Refer response to
Question No. CBI-72

A PROCESS TO ADMINISTER BUILDING ACCESS FOR PEOPLE WITH A DISABILITY

'The Protocol'

2004

Australian Building Codes Board

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PART A

INTRODUCTION

Introduction

This paper has been prepared to explain the reason behind the development of a proposed *Process to Administer Building Access for people with a disability* and to invite interested people to comment on the proposal.

The proposed protocol has been developed by the Building Access Policy Committee (BAPC) which is the committee set up by the Australian Building Codes Board (ABCB) to develop draft *Disability Standards* for Access to Premises (Premises Standard) under the Disability Discrimination Act 1992 (*DDA*).

The Building Code of Australia

The Building Code of Australia (*BCA*) is a statement of the minimum technical requirements for the design and construction of buildings and other related structures. The ABCB produces the *BCA* in conjunction with, and on behalf of the State, Territory and Australian Governments, who each have statutory responsibility for building regulations within their jurisdiction. Each government adopts the *BCA* as the technical building standard.

The *BCA*, by means of State and Territory building legislation, requires most buildings to have features to enable access and use by people with a disability.

Building control legislation

Building Acts and Regulations in the States and Territories allow for *building approval* processes which regulate when a building permit is required, the forms of delegation, the maintaining of registers of practitioners, appeal mechanisms, the means to audit and report on approval activities and the technical standard that is applied. In all cases, the technical standard is the *BCA*.

The process described in the protocol is intended to be consistent with the general principles of the building control process applied in the States and Territories. However, in some cases changes to legislation or procedures may be needed.

Building law in Australia:

- specifies that the building standard must be applied to new buildings and, with some discretionary powers, to existing buildings undergoing new work;
- generally covers building elements that are an integral part of a building or fixed to a building;
- does not require existing buildings, which continue in the same use, to be upgraded if no building work is planned other than in some exceptional circumstances;
- generally requires that buildings undergoing a *change of use* or classification (with or without building work) be brought into compliance with the current *BCA* requirements for the new use;
- allows for the provision of appeal/modification authorities which have the power to adjudicate on technical issues in relation to a particular building when the *BCA* may be considered too onerous or inappropriate; and
- embraces a performance based approach to provide the technical requirements for construction. The *BCA* is a performance-based code.

The Premises Standard

When the *DDA* commenced operation in March 1993, complaints to the Human Rights and Equal Opportunity Commission (HREOC) and to several equivalent State and Territory bodies highlighted inconsistencies between the *BCA* and anti-discrimination laws.

In an attempt to find a mechanism to overcome these inconsistencies in 2000 the Australian Government made changes to the *DDA* to allow for the development of *Disability Standards* for Access to Premises (Premises Standard). The Premises Standard will set out details of how building owners and developers can meet their responsibilities under the *DDA* by ensuring their buildings are as accessible as possible for people with a disability.

Since those changes, the Building Access Policy Committee (BAPC) which has representatives from organisations representing people with a disability, government, the property and building industry, designers and regulators have been working on developing a draft Premises Standard.

The Premises Standard will consist mainly of a revised set of the access technical provisions in the *BCA* and will be available for public comment early in 2004. When the Premises Standard is adopted by Federal Parliament, building owners and developers will be sure that if they meet the requirements on the revised *BCA* they will also be meeting the requirements of the *DDA* in relation to those matters covered by the Premises Standard.

The Premises Standard will apply to all new buildings. It will also apply to existing buildings undergoing new building work or *change of use* where development and *building approval* is required by State or Territory legislation.

The *BCA* is a national code which prescribes the *Performance Requirements* that have to be achieved in a building. The *BCA* is adopted by State and Territory building law. Developers can meet the *Performance Requirements* of the *BCA* by either adopting technical *Deemed-to-Satisfy Provisions* or by using *Alternative Solutions* which must also meet the *Performance Requirements*.

While many developers will choose to follow the *Deemed-to-Satisfy Provisions* of the *BCA,* the BAPC is aware that some will want to try innovative ways of meeting the *Performance Requirements* of the *BCA* by using an *Alternative Solution*.

Because the Premises Standard will 'mirror' the revised *BCA* there will always be questions about how to interpret *Alternative Solutions* of the *BCA* in a way that gives confidence to developers that they are still meeting the requirements of the Premises Standard and, therefore, the *DDA*.

The Premises Standard, when adopted, will apply to all new buildings and new building work, or *change of use* in existing buildings. The BAPC understands that for existing buildings undergoing renovation or *change in use,* there will be legitimate questions about whether or not a requirement to meet the provisions of the revised *BCA*/Premises Standard might involve an *unjustifiable hardship*.

For example, some existing buildings were designed and constructed many years ago, and it may be simply impossible technically to meet the requirements of the revised *BCA*/Premises Standard.

For this reason, while the Premises Standard will apply to all new buildings, it will continue to allow for defences of *unjustifiable hardship* in relation to changes to existing buildings.

This means that even when we have the revised *BCA*/Premises Standard we will still be faced with questions about *Alternative Solutions* and *unjustifiable hardship* in relation to existing buildings.

The BAPC believes that leaving these questions solely to individual interpretation, or waiting for formal legal determinations arising from successful *DDA* complaints, is not appropriate or effective.

For this reason the BAPC has also been working on drafting an Administrative Protocol suitable to be used by State and Territory building control *administrations*, which will assist them in achieving the best possible resolution of these questions.

The Protocol

The protocol aims to ensure, as far as possible, that the application of the *BCA* results in the provision of an accessible environment consistent with the objectives of the *DDA* and, as a result, minimises the likelihood of a successful complaint against a building owner, occupier or practitioner.

In achieving this outcome it is intended that a Protocol would:

- assist the State and Territory *Administrations* and eventually Building Control Authorities to assess performance based *Alternative solutions*;
- provide a mechanism to address legitimate questions about *unjustifiable hardship* in relation to existing buildings undergoing building work in an efficient, expedient and timely manner that would otherwise need to be resolved as a complaint under the *DDA*.
- give the building industry and its practitioners confidence that when a decision is properly made, the requirements of the *DDA* are also likely to be satisfied for new buildings and new building work;
- give people with a disability confidence that legitimate questions about access to premises in relation to the use of *Performance Requirements* and *unjustifiable hardship* can be addressed through the building control systems of the States and Territories; and
- not deny people with a disability their current rights under anti-discrimination law to lodge a complaint.

The Protocol will not be part of the Premises Standard. Rather, it will be an independent document establishing an administrative process for States and Territories to adopt voluntarily.

The *Access Panels* will effectively be making decisions at a State and Territory level about the application of the *BCA* in specific situations as outlined below. People with a disability would continue to have the right to makes complaints in relation to *Access Panel* decisions, because authority to make binding decisions about issues covered by the Premises Standard can only be made by the Federal Court.

States and Territories adopting the Protocol would sign the Annexes which include room for details to be provided on how the process described in the Protocol will be implemented in each particular State or Territory.

The main way in which the Protocol proposes to achieve the aims listed above is through the use of '*Access Panels*'. The Protocol provides for *Access Panels* to become involved in the *building approval* process in a number of specific situations. These are:

(a) For new buildings - when an *Alternative Solution* is proposed.

(b) For existing buildings - when new work is occurring and when -

  (i) An *Alternative Solution* is proposed;

  (ii) An exception from a *BCA* requirement is sought on the basis of *unjustifiable hardship*; or

  (iii) An exception from a *BCA* requirement is sought and a *Building Upgrade Plan* is proposed.

Article 7 of the Protocol requires that even when an exception from a *BCA* requirement is granted, the *BCA* will still be applied to the maximum extent not involving *unjustifiable hardship* in certain parts of the building, depending on the degree of work being done. Amendments to State and Territory legislation giving effect to the *BCA* will be necessary if the *BCA* is to be applied consistently across all jurisdictions in the manner described in article 7(2).

Individual State and Territory *administrations* are given considerable flexibility as to how *Access Panels* may be made up, for example in relation to the number and qualifications of panel members.

The BAPC envisages the views of an *Access Panel* would be sought in a number of circumstances, for example:

- A Local Government may be approached by a developer who claims he/she could not meet the full *BCA* requirements in relation to the new building work on an existing building renovation because of severe technical limits. In this case the Local Government or the developer may call on the expertise of the *Access Panel.*
- A *building approval* authority may require full *BCA* compliance in an existing building changing use, but the building owner may feel providing full access would cause him/her an *unjustifiable hardship*. In this case the building owner may seek to approach the *Access Panel.*
- A Council or private Building Surveyor might seek the views of an *Access Panel* when faced with an *Alternative Solution* to an access issue in a new or existing building.

As stated earlier, people with disabilities will continue to have the right to lodge a complaint with the HREOC and the courts if they feel that an incorrect decision has been made by an *Access Panel.* It is expected, however, that the expertise used to apply the Protocol and the Guidelines to the *Disability Standards* for Access to Premises under which the *Access Panel* will work, will result in decisions that are consistent with the *DDA.*

Inevitably when the revised *BCA* and Premises Standard are adopted, there will be a period when Local Government and private certifiers generally will seek the guidance and support of *Access Panels* when faced with difficult questions, because decisions by *Access Panels* will provide greater surety and protection.

As knowledge of the new requirements grow and decisions of *Access Panels* become widely available, approval authorities will develop the skills and confidence to make decisions without the need to refer to an *Access Panel*. This will be especially true in those Local Governments that have already established policies and procedures for dealing with current appeals by developers.

PART B

THE PROTOCOL

PROTOCOL FOR ADMINISTERING BUILDING ACCESS

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Annexure to the Protocol

Preamble

The objective of this Protocol is to establish a process for determining access requirements for buildings that can be adopted by *Administrations*. The process aims to ensure, as far as possible, that the application of the *BCA* results in the provision of an accessible environment consistent with the objectives of the *DDA* and, as a result, minimises the likelihood of a complaint against a building owner, occupier or practitioner.

The State and Territory Ministers responsible for the *administration* of building control within their jurisdictions (who have signed annexes to this Protocol) and the Australian Government, are Parties to this Protocol. The Parties acknowledge that:

- the *administration* of building control, which is the responsibility of State and Territory Governments, should be consistent with the Commonwealth Disability Discrimination Act 1992 (*DDA*) when dealing with building matters relating to accessibility; and
- the approach outlined in this Protocol and relevant annexures, aims to result consistently in *Building Solutions* that provide access to the built environment by the community and is intended to satisfy the objectives of the *DDA*; and
- if the approach described in this Protocol and relevant annexures is followed, it aims to provide consistency of application for the disability sector, and define the extent of discretion that the *Building Control Authority* may exercise.

Articles of Agreement

By signing an annex to this Protocol, the Parties agree to the following articles:

Article 1: Protocol scope

1. This Protocol covers any access-related matter that is covered by building legislation as described below:
   (a) where an *Alternative Solution* is proposed, or where there are appeals against interpretation of *BCA* provisions; and
   (b) building work on existing buildings where modifications or exceptions are sought; and
   (c) existing buildings where the *Building Control Authority* is vested with discretion to require the upgrading of a building. Examples of such instances may be when there is a *change of use* or classification, upgrade orders, or where the extent of the new work warrants the upgrading of access to areas beyond that proposed for the new work.
2. The Protocol is not intended to cover:
   (a) a builder, owner or occupier who creates an *access barrier* outside of the building law; or
   (b) a *Building Control Authority* which undertakes the approval of work without following the Protocol; or
   (c) a *Building Control Authority* which grants an exception or modification or the approval of an *Alternative Solution* without reference to an *Access Panel*; or

(d) a service provider who chooses to occupy an inaccessible building.

3. The Protocol only covers parts of a building regulated under building law and not elements such as fixtures and fittings, street furniture and operational issues. A builder, owner or occupier that creates, or permits the creation of, *access barriers* in such elements would not be protected by the Protocol.

Article 2: Definitions

1. For the purpose of this Protocol:

(a) "Access barrier" means discrimination against another person on the ground of the other person's disability or a disability of any of that other person's associates by the restriction or the refusing of persons access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use;

(b) "Access Panel" means a body authorised by the *Administration* to advise the *Building Control Authority* on access related matters, including assessing and endorsing *Building Upgrade Plans*, *Alternative Solutions* and, where required by the *Administration*, to hear appeals against decisions of the *Building Control Authority*;

(c) "Administration" means the State or Territory Government organisation responsible for the administration of building legislation in that jurisdiction;

(d) "Alternative Solution" means a *Building Solution* that complies with the *BCA Performance Requirements*, other than by reason of satisfying the *Deemed-to-Satisfy Provisions*;

(e) "BCA" means that part of the Building Code of Australia, up to and including the amendment that is accepted as part of a *Disability Standards* for Access to Premises. Prior to the formulation of a *Disability Standards* for Access to Premises, the BCA is to mean the Building Code of Australia as adopted by the State and Territory *Administration*;

(f) "Building Control Authority" means the person or body in the jurisdiction responsible for *building approval* of *Building Solutions*;

(g) "Building approval" means granting of an approval, building licence, building permit, building rules, or other form of consent or certification by a *Building Control Authority*;

(h) "Building Solution" means a solution which complies with the *BCA Performance Requirements* and is-

(i) an *Alternative Solution*; or

(ii) a solution which complies with the *Deemed-to-Satisfy Provisions*; or

(iii) a combination of (i) and (ii);

(i) "Building Upgrade Plan" means a plan for upgrading the accessibility of an existing building over time;

(j) "Change of use" means a change of use of a building from a use that the *BCA* recognises as appropriate to one Class of building, to a use that the *BCA* recognises as appropriate to a different Class of building;

(k) "Deemed-to-Satisfy Provisions" means a provision that is deemed to satisfy the *BCA Performance Requirements*;

(l) "DDA" means the Australian Government Disability Discrimination Act 1992;

(m) "Disability Standard" means a document, formulated by the Australian Government Attorney General in accordance with Section 31 of the *DDA*, that describes the level of access or the means of determining the level of access, to premises;

(n) "Essential facilities" are facilities within a building that are necessary in order for people to make full use of the building, for example, toilets;

(o) "Extensive building work" is building work that involves alterations/additions to an existing building where the proposed work exceeds 50% of the volume of the completed building within any 3 year period;

(p) "Performance Requirement" means a requirement that states the level of performance which a *Building Solution* must meet under the *BCA*;

(q) "Person Competent in Access" means a person recognised by the *Administration* as having the necessary qualifications and experience in access matters appropriate to be part of, and provide advice to, an *Access Panel*;

(r) "Significant building work" is building work that affects parts of the building that would normally be required to be accessible;

(s) "Unjustifiable hardship" has the meaning given in Section 11 of the *DDA*[1];

2. Words or terms that are defined in this Article appear as italicised text, except in headings.

[1] Section 11 of the DDA states "For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and the effect of the disability of a person concerned; and

(b) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and

(c) in the case of the provision of services, or the making available of facilities – an action plan given to the Commission under section 64"

Article 3: Process outcomes

The outcome of the process[2] is to:

1. provide for decisions to be made about access to premises in the course of the *building approval* process in an efficient and timely manner; and
2. give the building industry and its practitioners confidence that when an approval is made, the requirements of the *DDA* are intended to also be satisfied; and
3. assist *Administrations* and Building Control Authorities in assessing *Alternative Solutions* that are nationally consistent; and
4. give people with a disability confidence that the *building approval* systems of the States and Territories address the provision of access being provided to and within buildings while maintaining current rights under Australian Government and State and Territory anti-discrimination law to lodge a complaint; and
5. assist the Australian Government and the States and Territories in fostering an efficient and competitive building industry that is responsive to community needs and the objects of the *DDA*.

Article 4: Building standard

The standard for access issues for new buildings and building work on existing buildings is to be the *BCA*.

Article 5: Application to new buildings

This Protocol applies to new buildings where an *Alternative Solution* is proposed.

Article 6: Application to existing buildings

1. The Protocol applies to building work on existing buildings, and *change of use* to existing buildings and where:

   (a) an *Alternative Solution* is proposed; or

   (b) an exception from a requirement of the *BCA* is sought due to *unjustifiable hardship*.

2. The *BCA* is to be applied to the extent reasonable without causing *unjustifiable hardship* in:

   (a) the entire building where the building work is *extensive building work*; or

   (b) a part of a building undergoing building work-

      (i) that part of the building; and

      (ii) where the building work is *significant building work*-

         (A) through the building entrance to the area of the building work;

[2] (Refer to Appendix A for a diagrammatic overview of the process of approval using this Protocol)

and

(B) to and within any *essential facilities* associated with that part of the building.

Article 7: Building Upgrade Plan for existing buildings

1. Where an applicant considers that compliance with the *BCA* is not presently possible or where other interim measures, such as non-building measures, may provide an acceptable solution for a particular building, a proposal for a *Building Upgrade Plan* may be prepared and submitted to an *Access Panel* for assessment and endorsement.
2. A *Building Upgrade Plan* may also propose a solution that is outside the scope of the requirements of the *building approval* process instead of proposing a *Building Solution*. It may also provide for a reasonable program for progressive upgrade.
3. Once the *Access Panel* endorses a *Building Upgrade Plan*, compliance with the *building approval* process or any *building approval* is to be on the basis of that plan.
4. The *Administration* is to establish a process that provides for the *Building Upgrade Plan* to be achieved.
5. Where an endorsed *Building Upgrade Plan* is proposed to be modified, the proposed modifications must be submitted to the *Access Panel* for endorsement.

Article 8: Access Panel

1. An *Access Panel* is to be established by the *Administration* to determine access related matters including assessing *Building Upgrade Plans*, endorsing *Alternative Solutions* and, where required by the *Administration*, hearing appeals against a decision of a *Building Control Authority*.
2. The *Access Panel* must not endorse a reduction in the overall level of access provided to and within an existing building.
3. The *Access Panels* operation is to be transparent and decisions are to be made publicly available.
4. The membership of an *Access Panel* is to include a sufficient number of people with relevant expertise for the particular issues and is to include at least one (1) *Person Competent in Access* and where the *Access Panel* consists of more than 3 persons, at least one-third of the *Access Panel* must be represented by Persons Competent in Access.
5. Annex 9 provides guidance to assist the *Access Panel* in performing its functions.

Article 9: Appropriate qualifications and indemnity

1. The *Administration* is to ensure that the qualifications and experience of members of an *Access Panel* are appropriate for the issues under consideration and sufficient to enable them to competently carry out the functions of the *Access Panel.*
2. The *Administration* is to ensure that a *Person Competent in Access* is appropriately qualified and experienced.
3. The *Administration* is to ensure that all members of an *Access Panel* are appropriately indemnified.

Article 10: Complaints

1. Complaints of discrimination under the *DDA* can be made to the Human Rights and Equal Opportunity Commission (HREOC) or the federal courts by or on behalf of one or more persons aggrieved by the degree of building access or use. This Protocol, or a decision made by a *Building Control Authority* and an *Access Panel* under this Protocol, cannot remove or otherwise affect the right to complain.
2. However, the Protocol is intended to provide as much certainty as possible both to building owners, occupiers and practitioners and to the general community that access decisions taken in accordance with this Protocol are not likely to result in a successful complaint.
3. A successful complaint of discrimination resulting from a failure of the process established by an *Administration* is to result in a review of that process.
4. An *Administration* may also choose to allow appeals against decisions of the *Access Panel.* Where it chooses to do so, the mechanism should allow for an appeal by either an applicant or a third party. The person or body hearing the appeal must not have been a party to the original decision.

Article 11: Annexes

1. Annexes 1 to 8 of this Protocol describe the operational procedures of individual *Administrations* for administering this Protocol and are therefore an integral part of this document.
2. Annex 9 provides guidance on administering this Protocol.
3. Amendment and modifications to Annexes may be adopted and become effective in accordance with Article 13.

Article 12: Compliance with this Protocol

1. Each Party is to take appropriate measures within its competence and jurisdiction, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure effective application of this Protocol.
2. It is not mandatory under building control legislation or the *DDA* to comply with this Protocol. However, the level of certainty afforded by following this Protocol would only be available to those abiding by it.

3. Each Party is to draw the attention of all other Parties to any activity, which in its opinion, affects the implementation of the objectives and principles of this Protocol.

Article 13: Modification or amendment

1. A modification or amendment to this Protocol, excluding Annexes 1-9, is to only occur with the agreement of all Parties.
2. A modification or amendment to an individual Annex (Annexes 1-8) or to the guidance advice contained in Annex 9 of this Protocol is to only occur with the agreement of the Australian Building Codes Board representing the Australian Government and the State and Territory Governments.
3. This Protocol is to be reviewed within 2 years of its adoption and further reviewed at intervals of not more than 5 years.

Annex 1 [SAMPLE]
TO THE PROTOCOL FOR ADMINISTERING BUILDING ACCESS OPERATING PROCEDURES FOR [STATE / TERRITORY]

Clause 1.1 Agreement

This Annex outlines the operating procedures of the Protocol within the State/Territory of.....and the Commonwealth.

Clause 1.2 Interpretation of terms

The following are the terms used in the State and Territory building legislation that are considered equivalent to those used in the Protocol:

.....	for	Access Panel
.....	for	Administration
.....	for	Building Control Authority
.....	for	Building Upgrade Plan
.....	for	Person Competent in Access

Clause 1.3 Scope of applicable building legislation

1 Includes.....
2 Excludes.....

Clause 1.4 Building work

1 Current powers.....
2 Changes required.....
3 Any transitional arrangements.....

Clause 1.5 Qualifications of Building Control Authority

1 Current qualifications.....
2 Changes required.....
3 Any transitional arrangements.....

Clause 1.6 Access Panel

1 Membership.....
2 Qualifications of members generally.....
3 Any changes required.....
4 Any transitional arrangements.....

Clause 1.7 Qualifications of a Person Competent in Access

1 Current qualifications.....
2 Changes required.....
3 Any transitional arrangements.....

Clause 1.8 Building Upgrade Plan

1 Current powers.....

2 Changes required.....

3 Any transitional arrangements.....

Clause 1.9 Complaints

1 Current powers.....

2 Any changes required.....

3 Any transitional arrangements.....

Clause 1.10 Notice of decisions

Method of public notification.....

Clause 1.11 Signatories

Signature.....
Name.....
Title.....
Of.....
On.....

Signature.....
Name.....
Title.....
Of.....
On.....

Annex 9

TO THE PROTOCOL FOR ADMINISTERING BUILDING ACCESS GUIDANCE ADVICE

Clause 9.1: Intent

1. It is not possible to prescribe a single *Building Solution* that will cover all situations. Instead, the following is provided for guidance as to what should be considered when assessing individual situations.

2. The Protocol may be applied to new buildings to assist in assessing an *Alternative Solution*.

3. The Protocol may be applied to existing buildings undergoing building work. It can be applied to applications for exceptions from, and modifications to, *Deemed-to-Satisfy Provisions* and for endorsement of an *Alternative Solution*.

4. The Protocol does not apply to existing buildings where no work is being carried out other than where there is a *change of use* or classification.

Clause 9.2: Aspects not covered

1. The Protocol does not cover those aspects outside the *building approval* process. Where the work is within the scope of the *building approval* process, the Protocol does not require the upgrading of access:

   (a) for work that merely preserves the value or use of an existing asset, for example, maintaining, repairing and replacing;

   (b) for work on a system that does not effect access and is not subject to access requirements, such as modifications to a ventilation or sprinkler system or installing a suspended ceiling system; and

   (c) for situations not requiring building work e.g. *change of use* with no associated building work.

2. Any work covered above should not result in a reduction in the overall level of access provided to and within an existing building.

Clause 9.3: Building work

1. The objective of the Protocol is to provide a level of access that is consistent with the requirements of the *DDA Disability Standards* for Access to Premises. However, where it is not possible to comply fully due to *unjustifiable hardship*, it is important to achieve the maximum level possible without causing *unjustifiable hardship*, rather than no access at all.

2. The Protocol requires that the entire building be made accessible when it is undergoing *extensive building work*. This may be where the greater part of the building is being refurbished at one time, or within a relatively short period. For example, a program where the new building work, plus the work carried out over the previous 3 years, affects more than 50% of the volume of the building is considered as one "extensive" refurbishment.

3. An inaccessible existing building being added to may also be required to be made accessible, for example, where the addition is greater than the existing building (thus exceeding 50% of the total volume of the completed building) and the addition is being integrated into the existing building. Alternatively, the addition may be treated as a separate building provided it has separate access and is self-contained with all associated facilities.

4. Where building work in an existing inaccessible building is considered *significant building work* but not *extensive building work*, the Protocol requires that access be provided to the area of the new work and to any *essential facilities* associated with the new work. For example, any toilets, communal laundries or cafeteria that serves the area of the new work.

Clause 9.4: Access Panel

1. The body empowered under State or Territory law to rule on other building regulatory matters may also act as the *Access Panel* for access related matters, provided it is dually authorised and contains the appropriate expertise.

2. The more broad based the *Access Panels* membership, the more likely it will be that access is achieved and less likely that any decision would result in a disability discrimination complaint being successful. Membership of an *Access Panel* should include a minimum of three people. Members must have expertise relevant to the issues (eg lifts, sensory or mobility aspects of a building) and include a minimum of one person who is deemed or accredited to be a *Person Competent in Access* matters and where the panel is greater than 3 persons, at least one-third of the *Access Panel* must be represented by Persons Competent in Access matters. Where further expertise is needed, it is to be sought from advisers or the *Access Panel* enlarged.

3. The *Access Panel* will undertake a technical assessment of the proposals. In doing so, it would take into consideration factors relevant to the specific building. The *Access Panel* would need to consider *unjustifiable hardship* as part of any assessment in relation to existing buildings.

Note: An Access Expert who is recognised by the *Administration* as having the qualifications and experience in access matters appropriate for endorsing *Building Upgrade Plans* and to determine whether the access matters in a *Building Solution* comply with the relevant parts of the *BCA* may be a future option to an *Access Panel*. This will be dependent upon the development of accreditation mechanisms.

Clause 9.5: Unjustifiable Hardship

1. When making decisions in accordance with Article 6(2), no hard and fast rules can be provided, as the outcome will depend upon individual circumstances. What is unjustifiable in one case may not be so in another situation. Reference to recent case law or *Access Panel* decisions may also be a useful source of guidance when making a decision on *unjustifiable hardship*.

2. Decisions on whether the provision of access would involve *unjustifiable hardship* should be made in the context of the objective set out in the *DDA* and reflected in equivalent State and Territory legislation of eliminating discrimination, as far as possible. The factors for consideration listed below aim to assist in developing recommendations, however, none of the factors should be interpreted as leading automatically to *unjustifiable hardship* being accepted as applying.

3. Factors to consider may include the following:

(a) The economic viability of a project including-

(i) any loss of occupiable or rentable area;

(ii) the cost of upgrading ancillary features, such as the path of travel to the new work or the associated facilities, in relation to the overall cost of the new work; and

(iii) resources reasonably available to the person or organisation who would be required to meet to the costs of providing access.

(b) Whether the new work involves public funds. Buildings serving a public function and receiving public funds may, for example, need to demonstrate particularly exceptional circumstances to justify lack of access.

(c) The extent of the benefit from providing access including-

(i) the type and use of the building, for example, lack of access to a shopping centre or a medical centre will have an impact on a wider group of people than a building to which the general public is not normally admitted;

(ii) whether alternative access is available to the building or to the services and facilities provided within the building;

(iii) whether the building exists for, or is used for, significant public purposes. For example, if the building is used for electoral purposes or by local government for consultative purposes; and

(iv) whether the building has a significant community function, including cultural, religious, artistic, or sporting aspects of a community, or is used for educational purposes.

(d) The significance of any heritage value of features in a building that may be affected by changes to provide access. Every case should be considered on its own merit. This means that the importance of retaining any significant heritage feature needs to be weighed against the obligation to provide access under the *DDA*.

(e) Technical limits.

(f) Topographical restrictions or other site constraints.

(g) Any relevant safety and health factors.

(h) The requirements of other legislation.

4. Specialist property management advice may be needed to assess an applicant's submission on economic viability issues. Likewise, specialist heritage advice may be needed in some cases.

5. Another consideration would be that the provision of access must not contravene the other provisions of the *BCA* and building law.

6. Where the provision of full and equitable access in an existing building (including heritage buildings) is considered to involve *unjustifiable hardship*, a total exception may not always be appropriate. For example, while enlarging a lift shaft may not be possible, improving access by upgrading lift controls and providing announcements in lifts may be possible. While it may be too difficult to provide access to a small heritage listed building through the front door, it may be possible to design easier access for all visitors through a rear or side door.

7. A *Building Upgrade Plan* to address access difficulties in existing buildings may also be considered. While the immediate elimination of all *access barriers* in an existing building may be seen to involve *unjustifiable hardship*, addressing them over a specified period of time may not.

Clause 9.6: Building Upgrade Plan

1. A *Building Upgrade Plan* may propose an interim solution that is outside the scope of building regulations. An example would be to provide alternative building entrance arrangements, with appropriate signage and staff to provide direction, as an interim measure until such time as all entrances required to be accessible can be provided. If such interim arrangements are not honoured, the decision made by the *Access Panel* using this Protocol would no longer be applicable and a subsequent complaint under the *DDA* may be successful.

2. A *Building Upgrade Plan* should identify the key components and/or time-frame(s) necessary for timely compliance and completion of the *Building Upgrade Plan* such as "at expiry of current tenancy arrangements" or "within five years".

3. Once an *Access Panel* assesses and endorses a *Building Upgrade Plan* and the *Building approval* is given, a process that provides for the *Building Upgrade Plan* to be achieved should be established.

4. An existing *Building Upgrade Plan* must be taken into consideration by an *Access Panel* because it may affect the requirements due to a prior undertaking to improve access, or a prior acceptance that, to require certain access features, would be unjustifiable. For example, a building may be due for demolition or a major refurbishment in the near future and so an interim upgrade may be exempted.

DIAGRAM 1 - Building Access Regulatory Compliance Process

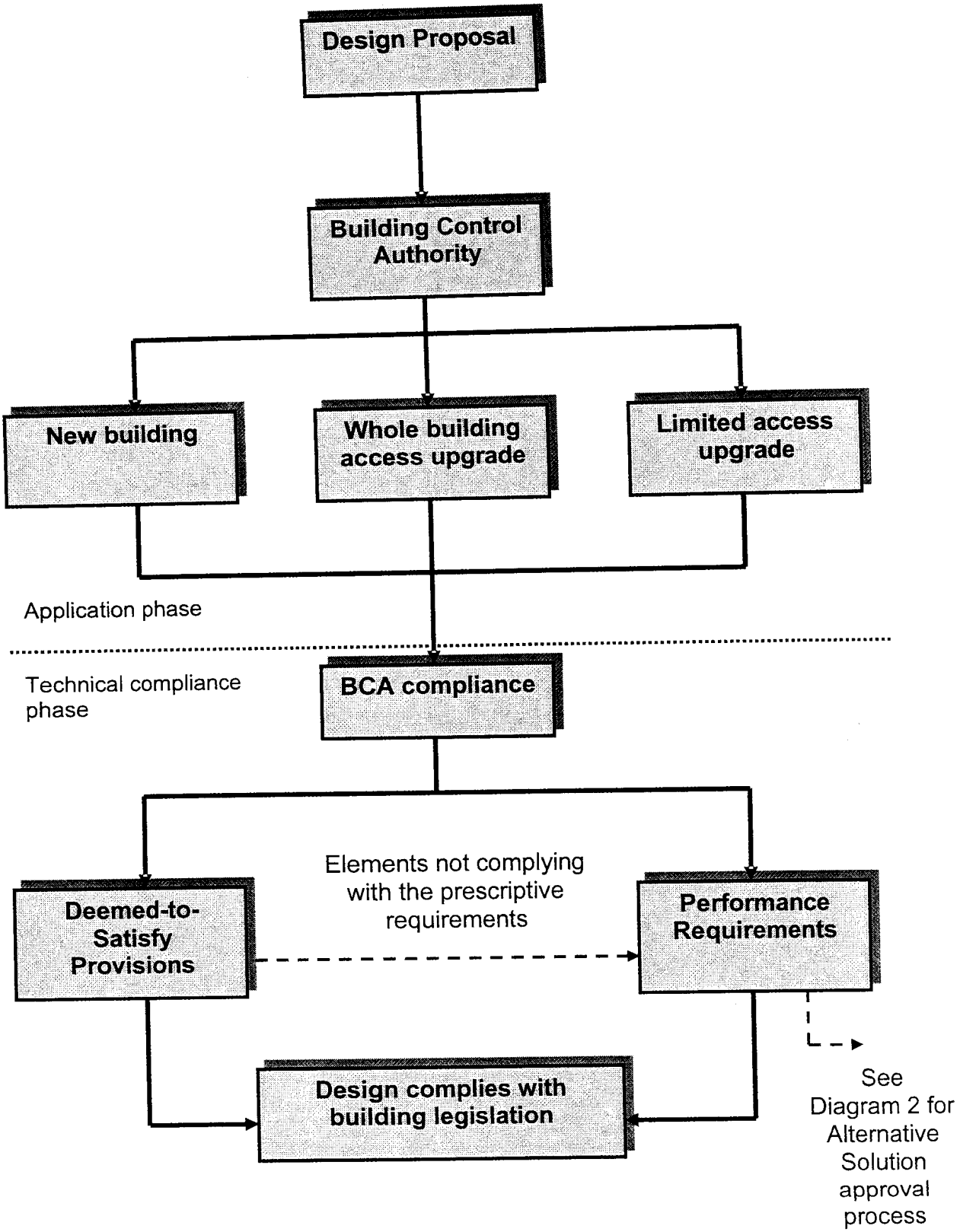
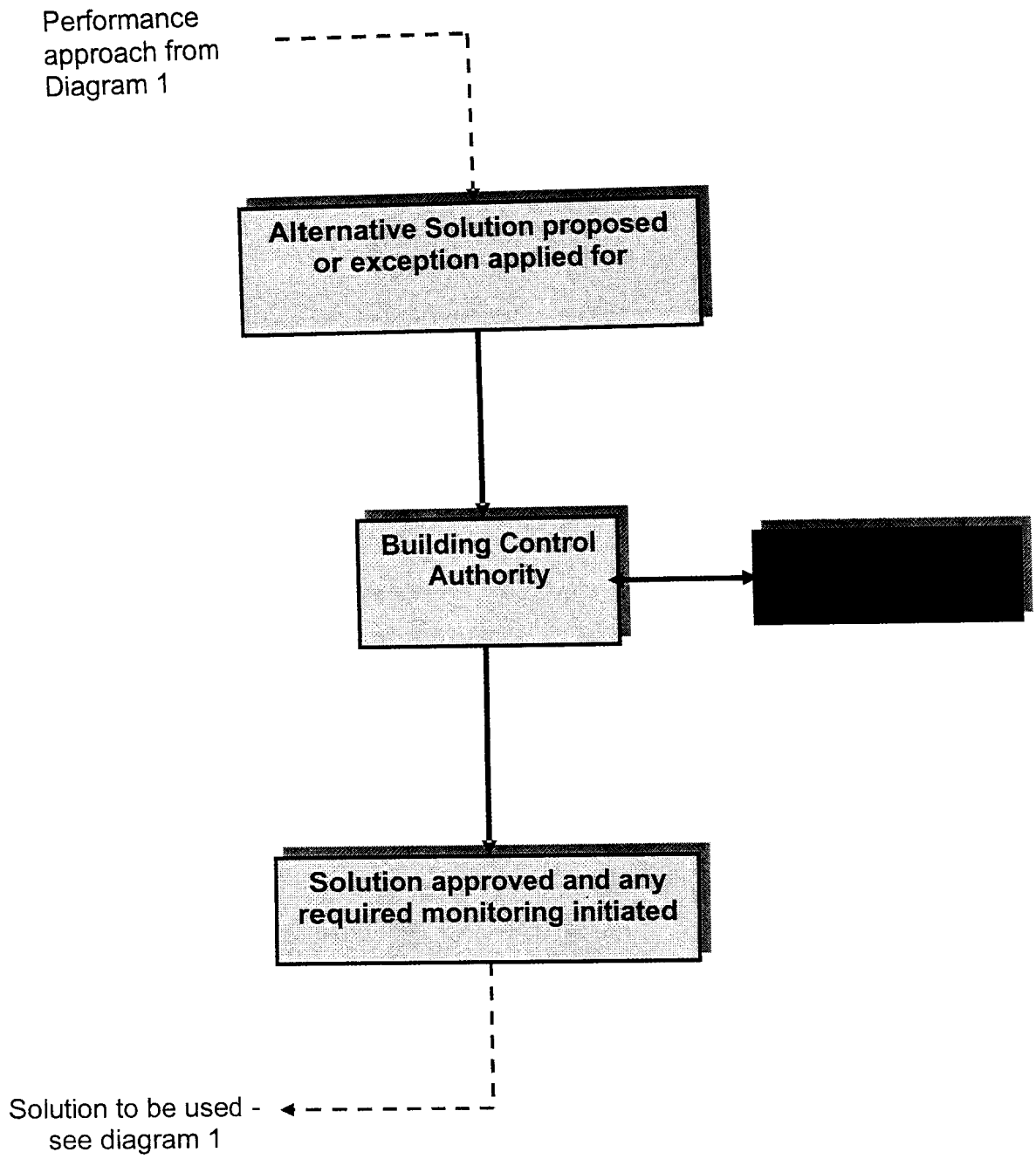


DIAGRAM 2 - Alternative Solution Approval Process



PART C

PRELIMINARY IMPACT ASSESSMENT

IMPACT ANALYSIS

Proposed Protocol for Administering Building Access in the context of the Disability Standards for Access to Premises

February 2004

This Impact Analysis has been prepared in accordance with the requirements of the Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies endorsed by the Council of Australian Governments and the Australian Building Codes Board's Economic Evaluation Model. Its purpose is to provide an assessment of the expected magnitude and incidence of the impacts of the regulatory proposal.

Summary

The Commonwealth Disability Discrimination Act 1992 (DDA) makes it unlawful to discriminate against a person on the ground of disability in a range of areas, including employment, accommodation, education, public transport and access to premises. A series of Standards are currently being produced under the DDA which will have the effect of codifying this general duty in relation to each of the five main areas covered by the DDA. As a result of agreements between the relevant authorities, the technical standards contained in the Disability Standards for Access to Premises (the Premises Standard) will be mirrored in the Building Code of Australia (BCA), which is the fundamental source of technical requirements applicable under relevant building legislation around Australia.

Thus, as a result of these agreements, changes to the existing BCA requirements in relation to access to buildings for people with a disability are to be adopted. A Regulation Impact Statement (RIS) is currently being developed in respect of these proposed changes. It is also proposed to develop an administrative protocol to assist in consistent application of the revised BCA access provisions. It is this Protocol that is assessed in this document.

The purpose of the Protocol is to provide a framework for a process that achieves a high degree of consistency in the application of the new BCA provisions where discretion is available. It will thereby help ensure certainty among stakeholder groups as to decisions on the application of BCA requirements and as to their consistency with DDA requirements.

The specific elements of the Protocol have been assessed in benefit/cost terms and it has been concluded that the Protocol itself imposes no substantive additional costs beyond those mandated by the proposed BCA access provisions. Rather, it ensures that those provisions are implemented in a consistent, cost-minimising and efficiency-maximising way.

The Protocol has been assessed against three alternatives: the first being to adopt no protocol and allow State and Territory Administrations to develop their own implementation arrangements; the second being to adopt a more prescriptive protocol; and the third being to adopt a modified protocol under which an individual Access Expert would be substituted for the Access Panel. It is concluded that both of these alternatives are less preferred in terms of the objective of ensuring that the BCA access provisions are consistently applied in cases where discretion is available.

Consequently, it is proposed to proceed with the formulation of the Protocol.

1. Background

The Commonwealth Disability Discrimination Act 1992 (DDA) makes it unlawful to discriminate against a person on the ground of disability in a range of areas, including employment, accommodation, education, public transport and access to premises. Since the DDA commenced operation in March 1993, complaints to the Human Rights and Equal Opportunity Commission (HREOC) and to equivalent State and Territory bodies have highlighted inconsistencies between the BCA and anti-discrimination laws. In 1995, the Australian Building Codes Board (ABCB) established the Building Access Policy Committee (BAPC). The BAPC was formed to recommend changes to the BCA, to consult widely with industry and the community, and to provide advice to the ABCB on access-related issues.

In April 2000, an amendment to the DDA to allow the Attorney-General to formulate the *Disability Standards for Access to Premises* (Premises Standard) came into effect. This amendment allows for a mechanism that will codify accessibility requirements under the Act and ultimately ensure consistency between the BCA and the DDA. The Commonwealth Government asked the ABCB to task the BAPC with developing proposals to change the current BCA (BCA96), which will also form the technical provisions of the proposed Premises Standard.

The effect of adopting a Premises Standard that is harmonised with the BCA would be that owners, designers, developers and operators of buildings used by the public would be able to satisfy obligations under the DDA (as applicable to buildings) by meeting the requirements of the BCA. From the viewpoint of the disability sector, the adoption of the Premises Standard will improve access by specifying precise requirements for assuring compliance with the objects of the DDA and will ensure consistency of application of the DDA throughout Australia. In the absence of a Premises Standard people with a disability, owners, developers, operators and building practitioners would continue having to rely on the individual complaints mechanism of the DDA as the only means of defining compliance.

Through the above process, the ABCB has identified a number of proposals for changes to the access provisions of the BCA, that will, enable the BCA to form part of the new national *Disability Standards for Access to Premises* under the *Disability Discrimination Act 1992.* The changes aim to ensure that premises that the public are entitled or allowed to enter or use are accessible to all users and also provide certainty for building owners, developers, operators and practitioners about their obligations under the DDA. The effect will be that building work that is completed in accordance with the BCA – and, hence, the Premises Standard – is taken as complying with the access to premises requirements of the DDA by virtue of Section 34 of the DDA. A draft of the proposed Premises Standard has now been completed.

The BCA, and the proposed Premises Standard, are performance-based documents that describe the outcomes to be achieved. It contains prescriptive solutions that are deemed to provide those outcomes, but also allow the flexibility of achieving the desired outcomes by other suitable means. Where an alternative to the prescriptive requirements is proposed, it must be demonstrated that the alternative solution meets the performance requirements, or that it is equivalent to the prescriptive requirements.

Whilst performance-based regulations provide for flexibility and innovation, there is an inherent degree of subjectivity in determining whether alternative solutions achieve the desired level of performance, particularly in areas where quantification of performance levels has not, and is unlikely to be achieved. Additionally, State and Territory building legislation, by which the BCA is applied, provides for discretion to be exercised by the regulatory authority in defined circumstances.

Potentially, these factors can result in case-by-case and State-by-State variations in compliance with the BCA and hence the Premises Standard. It was evident during the development of the draft Premises Standard that there was a demonstrated need to maintain the flexibility of a performance-based approach as provided under the BCA. The ability for appropriate discretion to be exercised in individual cases is also desirable, but in a way, that still provides surety that the objects of the DDA would be met and complaints under the DDA would be avoided.

A Protocol for administering building access has been proposed as a solution to these issues.

The purpose of the Protocol is to establish a process for determining access requirements at the level of specific buildings in a limited number of specific circumstances (see below). That is, it would guide the practical implementation of the requirements of the Premises Standard in the specific circumstances referred to in the Protocol. The circumstances are those where a degree of discretion in how to apply the BCA access requirements exists, for example, in a situation where a departure from the prescriptive requirements is proposed.

States and Territories are free to decide whether to adopt the Protocol or whether to adopt their own mechanisms for determining access-related issues. However, it is considered most likely that all States and Territories will implement the Protocol. It is also up to the discretion of building practitioners/owners as to whether they use the process set out in the Protocol where it has been adopted in a particular State or Territory. That is, in circumstances in which the Protocol applies, a building practitioner or owner is able either to decide access related issues him/herself or to use the processes set out in the Protocol.

The Protocol covers any access-related matter where:

- An *alternative solution*[3] is proposed to be adopted to meet the BCA performance requirements;
- Modifications or exceptions are sought (whether or not on the grounds of unjustifiable hardship) with regard to building work on existing buildings; or
- The Building Control Authority is vested with discretion to require the upgrading of a building – for example where there is a change of use or classification, upgrade orders, or where significant or extensive building work

[3] i.e. a means of compliance other than the prescriptive Deemed to Satisfy solutions contained in the BCA.

is being carried out warranting the upgrading of access to areas beyond that proposed for the new work.

This impact analysis relates specifically to the Protocol. A separate RIS has been developed in relation to the Premises Standard. This impact analysis is intended to conform to both the *Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies* endorsed by the Council of Australian Governments and the ABCB's *Economic Evaluation Model*. Its purpose is to provide an assessment of the expected magnitude and incidence of the impacts of the regulatory proposal.

2. Objectives

The objectives of the Protocol are to:

(a) provide for decisions to be made about access to premises in the course of the building approval process in an efficient, consistent and timely manner; and

(b) give the building industry and its practitioners confidence that when an approval is made, the requirements of the *DDA* are intended to also be satisfied;

(c) assist Administrations and Building Control Authorities in assessing Alternative Solutions that are nationally consistent;

(d) give people with disabilities confidence that the building approval systems of the States and Territories address the provision of access being provided to and within buildings; and

(e) assist the Australian Government, the State and Territory Governments in fostering an efficient and competitive building industry that is responsive to community needs and the objects of the *DDA*.

3. Identification and analysis of alternatives

A primary purpose of regulation impact assessment is to demonstrate that policy choices have been made in a rational, comparative framework and that the resulting regulatory proposal is likely to result in higher net benefits to the community than that of the identified alternatives. Therefore this section identifies and considers the merits of alternative means of achieving the objectives of the Protocol.

In determining the appropriate range of alternatives for consideration, the regulatory context must be taken into account. It is considered that three feasible alternatives are available within the context set out in this assessment. These are:

- Not adopting a Protocol and-
    - allowing States and Territories to develop their own arrangements for the implementation of the new BCA access provisions;

  - without States and Territories making specific arrangements for the implementation of the new BCA access provisions.
- Adopting a more prescriptive Protocol designed to ensure a high degree of uniformity in approach to implementation.
- Adopting a modified Protocol under which an individual Access Expert would be substituted for the Access Panel envisaged under the proposed Protocol.

The expected benefits and costs of these options are analysed below.

3.1 (a) No Protocol but States and Territories make own arrangements

The practical effect of not adopting an agreed Protocol in relation to the implementation of the BCA access provisions would depend on the approach adopted by the individual State and Territory building Administrations. The most probable response of these bodies is that they would individually develop broadly equivalent processes and guidelines to those included in the proposed Protocol. The impact of this would be a greater degree of divergence between the approaches adopted between jurisdictions although it is likely that some degree of co-operation would, nonetheless, occur. For example, some smaller jurisdictions may adopt the processes and guidelines already developed in larger States.

Assessment of benefits

The main potential benefits of this approach would be that States and Territories would be free to tailor their procedures and guidelines to suit their own situations and, in the longer term, needed amendments to these procedures and guidelines could be made more easily, without the need to secure nation-wide agreement, as is the case under the proposed Protocol.

The former benefit is likely to be of very limited importance in practice because the proposed Protocol already provides a degree of flexibility in implementation in recognition of the different legislative and administrative circumstances of the States and Territories. For example the Protocol proposes discretion as to whether the existing regulatory body would also be constituted as the Access Panel or whether some other body would be established for this purpose.

The latter benefit – that of ease of modification of the Protocol – is potentially more significant in practice since any regulatory uniformity arrangement that requires the agreement of nine jurisdictions has the potential for dynamic inefficiency to result. However two factors must be considered which suggest that the size of this potential problem is unlikely to be substantial in practice. First, the proposed Protocol contains review provisions from the outset, thus establishing the presumption that it will be kept under review and changed as necessary. Second, the broader context is one in which there has been, and continues to be, a high degree of co-operation between building authorities in the States and Territories on building regulatory matters as the long-term regulatory harmonisation project continues to be pursued.

Assessment of costs

Several costs can be identified in respect of the alternative of not adopting a national Protocol. These are:

- **Reduced certainty for stakeholders**. Building industry participants and other stakeholders would experience lesser degrees of consistency in discretionary decisions made on application of the BCA access provisions between jurisdictions, reducing certainty and probably increasing costs.
- **Probability of increased number of complaints under DDA.** The reduction in consistency and certainty would, in turn, be likely to lead to reduced confidence in the achievement of DDA requirements through the implementation of the BCA access provisions and therefore could increase the incidence of complaints under DDA processes. This would increase costs and undermine the purpose of the Premises Standard and the adoption of consistent BCA provisions. Another potential outcome in order to avoid complaints is a greater reliance on the prescriptive requirements rather than the formulation of more cost effective alternative solutions.
- **Reduced quality control in implementing the BCA access provisions.** The Protocol has been adopted as part of a co-operative and consultative process aimed at maximising national consistency between BCA and DDA requirements. Leaving each jurisdiction to develop its own approach would potentially undermine this mechanism for ensuring consistency between the two legislative requirements and would be likely to detract from the achievement of high quality implementation mechanisms across all jurisdictions.
- **Inconsistency with the logic of building regulatory harmonisation.** As noted above all Australian jurisdictions embarked on a long-term program of regulatory harmonisation in the building administration context. To fail to adopt a Protocol for use with the BCA access provisions would be inconsistent with this drive for harmonization, which is itself founded on recognition of the national character of the building industry.

Conclusion

Given the above, it is considered that this alternative is less preferred than the proposed Protocol. In particular it is considered that it is inconsistent with the nationally co-ordinated approach to harmonising DDA and BCA requirements and likely to undermine the achievement of the efficiency goals underlying that approach. This alternative does not fully satisfy the objective of consistent decisions from a national perspective.

3.1(b) No Protocol – without equivalent action in States/Territories

It was noted above that the practical effect of the non-adoption of the proposed Protocol would be dependent on the response of State and Territory Administrations. The above discussion was based on the presumption that these Administrations

would respond by adopting their own, equivalent, processes and structures. However a second possible response would be that some or all of these Administrations might make no specific provisions of these kinds.

Assessment of costs and benefits

The effect of such a decision would be to place the full onus of access-related decision-making, in the circumstances with which it is intended the Protocol will deal, on Building Control Authorities. This would mean that individual building certifiers, for example, would need to take responsibility for making all access-related decisions. In order to avoid complaints, a greater reliance on the prescriptive requirements rather than the formulation of more cost effective alternative solutions, may occur.

It might be expected that these Authorities would obtain advice from access experts to assist them in decision-making where they felt inadequately qualified or wished to reduce the risks associated with appeals against their decisions. To the extent that this occurred this alternative would, in any case, see access experts making some of the more difficult access decisions. However it can safely be assumed that specific access-related expertise would be brought to bear in a smaller number of cases under this option. This would mean that the overall quality of decision-making would be expected to be poorer and that successful appeals against access related decisions would be more numerous. In the absence of Access Panels, appeals would need to follow the current DDA processes involving HREOC and the Federal court system.

What net effect this would have on the actual provision of access is not possible to predict since it is not clear that decisions would deviate from those that would notionally have been made by an expert Access Panel in any systematic direction. However, it seems clear that the predictability of access decisions would be reduced and it would be likely that the increased transactions costs arising from larger numbers of appeals would outweigh any initial savings due to decision-making by Building Control Authorities.

More generally this alternative would appear to undermine substantially one of the key objectives of adopting Standards under the DDA by compromising the effective implementation of the Premises Standard as a predictable process by which access is determined and implemented. Thus, this alternative is less preferred than the proposed Protocol.

3.2 Adopt a more prescriptive protocol

The alternative of adopting a more prescriptive protocol would involve a greater specification of specific process requirements – eg. specifying that the Access Panel would be the existing building regulatory authority in all cases – as well as greater specification of specific aspects of the Protocol – eg. specifying maximum time-horizons for Building Upgrade Plans (BUPs) or providing further guidance on the application of the "unjustifiable hardship" test.

Assessment of benefits and costs

The assessment of the above alternative has highlighted the fact that building regulation in Australia is being progressively harmonised as a result of recognition of the essentially national scope of the building industry. This logic supports the adoption of a nationally adopted Protocol to guide the implementation of the proposed new BCA access provisions. Given this there would appear to be sound *a priori* reasons for preferring a prescriptive protocol that minimised inconsistencies in process and procedures between States and Territories.

However, the regulatory harmonisation undertaken in the building area continues to recognise the real differences that exist between jurisdictions and to accept that there may often be unjustifiable costs associated with a too-great degree of harmonisation being sought in the short term. Moreover, there may be limited benefits attached to very close harmonisation in many cases, while the costs incurred can be substantial.

In particular, it can be noted that continuing differences in the specific models of building administration used in particular States and Territories suggest that greater prescription as to matters such as Access Panels may be undesirable.

As well, the fact that agreement among all jurisdictions will be required to amend the Protocol suggests that a too prescriptive approach may be undesirable in that it could impede the process of adopting, amending and updating the Protocol over time by making agreement on changes more difficult to obtain.

Conclusion

It should be noted that the above has not clearly specified the contents of a particular alternative. Rather, the discussion has sought to contrast, in a generic fashion, the merits of adopting a more prescriptive protocol with those of adopting the proposed Protocol.

This is considered the only feasible approach to take since there is clearly a continuum of possibilities that would all meet the descriptor of being a "more prescriptive protocol", while the process of choosing between such options is necessarily a piecemeal one. That is, many of the judgements to be made as to the correct degree of prescription are independent of each other, yielding a potentially infinite (or at least very substantial) number of possible "more prescriptive protocols".

Thus, the purpose of this discussion of the alternative is to indicate the considerations that militate against adopting a more prescriptive approach and favour the currently proposed Protocol. Consistent with the general model of regulatory harmonisation pursued in relation to building regulation, the optimum degree of harmonisation is being sought.

3.3 Adopt a modified Protocol using an "Access Expert" as decision-maker

A third possible alternative would be to adopt a protocol along the lines currently proposed but to incorporate decision-making by individual Access Experts in place of the proposed use of Access Panels.

Assessment of benefits

The use of an individual Access Expert in place of an Access Panel could be expected to reduce the direct costs of decision-making under the Protocol. This is so to the extent that the sitting fees paid to Access Panel members would be reduced – with fees payable instead only to the single Access Expert. There may also be savings due to a more rapid decision-making process. That is, a single individual is likely to reach decisions more quickly than an Access Panel that must discuss the relevant issues amongst themselves and reach an agreed position. While the Protocol does not specify a minimum or maximum number of people that should constitute an Access Panel, the guidelines that accompany it as Annex 9 state that *"membership of an Access Panel should include a minimum of three people".*

A second potential source of cost savings relates to the cost of establishing separate Access Panels where no existing administrative body can be identified that is capable of being used as the basis of such a body. It has been noted above that the expectation is that States and Territories will use existing building appeals bodies as the basis of their Access Panel arrangements, with the likelihood that the membership of these bodies will be reformed to ensure adequate access to Access expertise. However in one State, no such administratively-based building appeals body currently exists. In this case, the ability to use individual Access Experts, rather than needing to establish an Access Panel from a zero base, could yield important cost savings. However given the speculative nature of this issue no quantitative estimate of the potential savings can be made as part of the present analysis.

Assessment of costs

The main costs associated with this alternative would be expected to be felt in terms of a likely reduction in the quality of decision-making in many circumstances. The Access Panel approach has been developed on the basis of a view that a combination of people with expertise in a range of building-related areas will be best placed to balance the relevant considerations involved in determining the access issues that will come before them for decision. This logic is set out in Annex 9 to the Protocol which states at Clause 9.4:

> *"The more broad-based the Access Panel's membership, the more likely it will be that access is achieved and less likely that any decision would result in a disability discrimination complaint being successful."*

Clearly the costs of lower quality decision-making resulting in successful complaints under DDA would be substantial and can, reasonably, be seen as likely to exceed those associated with the use of a larger Access Panel.

Conclusion

The above indicates that the option of using Access Experts is less preferred than the Access Panel approach because of the likelihood that the quality of decision-making would be compromised in many cases unless a range of expertise could be brought

together via an Access Panel to consider the issue. It is considered likely that the benefits of higher-quality decisions would exceed the additional costs of using Access Panels.

However, it should also be noted that the Protocol does envisage the possibility that the use of Access Experts may become possible in the future. Annex 9 to the Protocol (Clause 9.4.) includes the following note:

> *"An Access Expert who is recognised by the State and Territory Administrations as having the qualifications and experience in access matters appropriate...may be a future option to an Access Panel. This will be dependent on the development of accreditation mechanisms".*

Thus, the possibility is left open of Access Experts being used in conjunction with the Access Panel system established under the Protocol in the future, subject to an accreditation system being developed to ensure adequate quality control. The costs of such an accreditation system would also need consideration in determining whether the Access Expert option was appropriate for future adoption. However, in the short term the absence of such a mechanism, which would be fundamental to ensuring quality control with respect to the decisions of individual Access Experts, prevents this option being taken up. This is because it is considered essential that the Protocol be put into place at the same time as the adoption of the Premises Standard in order to ensure its effective operation in practice.

4. Description of major elements of the Protocol

The Protocol contains 13 Articles, which are summarised below. A copy of the Protocol is also attached to this impact analysis document.

Article 1 defines the scope of the Protocol noting both inclusions and exclusions.

Article 2 defines a range of terms used in the Protocol.

Article 3 sets out "process outcomes" – in essence, defining the specific objectives of the Protocol.

Article 4 states that the BCA is the access standard for new buildings.

Article 5 states that the Protocol applies to new buildings where a BCA Alternative Solution is proposed.

Article 6 defines the application of the Protocol to existing buildings. In particular, it notes that the BCA is to be applied *to the extent reasonable without causing unjustifiable hardship*[4].

[4] See, in particular, S 11; S 24(2).

Article 7 provides for the development of BUPs which may be endorsed by an Access Panel as part of the process of determining the level of access to be required under the Protocol. It also provides for a process to be established for implementing the BUPs.

Article 8 provides for each State and Territory Administration to establish an Access Panel and sets out the duties and powers of such Panels. The Access Panel is to be the body charged with administering the Protocol.

Article 9 sets out qualifications and indemnity requirements for Access Panel members.

Article 10 clarifies that complaints to HREOC may still arise despite compliance with the Protocol. However, where such complaints arise and are successful, a review of the processes established via the Protocol is to be undertaken. Article 10 also provides for possible appeals from the decisions of an Access Panel.

Article 11 establishes the existence of Annexes to the Protocol. Annexes 1 – 8 describe the operation procedures of each State and Territory for administering the Protocol, and Annex 9 provides guidance on administering the Protocol.

Article 12 requires each party to the Protocol to take measures to ensure its effective application.

Article 13 requires the agreement of all parties for any amendments to the Protocol to be adopted (excluding the Annexes). Amendments to the annexes require the agreement of the ABCB. Article 13 also requires the Protocol be reviewed within two years of its adoption and thereafter every five years.

5. Analysis of expected cost and benefit impacts

The starting point for the analysis of the expected cost impacts of the Protocol must be recognition of the broader legislative context as described in the Introduction. In particular it must be noted that the general requirement for buildings to be accessible is created by the DDA. The proposed Premises Standard is intended to assist in making this general legislative requirement operational by providing detailed design requirements that, in effect, define the standard of accessibility created by the DDA.

Conceptually, the Premises Standard can be regarded as imposing no additional requirements. Rather, it is merely making transparent the existing legislative requirements of the DDA. To this extent it can be argued that none of the substantive costs of compliance with the contents of the Premises Standard are attributable to the standard itself. Rather they are attributable to the DDA. However, in practical terms it is expected that the adoption of the Premises Standard will substantially change current practice. This is because the enforcement of the DDA currently relies on a complaints mechanism and building owners and developers, and other interested parties, may choose to avoid the costs of ensuring DDA compliance by accepting the, currently relatively low, risk of being the subject of a complaint.

The Protocol constitutes a mechanism for ensuring the effective and consistent application of the Premises Standard in circumstances where discretion is able to be exercised. Thus, while the specific design of the Protocol may, indeed, have an impact on the level of effective compliance with the Premises Standard (and, by extension, with the DDA), the costs of this compliance, or even of incremental compliance, cannot properly be attributed to the Protocol.

Indeed, as discussed in previous sections, the Protocol facilitates an environment that supports the use of cost effective alternatives to the prescriptive solutions contained in the Premises Standard, and the exercising of appropriate discretion whilst still providing surety for stakeholders on outcomes. The Protocol can therefore be expected to lead to lower costs compared to those generated by strict compliance with the prescriptive requirements of the Premises Standard, without reducing the benefits.

Given these factors it is necessary to focus the assessment of the impact of the Protocol on the costs and benefits of the major administrative arrangements that it establishes. Review of the Protocol indicates that the following elements are likely to have substantive cost and/or benefit implications:

- Creation of the concept of BUPs (Article 7);
- Creation of Access Panels (Article 8);
- Requirement for review of the process established under the Protocol in the event of a successful complaint of discrimination (Article 10(3));
- Provisions relating to modification or amendment (Article 13); and
- Guidance Advice (Annex 9).

The cost and benefit impacts of each of these elements of the Protocol are discussed in turn.

5.1 Building Upgrade Plans (BUPs)

According to Article 7.1. of the Protocol, a BUP can be proposed by an Applicant where it is believed that either:

- Compliance with the BCA is not presently possible; or
- Other interim measures such as non-building measures (like removable ramps or staff arrangements to provide assistance with access) may provide an acceptable solution for a particular building.

The BUP is consistent with the Action Plan concept established under the DDA. As well as potentially proposing non-building measures as part of its approach to compliance with the Premises Standard the BUP may also include a "reasonable program for progressive upgrade". Once a BUP is endorsed, the Building Control Authority must establish a process that provides for it to be achieved. Annex 9 provides (Clause 9.6.2) that a BUP should identify the key components and/or timeframes necessary for timely implementation of the BUP.

The BUP process can be seen as having two practical effects. First, by providing for the acceptance of non-building measures as partial substitutes for compliance with BCA access provisions it effectively creates an enhanced degree of regulatory flexibility. Logically this effect of the BUP will almost always be cost reducing, since applicants will generally seek to make use of non-building measures as an alternative to BCA compliance only where they are less costly than what would otherwise be the compliance requirement[5].

Second, the BUP provides a mechanism for maximising the degree of access provided under the provisions of the BCA and the Protocol. This aspect of its purpose is set out in Annex 9 to the Protocol (Clause 9.5.7) which states that:

> *"A Building Upgrade Plan to address access difficulties...may also be considered. While the immediate elimination of all access barriers in an existing building may be seen to involve unjustifiable hardship, addressing them over a specified period of time may not."*

Thus, the combination of providing for upgrades to be completed over a set period plus the potential use of non-building solutions will effectively reduce the scope of exemptions provided on "unjustifiable hardship" grounds and increase the degree of access achieved in practice. This clearly represents a source of important benefits in terms of the underlying objective of the DDA, and by extension, of the Premises Standard.

The impact of this mechanism on costs is less clear. Some aspects of this problem can be identified and discussed. First, the "unjustifiable hardship" test, which allows for exemptions from the general requirement to provide access, is established in Sections 11 and 24 of the DDA while guidance on its application is provided in Clause 9.5. of Annex 9 to the Protocol. Clause 9.5. stresses that no "hard and fast rules" can be provided on the interpretation of this requirement but goes on to suggest reference be made to relevant case law or Access Panel decisions. In addition, it sets out a range of "factors to consider" by way of providing further guidance. These include such matters as the economic viability of a project, the extent of the benefit from providing access, technical limits and topographical restrictions or other site constraints.

Thus, while there is no simple test of what constitutes "unjustifiable hardship" it appears that what is proposed effectively constitutes a process of weighing the benefits of access against the costs of its provision *in the specific case* (i.e. in relation to the individual circumstances of the building owner). Given a set of facts in relation to benefits and a set of specific owner circumstances, Clause 9.5. suggests that there should be some overall consistency in the judgements that would be made in terms of "unjustifiable hardship". From this conclusion follows:

- That instruments such as a BUP that have the potential to reduce the costs of achieving a given level of access would, in practice, be likely (through their

[5] An exception could be the case of a heritage building where a more expensive on-building solution may be adopted due to the need to avoid compromising some heritage value of the building itself.

administration by an Access Panel in conjunction with the unjustifiable hardship test) to lead to increased access being provided within the context of a more or less fixed cost (i.e. that which is regarded by an Access Panel as falling just short of imposing "unjustifiable hardship" in a particular case).

- Alternatively, if a greater degree of access has been provided at lower cost, due to the effects of the BUP, it may be that the "threshold" of costs, past which the "unjustifiable hardship" test is thought to apply, may in effect be set at a slightly lower point – since the benefit of providing an additional marginal increase in access becomes lower for a given cost (this relies on the notion that the hardship test is one which seeks to balance costs and benefits).

Both of these factors suggest that the use of the BUP should be either cost neutral or cost reducing in most cases. However, an additional consideration may work in the opposite direction – i.e. it may tend to be cost increasing. It is possible that the ability to commit building owners to a "staged" upgrade process would lead Administrations to require a greater level of access related expenditure to be undertaken than would be the case if their only option was to order improvements to be undertaken at the time of the building works. That is, it is possible that the total expenditure they believed would fall below the "unjustifiable hardship" threshold, taken over a period of years, would be greater than that they were prepared to require as an immediate expenditure on access provision.

To the extent that this dynamic operates there is the possibility for BUPs to have a cost increasing impact. However, any such impact is, necessarily, offset by the fact that additional benefits – in terms of achieving the DDA's objective of maximising access to public buildings – would also be achieved.

Conclusion

The above suggests two likely effects of the BUP tool that would be cost reducing and another that would be broadly cost neutral. There is another consideration which will tend to be in the direction of BUPs being cost increasing. Given this, no firm conclusion is possible as to the likely net effect of the BUP. More specifically it is clear that the impact in practice of the BUP tool will be substantially dependent on the manner in which it is implemented by Access Panels.

Considered in this light it appears likely that the BUPs will be broadly cost-neutral since:

- The over-riding requirement to maximise access subject to avoiding "unjustifiable hardship" – and the questions of judgement inherent in applying this – remain essentially unaltered by the use of the BUP mechanism; and
- The additional flexibility provided by the BUP would, at first principles, be expected to be cost-reducing overall.

Thus, it is not expected that the use of BUPs is likely to have any net cost increasing impact.

5.2 Access Panels

Articles 8 and 9 of the Protocol relate to the establishment of Access Panels. Access Panels are central to the operation of the Protocol. They are utilised to determine the application of the BCA access requirements in specific cases wherever a Building Control Authority, or other individual associated with the project, refers an access-related issue (that is within the ambit of the Protocol[6]) to an Access Panel rather than determining the matter his/herself. Second, it is anticipated that Access Panels will be nominated in most States and Territories as the relevant appeal body for the determination of appeals against decisions by Building Control Authorities on access-related issues.

Thus, the matters to be dealt with by Access Panels include assessing BUPs, assessing and endorsing alternative solutions and, where so tasked by the State and Territory Administrations, hearing appeals against a decision or interpretation made by a Building Control Authority.

Article 8 states that Access Panels should include "a sufficient number of people with relevant expertise" including at least one "person competent in access". The Protocol defines the latter term in circular fashion as being "a person recognised by the State and Territory Administrations as having the necessary qualifications and experience in access matters appropriate to be part of, and provide advice to, an Access Panel".

Beyond these requirements Articles 8 and 9 require that the operations of the Access Panel be transparent and decisions be made publicly available and all members of the Access Panel are appropriately indemnified.

The Protocol will apply to buildings that are required to be accessible to people with a disability in circumstances where it is proposed to adopt an alternative solution that

[6] As noted in the Introduction to this assessment, the Protocol applies where:

- An *alternative solution* is proposed to be adopted to meet the BCA performance requirements;
- Modifications or exceptions are sought with regard to building work on existing buildings; or
- The Building Control Authority is vested with discretion to require the upgrading of a building (e.g. where there is a change of use).

relates to that access being provided. The Protocol will apply in these cases wherever a question as to the compliance of these alternative solutions, exceptions, exemptions or modifications raises access related issues and where building designers, owners or assessors choose to use the Protocol's mechanisms.

Indications from State and Territory Administrations are that Access Panels will not, in general, be constituted as new bodies. Rather the existing building appeals boards (or equivalent) are expected to function as Access Panels for the purposes of the Protocol. Thus, the practical effect of the Access Panel requirement will, in the fundamental sense, be to add additional responsibilities or functions to an existing body. It is possible that, in some cases, the composition of these existing bodies may need to be varied to meet the Protocol's requirement that an Access Panel should include persons who are competent in access-related matters. This will occur where there are currently no such people among the appointees to existing bodies or where there are insufficient people with such expertise to ensure that a person competent in access will be able to be appointed wherever an Access Panel is convened.

The use of existing building appeals boards can be expected to minimise the costs of meeting the Protocol's Access Panel requirements. To the extent that the Access Panel requirement changes the composition of appointees to such Boards it is not considered likely that there will be any substantive additional cost involved. Thus, the main cost associated with the Access Panel arrangements is expected to be the increase in the number of matters to be heard by Appeals Boards to the extent that they are sitting as Access Panels.

"Stand Alone" Access Panels

One exception to the above conclusions must be noted. Consultation with Administrations in all States and Territories has identified one large State in which there is currently no administratively based building appeals mechanism. In this jurisdiction building appeals go directly to the court system for hearing. As a result of this and the fact that it is believed that no other existing body could be readily adapted to this function, the building authority in that State believes that the requirement under the Protocol to constitute an Access Panel may have substantial cost implications.

The conceptual question arising is whether the full costs associated with establishing Access Panels in this circumstance can be attributed to the Protocol. A number of factors must be considered in reaching this judgement. The general discussion of the costs of Access Panel arrangements, below, argues that while there may be important gross costs, the Access Panel process is likely to be cost reducing in a net sense, since alternative means of resolving access disputes (both those existing, under DDA, and those that can be envisaged as alternative means of administering the Premises Standard) are almost certainly more costly.

The State Administration in question has argued that the option of accrediting Access Experts, who would perform the function envisaged for Access Panels on an

individual basis, could be implemented at a lower cost in their case. This option is discussed further in the next section "Identification and Analysis of Feasible Alternatives".

In this context, it should be noted that the Protocol envisages the option of Access Experts being considered further in the future as a possible "alternative option" under the Protocol itself. This option has not been included in the Protocol at this stage because of the need to have the Access Protocol in place at the same time as the adoption of the Premises Standard. In this context it was considered that the process of developing and implementing nationally based accreditation processes for Access Experts would not be feasible within this timescale.

The extent to which Access Panel arrangements are likely to be used in practice is inherently difficult to estimate. Discussions with State and Territory Administrations indicate that they do not have a clear expectation in this regard. In practice, the extent of use of Access Panels will be determined by the propensity of Building Control Authorities or other individuals associated with the project to refer issues to the Panels, rather than making decisions themselves, as well as the propensity of parties to appeal decisions made by Building Control Authorities on access related matters.

It is possible that many Building Control Authorities may use the Access Panel process quite frequently, particularly in the early stages of the operation of the Premises Standard and Protocol as they may be reluctant to undertake the interpretation of these requirements themselves in a context in which there is no direct precedent on which to rely. As the interpretation of the Protocol by Access Panels becomes clearer and more widely known it is likely that Building Control Authorities will be more confident to decide on access related issues themselves.

Estimates from some building authorities suggest that the average direct cost of a panel's decision (i.e. the cost to government) is currently likely to be in the range of $800 - $1,200. This includes the costs of sitting fees, travel reimbursements, refreshments, etc. This estimate provides some indication of the likely cost of an Access Panel hearing given that the Access Panel will, in most cases, be the same body that currently deals with building appeals. At present it is expected that governments will meet the majority of these costs.

Additional costs are obviously borne by the parties to such hearings, in terms of the opportunity cost of the time required to attend hearings and any fees paid to experts that may appear. These additional costs may be substantial in relation to the fees of certain professionals (e.g. architects, engineers, builders), raising the issue of how they would flow through to the final customer. However, this issue is essentially one of a contractual nature.

Given the above it is arguable that the Access Panel arrangements will entail quite substantial gross cost implications. However, these arrangements must be seen in incremental terms. That is, the cost of resolving access-related issues through this mechanism must be considered in relation to current arrangements.

At present, access related disputes are initially dealt with by HREOC which attempts to conciliate agreements between the parties. If conciliation is not possible the complainant may take the complaint to the Federal Court. There are clear reasons for believing that going to the Federal Court is likely to be more costly than the proposed Access Panel arrangements. In particular, HREOC is not a body that specialises in building regulatory issues. Thus, the costs to it of making a determination in relation to a building-related access issue are likely to be greater than that incurred by a body that is specialist in building regulation[7]. Thus, to the extent that the Access Panel is sitting as an appeal body, the "per case" cost of a determination is likely to be lower than at present.

This leaves the Access Panels other main function which is to make a decision on access related issues instead of a Building Control Authority, where the Building Control Authority chooses not to decide directly. This is a new function, in effect. However it is still expected that this function may be cost reducing, rather than cost increasing. This is because the resolution of a difficult access-related issue by an expert body at the design stage rather than reliance on the Building Control Authority can be expected to reduce the incidence of subsequent complaints and, in particular, successful complaints requiring remedial action.

It should also be noted that a likely outcome of not having an Access Panel process in place would be that Building Control Authorities would adopt a risk minimising approach, including greater reliance on prescriptive provisions rather than alternative solutions that are more cost effective. The acceptance, through the Access Panel process, of a cost effective alternative solution would have the effect of offsetting the additional costs of the process. This concept is well demonstrated by current appeals board processes, whereby, unless there is a net benefit, an application to the appeals body is unlikely to occur.

Conclusion

The Access Panel requirement is considered to provide a more efficient and lower cost means of providing a dispute-resolution mechanism within the access context, compared to current mechanisms. It is therefore cost-minimising within the context of the Protocol and is likely to reduce substantially the existing cost of dispute-resolution, whilst facilitating the acceptance of cost effective alternative solutions.

5.3. *Review of the process established under the Protocol in the event of a successful complaint of discrimination (Article 10(3));*

Article 10(3) of the Protocol requires that there be a review of the process established under the Protocol whenever there is a successful complaint of discrimination made to HREOC or to the Federal Court as a result of a "failure of the process". The Protocol provides no specific guidance on what would constitute a failure of the process in this context, nor does it provide any guidance as to the nature or scope of any such review.

[7] It can be noted in this context that the BCA currently contains access-related provisions.

Such a review of the process would necessarily involve a substantive cost. However, it is clearly a contingent cost and one which is unlikely to occur with any frequency. Moreover Article 10(3) clearly indicates that the review requirement is to be brought into play where there has been a systemic failure of the process. In such circumstances a review of the process can be expected to be cost-minimising vis-à-vis an alternative of continuing with existing arrangements that have been determined to be systemically flawed. That is, the review requirement represents no more than a formalisation or codification of the general requirement of good regulatory governance, and that a regulatory process that is found to be substantially flawed should be reviewed and reformed expeditiously.

5.4. Provisions relating to modification or amendment (Article 13)

Article 13 of the Protocol requires the agreement of all parties for any amendments to the Protocol to be adopted (excluding the Annexes). Amendments to the Annexes require the agreement of the ABCB. Article 13 also requires that the Protocol be reviewed within two years of its adoption, and thereafter, every five years.

The first part of this requirement reflects the judgement that maintaining a uniform approach to the Protocol is likely to be the most effective and efficient means of implementing the proposed access arrangements. This is consistent with the broader policy direction in relation to building legislation which is geared toward the achievement of progressively greater degrees of regulatory harmonisation over time. Given this, the merits of maintaining a uniform approach over time will not be discussed as part of this impact analysis. That is, the case for uniformity in respect of the Protocol is considered to be a part of the generic case for uniformity, or close harmonisation, of building legislation generally.

The requirement for review of the Protocol is consistent with the general requirement contained in the Council of Australian Governments' *Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies* that arrangements for ongoing review of regulatory initiatives should be set out explicitly at the time of their adoption. The requirement for an initial review within two years of the adoption of the Protocol is considered appropriate given that the Protocol, and the Premises Standard to which it relates, represent new regulatory approaches with substantial potential impacts. Thus, it is necessary to ensure that such approaches are functioning as intended and that unanticipated problems have not arisen as soon as reasonably practicable after their introduction. It is considered that up to two years' experience with the operation of the Protocol may be required before there is a sufficient basis on which to evaluate its performance.

The second part of the requirement, that is five-yearly reviews to be conducted following the initial review requirement, represents a relatively rapid regulatory review cycle[8]. However, in line with the above observation that the Protocol and Premises Standard represent new regulatory approaches, it is considered appropriate to adopt such a relatively short cycle.

[8] By contrast most Australian States that use "sunsetting" of subordinate legislation operate a ten-year sunsetting cycle.

In summary, the review requirements relating to the Protocol should be considered conceptually as being part of the general costs of an appropriate and high quality regulatory management system aimed at ensuring the dynamic efficiency of regulatory approaches. As Article 13 of the Protocol does not include specific, prescriptive requirements regarding review processes or methodologies, it is considered that it does not impose costs beyond this necessary minimum.

5.5 Guidance Advice (Annex 9)

Annex 9 to the Protocol provides a range of "Guidance Advice" for building control authorities charged with the implementation of the Protocol (and, through it, the BCA access requirements). The Annex contains six clauses. The nature of each clause is set out below together with a brief discussion of the potential impact of each clause.

Clause 9.1: Intent

The statement of intent recognises that no single building solution will cover all situations and specifies that the Annex is intended to provide guidance as to the considerations to be weighed in assessing individual situations. Beyond this statement it merely re-states the scope of the Protocol.

Possible impact

This clause is for clarification purposes only and has no direct cost or benefit impact on any party.

Clause 9.2: Aspects not covered

This clause further clarifies the scope of the Protocol (largely established in Article 1) by defining specific matters that are *outside* its scope[9]. It notes that the Protocol does not cover matters that are outside the building approval process nor does it cover maintenance, repair or replacement works. In addition, building work that is clearly unrelated to access issues is excluded as are matters such as changes of use with no associated building work.

Comment

This clause clearly imposes no substantive burden because it does no more than clarify the extent of the Protocol's operation.

[9] By contrast Article 1 specifies matters that are *within* the scope of the Protocol.

Clause 9.3: Building work on existing buildings & change of use

This clause clarifies the application of the Protocol to existing buildings (as set out in Article 6). In particular, it states that, where full application of the BCA would cause "unjustifiable hardship", the BCA access requirements should be adopted as far as possible without causing such hardship thus maximising the effective level of access achieved.

In addition this clause provides guidance on the interpretation of *extensive building work* and on the requirements of the Protocol in respect of "extensive" and "significant" building work undertaken on existing buildings.

Comment

It is not considered that this guidance has the effect of extending the application or burdens imposed by the Protocol. To some extent it may be considered that the guidance would have the effect of reducing effective cost: for example, by specifying that an addition to an existing building may be treated as a separate new building provided it has its own access and is self-contained.

Clause 9.4.: Access Panel

This clause makes a number of clarifying statements regarding the composition and operations of Access Panels. In particular, it explicitly states that *"the body empowered...to rule on other building regulatory matters may also be the Access Panel..."*. In addition, the clause counsels that Access Panels should have the broadest possible membership in the interests of more effective operation. This latter is defined as increasing the likelihood that access will be achieved and minimising successful disability discrimination complaints due to flawed Access Panel decisions. Specific requirements for the composition of Access Panels are included. These have been discussed in Section 4.2. Finally, the clause specifies that Access Panels will undertake "a technical assessment of the proposals".

Comment

The specification that existing building regulatory bodies can be constituted as Access Panels is clearly cost-minimising as discussed earlier in this assessment (see Section 4.2.). As noted, it is understood that most States and Territories expect to take up this option.

The advice regarding the composition of Access Panels is, similarly, aimed at improving their practical effectiveness and thus reducing the total cost of achieving the required accessibility outcomes, i.e. taking into account the costs of complaints to HREOC and/or the courts that could arise as a result of flawed Access Panel decisions. As noted in Section 4.2. the specific requirements regarding access panel composition are not expected to be significantly cost increasing and are considered the minimum necessary to ensure that Access Panels can conduct their tasks effectively. In this context it is noted that only one person competent in access related matters is required to be present on any given Access Panel, unless the Access Panel comprises more than three people, in which case at least one third of the Access Panel must be competent in access.

Clause 9.5.: "Unjustifiable Hardship"

This clause stresses the need for "individual circumstances" to be weighed in determining the question of "unjustifiable hardship". It then provides a detailed list of factors that may be taken into account. These include:

- aspects of the economic viability of the project;
- the use of public funds;
- issues relating to the extent of the benefit associated with providing access;
- heritage issues;
- technical limits;
- site constraints;
- health and safety factors; and
- the requirements of other legislation.

Within this context the clause stresses that total exceptions may not always be appropriate and notes the availability of BUPs as a mechanism for addressing identified difficulties.

Comment

The issue of "unjustifiable hardship" is central to the application of the BCA Access provisions in relation to existing buildings[10]. It is therefore essential that there be a clear and consistent understanding of the issues involved among Access Panels, so that consistent and predictable decisions are made that implement the intention of the DDA and of the access provisions of the BCA.

The approach taken in this clause is to set out a range of factors for consideration that will facilitate Access Panels taking an essentially benefit/cost based approach to the question of "unjustifiable hardship". That is, following this guidance is likely to increase the likelihood that Access Panel decisions in individual cases will be broadly consistent with the underlying benefit/cost basis of regulatory decision-making that is endorsed by COAG, and is consistent with a welfare-maximising approach to government action.

[10] Note that the concept applies *exclusively* to existing buildings.

Clause 9.6.: Building Upgrade Plans (BUPs)

This clause provides detail on BUP requirements. In particular, it notes that BUPs should identify key components and/or timeframes necessary for completion of the BUP and that a process for achieving the BUP should be established. Any existing BUPs should also be taken into account by Access Panels.

Comment

This clause is largely directed toward ensuring that the BUP process is credible and effective in practice in achieving its purpose of maximising effective access in cases where the "unjustifiable hardship" exception has been brought into play. This is essential if the BUP process is to be able to be used successfully as a means of maximising the degree of access provided in a flexible, cost-efficient manner.

Given this focus, the BUP clause can be seen as directed toward ensuring compliance rather than imposing specific additional costs.

Conclusion

The above clause-by-clause analysis indicates clearly that the contents of Annex 9 to the Protocol are entirely consistent with its stated intent of providing "guidance advice", and that none of these clauses can be regarded as imposing substantive burdens on any stakeholders beyond those established by the Protocol *per se* and the BCA access provisions.

6. Statement of compliance with National Competition Policy

The National Competition Policy Agreements set out specific requirements with regard to all new legislation adopted by jurisdictions that are party to the agreements. Clause 5(1) of the Competition Principles Agreement sets out the basic principle that must be applied to both existing legislation, under the legislative review process, and to proposed legislation:

> *The guiding principle is that legislation (including Acts, enactments, Ordinances or Regulations) 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 regulation can only be achieved by restricting competition.*

Clause 5(5) provides a specific obligation on parties to the agreement with regard to newly proposed legislation:

Each party will require proposals for new legislation that restricts competition to be accompanied by evidence that the restriction is consistent with the principle set out in sub-clause (1).[11]

Therefore all impact assessments must include a section providing evidence that the proposed regulatory instrument is consistent with these National Competition Policy obligations.

No restrictions on competition have been identified in connection with the proposed Protocol governing the implementation of the proposed BCA access provisions. Therefore, the proposed change is considered to be fully compliant with the National Competition Policy.

7. Conclusion

The proposed Protocol is intended to guide the implementation by State and Territory building control authorities of new BCA access provisions in situations where discretion is available. In so doing, it will help to ensure that the provisions are appropriately implemented in practice and that there is a high degree of consistency between the approaches to implementation in different jurisdictions. It will thereby help to ensure certainty among stakeholder groups as to BCA requirements and as to their consistency with DDA requirements.

The specific elements of the Protocol, including the guidance material contained in Annex 9, have been assessed in benefit/cost terms and it has been concluded that the Protocol itself imposes no substantive additional costs beyond those mandated by the new BCA access provisions. Rather, it ensures that those provisions are implemented in a consistent, cost minimising and efficiency-maximising way.

In addition it is emphasised that the adoption of the Protocol by State and Territory Administrations and its use by practitioners will be voluntary.

The Protocol has been assessed against the alternatives of adopting no Protocol and allowing States and Territory Administrations to develop their own implementation arrangements or adopting a more prescriptive Protocol and adopting a variant of the Protocol that provides for decision-making by individual Access Experts instead of by an Access Panel. It is concluded that these alternatives are less preferred in terms of the objective of ensuring that the BCA access provisions are properly implemented and achieve effective consistency with BCA requirements.

Consequently it is proposed to proceed with the adoption of the Protocol.

[11] *Competition Principles Agreement*, Clause 5. 1995. See: www.ncc.gov.au

8. Public Comment Process

While not a requirement it is preferred that anyone wishing to provide comments does so using the following response forms.

CLOSING DATE FOR COMMENTS: 30 April, 2004

For further information on the Protocol Impact Analysis, please contact:

Deborah Fleming
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PROTOCOL IMPACT ANALYSIS

To: Ms Deborah Fleming

Australian Building Codes Board

Name: ..... Date: .....

Organisation: .....

Address: .....

.....

.....

Email:.....

Telephone No: ..... Fax No:.....

Respondents are asked, where possible, to comment on the text proposed for specific elements rather than making general comments on the complete package; general comments can be difficult to assess. Clause or sub-clause numbers should be referred to and comment restricted to whether the proposal is not supported or may be supported with changes, whether some situations are not adequately covered or whether there are unforseen undesirable implications. A "no comment" on a clause will be taken as support. It would be useful if respondents would also substantiate cost-related comments with costing data.

Together with this response sheet, please find attached (on the following pages), a response sheet to insert comments.

Please fax responses to (02) 6213 7287, or e-mail to Deborah.Fleming@abcb.gov.au or mail to the following address.

A Process to Administer Building Access
(Protocol)
Australian Building Codes Board
GPO Box 9839
CANBERRA ACT 2601

CLOSING DATE FOR COMMENTS: 30 April, 2004

PROTOCOL IMPACT ANALYSIS

COMMENTS / PROPOSED CHANGES

1. Please include a reference to the clause/s to which the comments apply.
2. If appropriate, indicate whether you agree or disagree with the proposed clause/s.