Building Surveyors
- ❑ Brian Gobie, Regulatory Manager, Gold Coast City Council
- ❑ Larry Porter, BSAP Queensland and public private certifier
- ❑ Clay Anderson, Regulatory Manager Noosa Shire Council
- ❑ Mal Edmiston, Department of Works and CPD assessor for AIBS Queensland
- ❑ Gary Lucas, Institute of Engineers, Queensland
- ❑ Phil Breeze, Queensland Master Builders Association
- ❑ Linda Melhuish, Logan City Council, representing Stan Spyrou, AIBS Queensland president
- ❑ Peter Nelson, Queensland President Building Designers Association
- ❑ Mark O'Leary, Department of Local Government and Planning
- ❑ Kate Peters, Department of Local Government and Planning
- ❑ David Howe, Department of Local Government and Planning
- ❑ Ain Kuru, Department of Local Government and Planning
- ❑ Bill Hastie, Department of Local Government and Planning
- ❑ Ashley Anderssen, Queensland Treasury

## ANNEX C LIST OF SUBMISSIONS

The following submissions were received in response to the Draft Report of the Preliminary Public Benefit Test – The Queensland Building Act and Associated Regulations.

- Alan Greet, Queensland Building Consulting Group
- Australian Institute of Building Surveyors
- Biggenden Shire Council
- Boonah Shire Council
- Brisbane City Council
- Building Designers' Association of Queensland Inc.
- Building Services Authority
- Bundaberg City Council
- Burdekin Shire Council
- Cambooya Shire Council
- Colin Job
- Department of Public Works (Project Services)
- Esk Shire Council
- Gold Coast City Council
- Greg Dempster and Jeff Ashby, Development Certification Pty. Ltd.
- Housing Industry Association
- Ipswich City Council
- Jim Gardner
- Ken Murray, AAA Building Consultants
- Local Government Association Queensland
- Logan City Council
- Mal Edmiston
- Maryborough City Council
- Nanango Shire Council
- Neville Madsen
- Pine Rivers Shire Council
- R. and L. Campbell
- Robert Farmer, Clarendon Homes (Qld) Pty Ltd
- Rockhampton City Council
- Ron Blake
- Russell Springall
- Sarina Shire Council
- Shire of Hinchinbrook
- Stacy Kennedy, Express Plan Approval Services Pty. Ltd.
- The Institution of Engineers Australia (Queensland Division)
- The Institution of Engineers Australia (Society of Fire Safety)
- Thuringowa City Council
- Toowoomba City Council

- ❑ Troy Richardson, Troy Richardson's Building Approval and Inspection Services
- ❑ Urban Development Institute of Australia (Queensland)
- ❑ Vic Curtis
- ❑ Warwick Shire Council

## ANNEX D INTERJURISDICTIONAL REVIEW

The objective of the interstate review is to provide an overview of the key features of building legislation in selected states and their past and present policy experiences. There are number of anti-competitive aspects to building legislation and the focus of this annex is on building certification systems — an area where many anti-competitive practices exist. Government departments and agencies, regulators, building practitioners and industry representative groups were consulted on the operation of the building certification system in Victoria and NSW.

Building certification is either supplied by council certifiers, private sector certifiers or a combination of both in the States and Territories. Tasmania and Western Australia have solely council certifiers, but are moving towards more involvement in the market from private sector certifiers. New South Wales, Queensland, South Australia and Victoria have a combination of council and private sector certifiers. The Australian Capital Territory and the Northern Territory markets are solely serviced by private sector certifiers. New Zealand has a combination of council and private sector certifiers.

### Victoria

Under the *Building Act 1993*, the Building Commission is responsible for overseeing the regulation and administration of building in Victoria. The objective of the Building Commission is to create an environment which sustains cost efficient, flexible and competitive building services. The legislation has similar licensing procedures for all building practitioners which includes building certifiers (known as ‘building surveyors’). Under the legislation, only registered building certifiers are able to provide building certification services.

Building practitioners, including building certifiers, are required to be registered with the Building Practitioners Board (BPB), a body within the Building Commission. The BPB also supervises and monitors the conduct and practice of registered building practitioners and makes recommendations about the qualifications for registration to the government.

An applicant is required to lodge their application with the BPB. The application requests information on qualifications and experience, and evidence that the applicant is covered by the professional indemnity insurance. Specifically, the BPB requires a degree or diploma in building surveying from a university and 4 years acceptable practical experience. The BPB must be satisfied that the applicant is competent and has gained extensive balanced experience as a certifier.

Certifiers must renew their registration annually by providing proof of a current insurance policy and the payment of an annual fee. The purpose of the insurance is to ensure that each practitioner is able to contribute in the event of a successful claim for damages against the builder.

Certifiers grant a building permit before construction commences and an occupancy permit before it can be occupied. Council and private sector certifiers generally operate under the same legislative requirements. However, council certifiers have greater enforcement powers than private sector certifiers. Council certifiers retain certain responsibilities for enforcement of public safety and illegal building work as well as record-keeping activities.

Performance audits are conducted of all certifiers to ensure that building standards are maintained. The audit process involves selecting practitioners at random from a target class of building practitioners. The officer conducting the audit visits each building practitioner and checks compliance on a sample number of jobs with legislation and reporting requirements. Serious breaches of legislation are either referred to the BPB for inquiry or recommended for prosecution by the Building Commission.

The BPB investigates complaints about the misconduct of building practitioners. The BPB can decide whether to hold an inquiry by considering the evidence supporting a complaint from an investigation by the Building Commission. The BPB has the ability to make a number of directions. These include reprimanding the practitioner; suspending the certifiers registration for up to 3 years; cancelling a practitioners registration and imposing a fine not exceeding \$5,000. The BPB is also able to award costs associated with the holding of the inquiry where a finding against the certifier is delivered. The outcomes of inquiries are published in the Building Commission's regular newsletter.

## **Key Issues**

### *Competitive Neutrality*

A number of industry participants consulted thought that councils prefer to concentrate on their statutory functions rather than competing in the certification market. The statutory functions of councils in the planning and development process are a significant function in itself. Many councils also sub-contract out their certification work.

Regulators and private industry thought that council certifiers have an advantage over private sector certifiers, but it was thought that this advantage did not significantly affect the ability of private sector certifiers to compete. This may be reflected in the market share of private sector certifiers. In 2000-01, the market share of permits issued by private sector certifiers was about 82 per cent.

Some private industry participants identified specific advantages of council certifiers. These included the ability of councils to bundle together a number of planning and development services, including certification, and provide these services at reasonable price. Private sector certifiers are unable to provide the same service because councils have a statutory monopoly over such services.

The fees charged by councils for the lodgement of documents are the same for private and council certifiers. However, some private industry participants questioned whether councils internally accounted for these costs and reflected them in the prices they charge.

Council certifiers also have a wider range of powers than private building certifiers. Council certifiers have powers to enforce building and emergency orders including powers to prosecute, private sector certifiers are unable to enforce building orders. Private sector certifiers refer such cases to the Building Commission which, as an independent body, performs the enforcement function. There is a low level of referrals to the Commission and the Auditor-General of Victoria is concerned that this may indicate a fall in building standards and a risk to public health and safety.

#### *Fee Setting*

Fees are predominantly determined by market forces, but the Australian Institute of Building Surveyors and the Building Commission has guidelines on minimum fees. Certifiers are not required to set fees in accordance with the guidelines, but some indication from the government and the industry on prices may influence certification fees. Certifiers may be inclined to always charge above these minimum fees, particularly where there is lack of effective competition. Anecdotal evidence suggests that certifiers largely disregard these guidelines, discounting their fees in order to win work (FRG 1999).

Council certifiers are generally thought to charge the minimum fee and private sector certifiers usually charge significantly above the minimum. It was considered that consumers are willing to pay this higher price of private sector certifiers because they are more efficient and provide a better quality service than council certifiers. Private sector certifiers are considered by a number of industry participants to have more expertise. Most large and complex building projects are handled by private sector certifiers.

#### *Competition and Standards*

Private sector certifiers compete with council certifiers. The private sector certifiers have introduced competition into the market and the most significant impact has been the reduction in approval times. Processing times for building permits have halved and there is also a better understanding of the regulatory requirements in the building industry (AGV 200 and FRG 2000). Professional

indemnity insurance premiums for building practitioners have also decreased. However, it is difficult to assess whether the introduction of private sector certifiers has seen a fall in the standards required to obtain a permit.

### *Complaints Against Certifiers*

In Victoria, relatively more complaints are made against private sector certifiers than any other registered building practitioner. However, many of these complaints have been minor and resolved quickly. Certifiers and domestic builders formed 80 per cent of those who appeared before the BPB. The relatively high complaints rate is a reflection, in part, of their policing role in the building control process (Auditor General of Victoria 2000).

Over the three years to June 2001, around 125,000 new homes were approved in Victoria. Assuming that in Victoria similar proportions of applications are approved as in Queensland, it is estimated that around 280,000 building applications were made over the same period of time. With 82 per cent of the applications being approved by private sector certifiers, this implies 230,000 applications were processed by private building certifiers. In the three years to 2000-01, 222 complaints were received in Victoria. This information suggests that the error rate is no higher than 0.10 per cent.

More difficulties have arisen with private sector certifiers than council certifiers. In 1997-98, the Building Commission conducted 57 audits – 4 of council certifiers and 53 of private sector certifiers. 32 of the 53 private sector certifiers required further action such as a letter of warning, an inquiry or legal action.

TABLE D.1 NUMBER OF BUILDING CERTIFIERS AND COMPLAINTS

Year	Registered number of building certifiers	Number of complaints
1996-1997	na	71
1997-1998	na	110
1998-1999	438	122
1999-2000	447	60
2000-2001	452	40

Source: AGV (1999) and BC (2001).

In recent years, the Building Commission has found a fall in complaints for all building practitioners in Victoria. The Commission has attributed this fall to a reduction in the number of complaints and, also, revised investigation policy and targeted performance audits (Building Commission 2001). The targeted performance audits involved visits to councils to inspect documentation submitted by certifiers. The Commission is developing a database on each registered certifier

to record breaches and other information as a basis for targeting performance audits.

### *Administering Complaints*

In 1999, the Audit and Investigations Unit of the Building Commission streamlined the processing of complaints. Minor breaches of the Act are handled by correspondence. If the Commission is satisfied with the certifier's response, the matter is noted against the certifier's record and no further action is taken. Regular complaints against a certifier may proceed to an investigation or a performance audit. Some cases may also be investigated collectively rather than individually. This process enables resources to be devoted to more important cases.

### *Conflicts of Interest*

There is a potential conflict of interest between the building certifier and the builder. This arises when a building surveyor is engaged by the builder, as an agent of the owner, rather than the owner.<sup>5</sup> The building certifier has a close and ongoing working relationship with a builder and is dependent on the builder for future work. This may inhibit the certifier's independence and ability to challenge any building work not consistent with standards or permits.

A CSIRO survey shows that 70 per cent of respondents viewed the builder to be the certifier's client rather than the building owner and 17 per cent regarded the building owner as the client (Auditor General of Victoria 2000). The standard building contract in Victoria also appoints the builder as the agent of the owner to appoint the certifier. This perception works against the development of an independent relationship between the certifier and the builder whose work is reviewed by the certifier. This may be a factor leading to the low number of cases referred to the Commission from private sector certifiers for enforcement of building orders.

Certifiers are specifically restricted from certifying a building in which they have too close an interest, which need not be pecuniary. Involvement in planning or design, a pecuniary interest or employment by an associated person or body is sufficient for establishing that too close an interest exists.

A conflict of interest also arises with the Commission having an operational control function as a certifier in terms of issuing permits for certain structures such as temporary structures, while also acting as industry regulator. There may be inadequate independence for the Commission to effectively undertake a monitoring and enforcement role on itself, that is, in relation to investigating complaints against itself or prosecuting itself.

---

<sup>5</sup> There is currently legislation before the Victorian Parliament that will require a building certifier to be contracted by the owner.



### *Planning Permits*

Private sector certifiers issue building and occupancy permits. The planning permits continue to be issued by council certifiers. There may be scope to improve the synergies in the development approval process by opening up the market for planning permits to competition and permitting the issue of these permits by private sector certifiers.

## **New South Wales**

Under the *Environmental Planning and Assessment Act 1979*, Planning NSW, a government agency, is responsible for implementing and administering the legislation relating to development control including overseeing the building certification market. Complaints are handled by councils for council certifiers and the accreditation body for private sector certifiers.

An accreditation body such as the Institute of Engineers accredits private sector certifiers. The accreditation body receives authorisation under the *Environmental Planning and Assessment Act 1979* and there are currently four accreditation bodies. There are no legislated qualification or experience requirements for private sector certifiers, but the government must be satisfied that sufficient competency standards are in place before authorisation is given to an accreditation body. The qualification requirements generally require an applicant to be able demonstrate an understanding of engineering practices, building codes and legislation, and management of building projects. Private sector certifiers must also continue education, follow professional conduct requirements and be aware of the provisions in NSW legislation that covers conflict of interest. Insurance is legislatively required for private sector certifiers and this must be checked by the accreditation authority. The competency standards for council certifiers are determined by local councils.

The certifier is responsible for ensuring work is carried out appropriately during the construction phase. The certifier must be appointed before the commencement of the construction phase. The certifier commences the building process with a construction certificate and finalises the process by assessing whether the building is suitable for occupation in accordance with the Building Code of Australia. The performance of accredited certifiers is monitored and reviewed through audits and complaints handling.

Complaints are usually made to the local council or Planning NSW and for private sector certifiers are referred to the relevant accreditation body that accredited the private certifier. Complaints are investigated by the accreditation body. After investigation, the accreditation body has the power to reprimand the certifier; impose conditions on the certifier; require the certifier to undertake additional

training; request additional information from the certifier or dismiss the complaint. Complaints against council certifiers are handled by the respective council.

### *Competitive Neutrality*

Council certifiers appear to have a significant competitive advantage over private building certifiers. Private sector certifiers are required to be accredited by an authorised accreditation scheme, legislatively require professional indemnity insurance and must undertake continual education. There are no such specific requirements for council certifiers (although councils may be required to have professional indemnity and public liability insurance for their overall operation).

A private sector industry participant thought that councils also implement practices to make it unviable for private sector certifiers to conduct a business. The price of council certification is lower than private sector certifiers, although some building owners prefer private sector certifiers because their approvals are more timely. Council certifiers were thought to not necessarily be accounting for lodgement of fees in their prices while private sector certifiers pay lodgement fees.

Some council certifiers are alleged to engage in unfair practices. Council certifiers can quickly change the supply of certifiers, to keep private sector certifiers out of a market, by acquiring certifiers from other areas of a council. In one case it was alleged that a council charged no fee for the provision of a certificate, as a means of keeping private sector certifiers out of an area (Planning NSW 2001).

Council certifiers also have a wider range of powers than private building certifiers. The private certifier can take reasonable steps to ensure that a builder complies with the construction certificate by issuing warnings. Unresolved breaches are referred to the council which retains the ability to issue notices and orders.

### *Fee Setting*

Private sector certifiers set fees based on market forces while council certifiers have a 'derived fee'. The NSW Independent Pricing and Regulatory Tribunal has issued guidelines on the setting of fees by councils. The guidelines use competitive neutrality principles for the determination of fees. Councils are supposed to follow these guidelines in setting fees for certification work, but there is no enforcement or monitoring of whether councils are following these guidelines.

### *Roles and Standards*

There is ambiguity between the roles of council and private sector certifiers. The role of private sector certifiers is set out by their accreditation body and industry code of conduct. The role of council certifiers is set out in the employment

contract with their respective council. There is no uniformity between the roles of different types of certifiers even though they provide the same service.

A regulator is concerned that the different roles are producing a standards imbalance between council and private sector certifiers. The competency standards of private sector certifiers are considered to be higher. Private sector certifiers usually need to be degree qualified, familiar with building legislation and have experience in managing building projects. There are no such formal requirements for council certifiers.

This may also be reflected in the type of work undertaken by the council and private sector certifiers. While there are no statistical data available on market shares, a regulator suggests that private sector certifiers have about 70 per cent of the large scale (or 'complex') certification market and about 30 per cent of the residential housing (or 'simple') certification market.

#### *Administering Complaints*

There are some views from a regulator that the disciplinary procedures for private sector certifiers may be weaker than necessary to maintain building standards. The accreditation body of a private certifier administers complaints. The accreditation body may be reluctant to discipline a certifier that it has accredited.

## **New Zealand**

Under the *Building Act 1991*, the Building Industry Authority (BIA) regulates the building industry and is funded by a levy on building certificates, which is collected by territorial authorities (local councils). The BIA's responsibilities include administering the New Zealand Building Code, handling disputes and regulating private building certifiers.

The BIA approves and registers private sector certifiers. Applicants are required to have appropriate qualifications and experience, and must be covered by appropriate insurance at the time of approval. Private sector certifiers check plans, specifications and building work during construction. Certifiers are permitted to issue certificates in respect of buildings in which they have a professional or financial interest.

Private sector certifiers compete with certifiers from territorial authorities (local councils) in respect of ensuring compliance with the New Zealand Building Code. Territorial authorities' certifiers are not subject to BIA regulation. Building owners have the choice of employing private sector certifiers or territorial authority certifiers.

The New Zealand Government is currently reviewing its *Building Act 1991*, including certifiers and a number of issues have arisen through the course of the review on competitive neutrality, competition and self-certification.

#### *Competitive Neutrality*

Competitive neutrality issues arise between private and territorial authority certifiers. The certifiers employed by the territorial authorities have lower levels of qualification, competence and knowledge than private sector certifiers. The territorial authorities employ certifiers who do not meet the minimum requirements of those certified by the BIA. Private sector certifiers also are more stringently audited than council certifiers and are required to have appropriate business insurance.

The two types of certifiers have similar powers, but territorial authority certifiers have some additional discretionary enforcement powers to correct faulty work, but these are rarely used.

#### *Competition*

There is healthy competition between the two types of certifiers in major New Zealand centres, Wellington and Auckland, but the council certifiers tend to dominate the market in remote areas. This is mainly because it is not cost effective for private sector certifiers to provide such services to remote areas.

#### *Self-certification*

The certifiers have a monopoly over certifying compliance with the building standards. One submission to the Building Review thought that self-certification underpinned with a good education system and a direct line of responsibility to the practitioner would improve the current system. The submission stated that self-certification is a cost efficient and ensures practitioner accountability. Other submissions thought that there would be difficulties with builders self-certifying their own work. Building standards could fall and conflicts of interests would also arise.

## ANNEX E REFERENCES

- Akerlof, G.A., 1970, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, *Quarterly Journal of Economics*, Vol 84, Issue 3, pp. 488-500.
- Auditor-General of Victoria, 2000, Building Control in Victoria – Setting Sound Foundations, Performance Audit No. 64, Government of Victoria, Victoria.
- Beales, H., Craswell, R., & Salop, S.C., 1981, The Efficient Regulation of Consumer Information, *Journal of Law & Economics*, Vol 24, Issue 3, December, pp. 491-539.
- Building Commission, 2001, Annual Report 2000-2001, Victoria.
- Freehills Regulatory Group, 1999, NCP Review of Architects and Building Legislation, Final Report, Victoria.
- Friedman, M, 1962, Occupational Licensure, in *Capitalism and Freedom*, Chicago, pp. 137-160 at p. 149.
- Heal, G., 1976, Do Bad Products Drive Out Good?, *Quarterly Journal of Economics*, Vol 90, pp. 500-503.
- Kim, J-C., 1985, The Market for “Lemons” Reconsidered: A Model of the Used Car market with Asymmetric Information, *American Economic Review*, Vol. 75, Issue 4, September, pp. 836-843.
- Leland, H.E., 1979, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, *Journal of Political Economy*, Vol 87, Issue 6, December, pp. 1328-1346.
- \_\_\_\_\_, 1980, Minimum-Quality Standards and Licensing in Markets with Asymmetric Information, in Rottenberg S.(ed), 1980, *Occupational Licensure and Regulation*, Washington DC. American Enterprise Institute, pp. 265-284.
- Local Government Association of Queensland, 2001, Review into Building Certification in Queensland.
- National Competition Council, 2001, Reforming the Regulation of the Professions – Staff Discussion Paper, May
- \_\_\_\_\_, 2001, NCP – Third Tranche Assessment Framework, 5 February.

Planning NSW 2001, Scoping Study: Towards a Performance Monitoring and Benchmarking Program for the NSW Development Assessment System, NSW

Queensland Treasury, 1999, Public Benefit Test Guidelines – Approach to undertaking Public Benefit Test Assessments for Legislation Reviews under the National Competition Policy, October.

The Allen Consulting Group, 2000, Occupational Licensing in the ACT Building and Construction Industry, A National Competition Policy Review of the *Building Act 1982*, the *Electricity Act 1971*, and the *Plumbers, Drainers and Gasfitters Board Act 1982*, Final Report, August.

Vining, A.R. & Weimer, D.L., 1988, Information Asymmetry Favours Sellers: A Policy Framework, *Policy Sciences*, No. 21, pp. 281-303.