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Building Practitioners Board

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Dear Mr Murtough,

2014 REVIEW OF THE MUTUAL RECOGNITION AGREEMENT AND THE TRANS-TASMAN MUTUAL RECOGNITION ARRANGEMENT

Introduction

The Building Practitioners Board is established under section 183 of the *Building Act* 1993 (Vic). Amongst other things, the Board is responsible for administering a registration system for building practitioners in Victoria and supervising and monitoring the conduct and ability to practise of registered practitioners in that State.

A number of the questions posed in the Commission's Issues Paper relate directly to the Board's functions in this regard. In particular these are:

- Q36 Have current arrangements ensured that Ministerial Declarations are kept up to date? If not, what changes are required, and what would be the costs and benefits?
- Q41 Should people registered under mutual recognition be subject to the same ongoing requirements as other licence holders in a jurisdiction? Why or why not?
- Q43 Is there any evidence of jurisdiction 'shopping and hopping' occurring for occupations which is leading to harm to property, health and safety in another jurisdiction via mutual recognition? If so, what is the extent of the problem and is it a systemic issue affecting an entire occupation? Is there evidence of any benefits, such as regulatory competition and innovation between jurisdictions?
- Q44 How effective are current informal and formal processes — dialogue between jurisdictions, referral of occupational standards to Ministerial Councils, and recourse to a tribunal — in addressing concerns about differing standards across jurisdictions?

Question 36

For a body such as the Building Practitioners Board the key issue in the administration of the mutual recognition scheme as it relates to occupations, is the ability to establish a clear and coherent equivalency between registration categories and classes in different jurisdictions.

A particular difficulty arises for the Board where the Ministerial Declaration of equivalency for a particular registration relates to the construction of classes of buildings where the content of those classes may have changed in the years since the Declaration was made. For example, many of the equivalencies set out in the Ministerial Declaration gazetted in 2009 refer to Class 10 Buildings as defined in the Building Code of Australia without differentiating between the sub-classes contained within Class 10.

BCA Class 10 consists of three distinct sub-classes being:

Class 10a – A private garage, carport, shed or the like;

Class 10b – A structure being a fence, mast antenna, retaining or free standing wall, swimming pool or the like; and

Class 10c – Private bushfire shelter.

Each of these sub-classes covers different types of construction skill and carries different levels of risk. The construction of private bushfire shelters is subject to the ABCB Performance Standards for Private Bushfire Shelters issued in 2010.

The 2009 Ministerial Declaration is almost, but not precisely, contemporaneous with the local regulatory changes made in Victoria to ensure that bushfire shelters are constructed to appropriate standards. The real issue is the absence of a clear mechanism to ensure that significant changes to the Building Code, such as the introduction of a new subclass of building, are taken into account in reviewing equivalencies.

Another issue for the Board is the different configuration of categories and classes of registration that exist between the participating jurisdictions. There are many examples that exist; the following are just a selection:

- Single category of civil engineer in Victoria as opposed to multiple categories in NSW;
- Single category of draftsman, class of building design (architectural) in Victoria as opposed to three categories of Building Design in Queensland;
- Separate Categories for Domestic and Commercial Builder in Victoria as opposed to differentiation of category of builder by low, mid or high rise in Queensland and New South Wales.

The change needed is to ensure that the Ministerial Declarations of equivalency are reviewed regularly. The BCA has until recently been reviewed annually. It will in future be reviewed every two years. Alignment of the declarations to that review would ensure currency and should not involve any undue administrative burden as other documents that make reference to the BCA are also reviewed and updated within the industry. Such a process will ensure Ministerial Declarations are kept up to date and true and transparent equivalencies maintained.

Question 41

The Board accepts that the mutual legislation scheme precludes it from re-testing the qualifications and experience of the applicant. However, section 17 of the *Mutual Recognition Act* does allow the

operation of other laws that apply equally to all persons carrying on or seeking to carry on the occupation for which mutual recognition registration is sought so long as those laws are not based on the attainment or possession of some qualification or experience.

Section 169A of the Building Act 1993 allows the Board to seek a police record check on applicants for registration in Victoria. The Board applies a policy of seeking such a check in relation to all applications including mutual recognition applications. All persons carrying out the occupation of a registered building practitioner in Victoria are subject to a wide range of responsibilities and obligations in the conduct of their business. They must observe the requirements of a wide range of legislation including:

- *Building Act 1993*
- *Building Regulations 2006*
- *Domestic Building Contracts Act 1995*
- *Occupational Health and Safety Act 2004*
- *Building and Construction Industry Security of Payments Act 2002.*

Registered building practitioners must also comply with the requirements of the Australian Standards, Building Code of Australia, local governments and the Victorian Building Authority's Standards and Tolerances. Honesty and integrity are important. Building practitioners must ensure that all their legislative and contractual responsibilities and obligations are met.

Where the results of the Police Record Check indicates the applicant does not have a clear record the Board will consider and assess an individual's Police Record Check results on a case-by-case basis. The conduct disclosed in the Police Record Check will be considered in context, based on relevance and the potential risk of harm or misleading conduct towards to consumers and other users of building services.

A history of dishonesty will give rise to the concern that the applicant may not have the good character necessary to carry on business diligently, to secure the honesty of his or her staff, respect their contractual obligations to consumers, establish and maintain a proper compliance culture, and demonstrate proper respect for legal, regulatory and professional obligations and exercise candour and good faith in dealings with regulators.

A Police Record Check that discloses a history of criminal behaviour involving violence will give the Board cause for concern that the applicant may not respect the personal safety and bodily integrity of clients and may pose a threat to the health and safety of others. It will also give rise to concern that the applicant will not observe restraint and proper process when dealing with disputes with clients, other building practitioners, staff, or with persons on properties adjoining a building site in carrying out the occupation of a registered building practitioner.

In considering the results of a Police Record Check in an individual case the Board will adopt a risk based assessment approach to ensure that all applicants are treated equally and fairly, that assessments are based on objective criteria and that the administrative law principles of lawfulness, fairness and rationality are observed in the exercise of the discretion vested in the Board. The Board regards it as consumer protection issue that all practitioners and applicants for registration are subject to the same level of probity review.

Question 43

There is some evidence to suggest that there is 'shopping and hopping' taking place in the selection of registering jurisdiction. This takes three forms.

1. The Board has examples of individual applicants who having applied to Victoria for a non-mutual recognition registration i.e. that is for registration in Victoria as their home jurisdiction, have refused to supply a consent for a police record check. The same applicant has, consequently, abandoned the Victorian application and sought and obtained registration interstate. These applications have been made in ignorance of the fact that a police record check will still be required but do indicate that some individual applicants attempt to obtain registration in the jurisdiction where they believe they will be subject to a lower level of probity vetting.
2. An applicant, usually a Victorian resident, applies in Victoria for a non-mutual recognition registration, i.e. for registration in Victoria as their home jurisdiction, and fails for some reason to meet the requirements for registration in Victoria. The applicant then seeks and obtains registration in a participating jurisdiction and seeks a mutual recognition registration in an equivalent category or class of registration. Applications of this type indicate that the threshold requirements for registration in terms of skills and experience are not equivalent across all participating jurisdictions. The Board must register such applicants but it has recently adopted the policy of seeking to engage in open communication with interstate bodies to keep informed of all relevant matters within the industry relating to Mutual Recognition. Table One attached indicates a clear and increasing trend in the number of applicants failing to be registered in Victoria and seeking registration using mutual recognition. Table One covers 97 applications. Table Two attached breaks down those 97 applications by jurisdiction.
3. An applicant, usually a Victorian resident, does not seek registration in Victoria as their home jurisdiction. Instead they seek initial registration in another participating jurisdiction. Anecdotal evidence is relayed from time to time to Board members that third parties, such as estate agents or others associated with the building industry, tell potential applicants that it will be easier to obtain registration in another jurisdiction and then seek registration in Victoria via mutual recognition. Such anecdotal information is difficult to verify. However, the Board does see trends or spikes in the number of mutual recognition applications from particular jurisdictions. These spikes may be indicative of some influence other than the number of applications that might be expected from a particular jurisdiction based only on per capita or size of the local building industry. The figures set out in Table Two attached are illustrative of this as the applications from Queensland appear to be disproportionate.

Question 44

The Board recently endorsed a policy of seeking dialogue with its counterparts in other participating jurisdictions. However, such dialogue can at best be informal. It is important that cross jurisdictional liaison be systematised to ensure true equivalency in skills and experience levels and also in terms of probity to ensure consumers of building services have the same level of protection regardless of the home jurisdiction of first registration.

The Board would be happy to discuss any of the matters raised in this letter.

Yours sincerely,

Dr Fiona Hanlon
Chair, Building Practitioners Board

Table One: MR Applications by persons refused registration in Victoria on application to Victoria as home jurisdiction

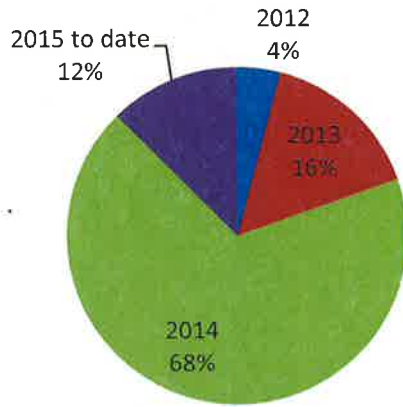


Table Two: Applications refused in Victoria but later re-submitted as MR applications by jurisdiction

