

12 October 2021

Mr Angus Abadee
Director, Building and Construction Policy
Department of Customer Service

Via email: angus.abadee@customerservice.nsw.gov.au

Dear Angus

Thank you for meeting with the Association of Australian Certifiers (AAC) on 21 September 2021 to discuss which version of the Building Code of Australia (BCA) applies during staged building work and the need for changes to be made to the *Environment Planning and Assessment Regulation 2000* (the EP&A Regulation).

During our meeting you requested further information regarding amendments to existing buildings, multi-tower developments and how this matter is handled in other jurisdictions.

These matters are addressed further below.

We would also reiterate that the current interpretation included in the Department's Guidance Material adds unnecessary complexity for practitioners and the public, makes it harder to hold practitioners to account and is inconsistent in its application to Crown work. It also does nothing to improve workmanship and ultimately prevent defects.

This matter is largely an administrative issue, which can be easily addressed through a minor amendment to the EP&A Regulation.

Amendments to existing buildings

The main issue arises when a development program requires staged Construction Certificates or multiple Complying Development Certificates to be issued over a period of months as the documentation is readied in sequence, ahead of construction work.

Even if there is no change of use or performance solutions applicable, a change mid process can cause abortive works where BCA clauses change and/or different versions of Australian Standards are adopted.

The process is further complicated where the existing building has fire services that perform to a standard predating both BCA versions.

The level of confusion caused amongst designers is multiplied by the time it gets to installers.

The cost of aborting work, frantic design revision and added complexity for all practitioners results in significant costs passed on to consumers, mistakes in workmanship, less transparency and worse outcomes for consumers.

There is also the risk of reduced transparency in design delivery is much greater, as in some cases the designers and installers costs are not recoverable. This can result in a less transparent process with risks of the registered certifier being kept further away from the process than would otherwise be the case, and hence less able to detect issues and require amendments.

In addition, unnecessary complications occur with the fire safety statements, as each statement may be different and in the case of Construction Certificates under a single development consent, the last fire safety statement prepared for the last Occupation Certificate can be a source of compromise and misinformation or be of excessive length, which then flows on to the Annual Fire Safety Statement.

In summary, simple processes are more transparent and increase accountability, in contrast to unnecessarily complicated processes, like that created by the Guidance Material, which make it easier for practitioners to do the wrong thing to the detriment of owners and the public.

Multi-tower developments

Regarding multi-tower developments, the issues identified above are also applicable.

In addition, most of these projects involve between five and 10 Construction Certificates under the one Development Consent (excluding tenancy fit-out works).

There are typically performance solutions relating to Fire Safety and a Fire Engineering Brief (FEB) and Fire Engineering Report (FER) process. Changes to the BCA during the course of the design or works, require gap analysis reporting for BCA clauses and Standards that have changed, and revision to the FEB / FER in a manner which can confuse and subvert an orderly process, taking more time, and almost always costing more money than is otherwise necessary.

Additionally, a revised FEB/FER needs resubmission to Fire and Rescue NSW and this can cause further delay in approval.

Given the ABCB does not always state clearly the changes that will be included in an upcoming update to the BCA, this can cause a range of issues including:

- construction to be delayed.
- unauthorised works.
- a hesitancy to call for required inspection (until approvals catch up), including in some cases, trying to keep the registered certifier unaware of progress of works.

These are all unnecessary pressures that occur in real life and result in less transparency, less compliant construction work and lesser quality of certification. The cause of all of these issues is known and has a ready remedy that is reasonable and sensible.

The outcome of regulating in accordance with the Guidance Material, will be that many building will still not be delivered meeting multiple versions of the BCA (for reasons described).

The inconsistencies and errors in design and construction, where investigated post construction by body corporates (or others) will be significantly more difficult to accurately discern and prove, making the process of reparation or rectification more difficult and more expensive and time consuming than is the case where one BCA version applies to a whole building.

Other jurisdictions

Other jurisdictions across the country include sensible clauses in their respective regulatory regimes which recognise the issues created by policy changes included in different versions of the BCA.

These approaches recognise the practical implementation issues created by changes to the BCA during the life of a construction project by including an appropriate level of discretion, which allows the registered certifier to solve issues in the best interests of the applicant and the public.

The below table summaries how other jurisdictions address this issue.

STATE	REGULATORY REFERENCE	SUMMARY
Tasmania	Tasmania - Section 55 - Compliance with Building Code - https://www.legislation.tas.gov.au/view/whole/html/made/act-2000-100	Building Surveyor may apply previous version of BCA.
South Australia	South Australia - Section 132 Law Governing Procedures under this Act - https://www.legislation.sa.gov.au/LZ/C/A/PLANNING%20DEVELOPMENT%20AND%20INFRASTRUCTURE%20ACT%202016/CURRENT/2016.14.AUTH.PDF	BCA version based on the date a Building Surveyor is selected on the Portal.
Northern Territory	Northern Territory - Section 51 Application of New Regulations - https://legislation.nt.gov.au/Legislation/BUILDING-ACT-1993	Building Surveyor may apply previous version of BCA.
Victoria	Victoria - Section 10.2 Application of new building regulations to building work - https://www.legislation.vic.gov.au/in-force/acts/building-act-1993/122	Building Surveyor may apply previous version of BCA.
Queensland	Queensland - Section 15 References to changed BCA or QDC provision - https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1975-011	Building Surveyor may apply previous version of BCA.
Western Australia	Western Australia – Regulation 31A – Applicable building standards generally - http://classic.austlii.edu.au/au/legis/wa/consol_reg/br2012200/s31a.html	Version of the BCA at the time the application for the building permit is made, or version of the BCA that was in effect 12 months before the time the application for Building Permit is made.

Finally, for completeness, I have included the key points raised at our meeting in the below appendix.

I trust this further information is helpful. Please do not hesitate to contact me if you would like to discuss this important matter further.

Yours sincerely



Jill Brookfield
Chief Executive Officer

Appendix

Meeting with Department of Customer Service Policy regarding which version of the BCA

Date: 21 September 2021

In attendance:

- Robert Marinelli (RM), Stephen Natilli (SN), James Deters (JD), Steve Watson (SW), Jill Brookfield (JB) – AAC.
- Angus Abadee (AA), Stephen Durnford (SD), Matthew Wunsch (MW) - Building and Construction Policy.

This meeting followed the AAC's meeting with Gavin Melvin, Minister Anderson's Chief of Staff on 13 September 2021

Key discussion points:

- Regulation is ambiguous and needs to be clarified.
- Guideline from OBC states it is not legal advice, but it hasn't been tested.
- Gavin Melvin suggested practitioners should be held to one standard.
- Cannot have different BCA versions for annual Fire Safety Statements.
- Should be a single standard, e.g., the building would still be ok if there was no new BCA.
- Keep it simple so no one can hide behind BCA version issues.
- Workmanship is key, not the version of the BCA. Must improve workmanship.
- Add "first" in the Regulation as AAC recommended in its submission.
- Multi-tower development usually has a Master DA with each tower having its own CC.
- AA asked AAC to provide comments applying BCA on multi-tower development.
- AA asked about remediation – is remediation done to date built or date of remediation?
- Regulated design doesn't specify BCA version.
- Alterations to existing buildings?
- DCS looking at buildings less 10 years old.
- Compliance with the standard is the focus.
- SD suggested discretion is needed and it's not a one size fits all.
- Developers rely on pre-sales of apartments and applying new BCA may alter the apartment so that the pre-sale falls through.
- Pre-purchase rules have tightened.
- Crown jobs – one BCA applies from the time of tender. Should be a level playing field.

Actions

- DCS will further review and may ask AAC more questions.
- AAC to provide additional comment on:
 - Amendments to existing buildings
 - Multi-tower development
 - Other jurisdictions