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2 June 2025

Queensland Productivity Commission
Att: Ms A. Moody

Dear Ms Moody,

Construction Productivity
Preliminary Submissions

Thank you for the opportunity to provide public consultation in respect of the Commission's Construction Productivity inquiry.

Mr Luke Neller is the QLD/NT Board Director for the Australian Institute of Building Surveyors ("***AIBS***"), the director of Leeward Management Pty Ltd ATF LE Trust T/As Project BA ("***Project BA***"), and an experience senior private building certifier. Ms Timmins is in-house counsel for Project BA, who you will note has been heavily involved in judicial proceedings regarding planning and environment law matters. Note, this submission is on behalf of Project BA and not the AIBS.

These submissions focus on industry specific issues which appear to be faced consistently across the industry. These included:

(a) Jurisdictional duplication with local governments regulating building assessment provisions,[1] which ought to properly be regulated by a building certifier through the building development application process and not duplicated[2] ("***regulatory complexity***");
(b) inconsistencies between local governments in interpretation and application of legislation and legislative provisions, including inconsistency in how local planning schemes operate, and what can be regulated within local planning schemes ("***regulatory inconsistency***");

[1] Defined in section 30 of the *Building Act 1975 (Qld)*.
[2] Section 8(5) of the Planning Act 2016 (Qld)

Regulatory Complexity and regulatory inconsistency

These two issues have been addressed together as they largely overlap. However, Regulatory complexity is where councils are regulating matters already regulated by building certifiers, such as triggering development applications for building works in flood, bushfire, or other overlays, where these are already regulated under building assessment provisions where council is may be a referral agency. Where as Regulatory inconsistency is in reference to neighboring local governments having a different development procedure for the same issue.

It is not uncommon for local planning instruments to regulate matters already regulated by the building assessment provisions, by including them in their local planning scheme as different "types" of development (e.g. material change of use). While section 8 of the *Planning Act 2016 (Qld)*, and the Explanatory Note for that provision, appear to seek to avoid "building work" regulated by the building assessment provisions being regulated by local planning instruments. However, a recent decision by the Court of Appeal in the matter of *Leeward Management Pty Ltd v Sunshine Coast Regional Council [2025] QCA 11*, effectively determined that local planning instruments can legitimately regulate matters regulated by the building assessment provisions through other "types" of development applications (e.g. a material change of use). Essentially, the current legislative framework includes a loophole that allows local government to regulate matters the legislature never intended them to.

We say it appears the legislature never intended for local governments to regulate these matters because of the content of section 8(5) and (6) of the *Planning Act* and the Explanatory Note for that provision, where:

(a) section 8(5) and (6) prescribes:

> *"(5) A local planning instrument must not include a provision about building work, to the extent the building work is regulated under the building assessment provisions, unless allowed under the Building Act.*
> *(6) To the extent a local planning instrument does not comply with subsection (5), the local planning instrument is of no effect."*

(b) the Explanatory Note for those provisions states, at pages 208-209:

> *"Building and other work are not material change of use, and should not be described as such, even though material changes of use can often only occur after such work has been carried out. For example:*
> - *A change in building set-back for a residential allotment, a change in building height, or an extension to a residential dwelling is building work, not a material change of use. ..."*
> - ...
>
> *Planning Schemes have in the past often characterised development that is in fact only building work as material change of use, either in error, or in the expectations that this allows for the regulation of an aspect of building work that is in fact regulated under the building assessment provisions, so is unavailable to the local government to regulate independently.*

Characterising building work under a planning scheme as a material change of use does not turn the building work into a material change of use. The test of whether something is a material change of use is an object text under the Bill, and cannot be changed under a planning scheme.

..." (my underlining)

At the local level, regulation of certain aspects of development is inconsistent across the local jurisdictions, with different application types being required for the same matter. Some examples include:

(a) if you propose demolishing a dwelling (and there is nothing unusual such as character or heritage issues), Gympie Regional have no requirements whereas Noosa Council require a planning development application for building works and a referral agency response;
(b) if you propose building a dwelling house over the prescribed height limitation, Brisbane City Council require a referral agency response whereas Sunshine Coast Regional Council require an impact assessable planning development application for material change of use.

This is confusing for the industry, contributes to regulatory complexity and impacts the productivity of the construction industry. Not only because developers, builders, town planners and building certifiers have no certainty as to what the requirements are for the construction of essentially the same proposal among the various local jurisdictions, but often what is required of the local council is contrary to what is prescribed by the legislation.

For example, when a referral agency response is required is prescribed by Schedule 9 of the *Planning Regulation*. I.e. because it is prescribed by the Regulation, there ought to be consistency across Queensland as to when a referral response is required for proposed development, there should be no inconsistency in that respect across local jurisdictions. However, there is.

Further to the above, this type of inconsistent legislative interpretation and application impacts the confidence of private building certifiers, as they have a legal obligation to ensure all the necessary approvals and referral responses are obtained prior to issuing a building development permit.[3]

At the judicial level, judges are often required to give significant consideration to the current legislative regime to determine the interpretation and application of legislation. See for example the judgement of *Leeward Management Pty Ltd v Noosa Shire Council [2022] QPEC 58*, which comprises a 48 page judgement, a large portion of which turned to determining the interpretation and application of sections 54(3) and 60(4) of the *Planning Act*.

Alternative Provisions – Varied between each Local Government jurisdiction.

While the QDC and the draft housing provisions provide consistent assessment benchmarks for housing across the state, the current legislation allows each local government to vary these benchmarks locally. This is done through a series of mechanisms including:

[3] *Building Act*, section 83.

- Alternative provisions to the QDC[4]
- Making provisions about building matters[5]
- Amenity and Aesthetics Provisions[6]
- Building matters not regulated by the building assessment provisions[7]
- Plans of Development and other conditions imposed by earlier development approvals

This ability to create local government housing provisions becomes complicated for the entire construction sector, where they are not experienced with the specific nuances with that area. The outcome of this is:

- a burden on those in the design team in understanding site constraints, modifying building plans, and back and forth with non-compliances that were missed initially.
- a burden on certification teams to understand site constraints and required approvals for non-compliances, back and forth with local governments about local processes in development pathways for identified non-compliances, back and forth with design teams to remedy any breaches.
- Degradation of well-designed building layouts which have been optimized for functionality, efficiency, materials and construction methodologies.

There is little accountability on local governments to ensure they are consistent with these regulatory provisions, and in many cases these powers and functions are abused and used as loopholes, which will be discussed later.

Building certifier attraction retention

While there are a number of issues contributing to the current figures for building certifier attraction retention, some of which are in depth, we only intend on briefly addressing some of these issues in this letter. Attraction and retention of building certifiers is critical for productivity in the construction sector. Shortages of building certifiers will lead to increased approval timeframes, less consulting and advisory to the sector, and either reduced number of inspections or lengthy wait periods to book mandatory inspections.

The *2022 Local Government Workforce Skills and Capability Survey* Final Report found that the top three occupations that local government found difficult in recruiting were town planners, engineers and building certifiers, with those occupational skill shortages becoming critical. The report revealed the key drivers for the occupational gaps in building certification included impacts of private certification, lack of staff interest to upskill, insurance costs, and a lack of applicants with required skill, experience and accreditations. It is clear from the data available regarding building certifiers, critical skills shortage is not unique to the public sector. There are currently approximately 510 qualified building certifiers in Queensland[8], and Skye Bowie of the Queensland Building and Construction Commission recently made comment that a significant number of those certifiers are approaching retirement age and are expected to retire in the next 10 years. A critical shortage of building certifiers is detrimental to the construction

[4] Building Act, section 33
[5] Building Act, s32
[6] Planning Regulation Schedule 9, Part 3, Div 2, Table 1
[7] Planning Act, s8
[8] According to a recent statistic stated by the Queensland Building and Construction Commission, the regulatory body for building certifiers in Queensland.

industry.

While we acknowledge that there are several contributing factors, regulatory complexity is a significant factor in building certifier attraction retention, both directly and indirectly.

Directly, the regulatory complexity and inconsistencies experienced across every local government, and sometimes even experienced when dealing with different staff within the same local government:

(a) are a strong deterrence in building certifier attraction and retention because such complexities and inconsistencies create feelings of professional incompetence, uncertainty and/or professional frustration and stress; and

(b) create or exacerbate liability concerns among building certifiers, who have a legal and professional responsibility to ensuring all necessary planning approvals are obtained prior to issuing a building development approval,[9] assessing building development applications to decide whether they comply with the building assessment provisions[10] (which include local government planning schemes),[11] and ensuring compliance with the National Construction Code, Queensland Development Code, and relevant standards.

Indirectly, that regulatory complexity and inconsistency:

(a) unnecessarily increases the level of assessment and/or inspection required of the building certifier, where the building certifier is required to increase fees and delay in providing services which results in increased costs and delays for the consumer and the housing construction overall;

(b) contribute to burn out in individuals, which results in scaling back workload and/or leaving the industry entirely.

Regulatory complexity and ever-changing laws and standards also indirectly impact building certifiers' professional indemnity insurance. The premiums for this type of insurance are, to put it mildly, absurd. Where a building certifier has been the subject of a regulatory audit or investigation (which alone is a burden on both individual and business output), those insurance premiums can further increase. This significant cost of business is required to be passed on to the consumer through increased fees charged in order for any certification business to remain viable.

Finally, adding to the direct and indirect impacts of regulatory complexity, there is a serious lack of industry support. Building certifiers do not have a supporting body, only a regulatory one, being the Queensland Building and Construction Commission which monitors building certifiers through audits and investigations of written complaints alleging unsatisfactory conduct or professional misconduct. In the past, we have personally sought assistance from the QBCC for guidance on issues of regulatory complexity, only to be turned away. We have also sought guidance from Building Policy at the Department of Energy and Public Works, where we received a general non-specific response which also

[9] *Building Act*, section 84(1).
[10] See *Building Act*, section 30.
[11] See *Building Act*, section 30(e).

included a disclaimer that same was not legal advice and could not be relied upon. My experience, and the experiences reported to me by my peers, poses the question: is our role as a building certifier a prestigious position within the community, or an industry scape goat?

We consider building certifiers, and the construction industry as a whole, would benefit from having a supporting body. That supporting body could have jurisdiction to issue determinations, similar to that of the Australia Taxation Office issuing Tax Rulings, to assist building certifiers in exercising discretion and making decisions for complex practical issues. The benefits from such a supporting body would be significant, including reducing certifier stress and burn out, reducing the risk of complaints being made to the QBCC in respect of a certifier's conduct, and reducing premium quantum for professional indemnity insurance.

We have only touched on these matters briefly, however should you be interested, we would welcome the opportunity to address this issue further.

CASE STUDIES AND EXAMPLES OF REGULATORY COMPLEXITY

We were in attendance at the AIBS QLD/NT Chapter Conference 2025 and had the benefit of watching Ms Angela Moody give a presentation regarding the Queensland Productivity Commission research and note her advice that the QPC is seeking submissions regarding case studies and examples.

Below are some of the examples of how regulatory complexity impacts private certification, and in turn the construction industry. Other than where a judgment of the Court was involved, we have omitted naming the particular local government involved as we wish to encourage local governments to continue to collaborate with Project BA in resolving these types of issues. However please note, the examples we have provided each involve a different local government.

Example 1: Noosa Shire Council

Project BA and Noosa Council were in dispute over the interpretation of the planning development approval process required by the *Planning Act 2016 (Qld)* ("***Planning Act***"). They were unable to resolve the dispute without Court intervention and the matter was required to be heard and determined by the Planning and Environment Court.

Project BA contended that where a planning development application was properly made to the council, the council was required to include any required referral response for the proposal as part of its decision notice and was required to do so without charging any additional fee. Project BA relied upon sections 54(3) and 60(4) of the *Planning Act* to support that contention.

Noosa Council contended that they were only required to assess and decide the planning development application, and that a separate building development application was required to be referred to them by the building certifier in respect of any concurrency agencies matters.

In 2022, His Honour Judge Long made an interim Judgment[12] in favour of Project BA and held that

[12] *Leeward Management Pty Ltd v Noosa Shire Council [2022] QPEC 58*

Noosa Council was required to assess the planning development application as the assessment manager and with the functions and powers it would have had as a referral agency for the singular fee.

In 2023, His Honour Judge Long reaffirmed:

> *"[4] ... the overall effect is that, in order for the appellant to have decisions and the necessary decision notices, as to all of the necessary approvals for the proposed development, this development application, as properly made to the Council:*
>
> *(a) required assessment by the Council as to the planning approval which was involved, including to any extent to which that also involved the Council's responsibility as a referral agency;*
>
> *(b) required that this determination be the subject of a decision notice as to the application for approval of the proposal having regard to the planning perspective; and*
>
> *(c) also required the inclusion of any referral agency response in respect of the building approval, so that the private certifier could make the necessary decision having regard to any requirements of the Council as referral agency."* (my underlining)
>
> *[23] ... it is necessary to return to the earlier observations as to the basis upon which this matter is before the Court and particularly the understanding that the decision which is now being made is that which was required of the respondent pursuant to s 54(3) and 60(4) of the PA.*
>
> *[24] That is, in particularly understanding that the effect of s 54(3) is not to put aside the role of the respondent as a referral agency but rather to include such functions and powers with those to be performed as assessment manager. ... Accordingly, the decision should follow a format which would be ordinarily expected and which seeks to identify those conditions which are required, pursuant to the exercise of those referral agency functions and powers, to be imposed by the granting of any such permit."*

On 17 October 2023, His Honour made the final Judgment, which:

(a) ordered that the planning development application made by Project BA was approved subject to the conditions;

(b) included, within those development approval conditions, *"2. REFERRAL AGENCIES"* and recorded:

> *"The Assessment Manager would have been a referral agency pursuant to Planning Regulation 2017, Schedule 9, Part 3, Division 2, Table 3 – Design and Siting for part of the application (building work assessable against the building assessment provisions) and so has the functions and powers of a referral agency for that part.*
>
> *The Assessment Manager exercising its functions and powers it would have had as an Referral Agency requires any Development Permit for Building Works in relation to that building work to be subject to conditions 3 and 4 from Part 1 of this approval and the following conditions: ..."*

In those Judgments, the Planning and Environment Court not only clarified the interpretation and application of sections 54(3) and 60(4) of the *Planning Act*, it also clarified the *"format which would be ordinarily expected"* for a decision notice where Council is the assessment manager and has the functions and powers of a referral agency.

The Queensland Ombudsman, who investigated the Noosa Council in respect of this issue, recognised the effect of the abovementioned judgments and made the following observation to the Council at the close of its investigation:

> *"Observation 2: Council develop and use a template for its development approvals for combined AM and RA decisions consistent with that utilized by the Court in Leeward Management Pty Ltd v Noosa Shire Council [2022], Judgment, 17 October 2023."*

Project BA's contention, and the ultimate Judgment that was received, simplified and expediated the residential development process where local government is required to assess development proposals in all of its jurisdictions (i.e. assessment manager and referral agency) for a single fee.

This case set a precedent that benefits the development process by confirming the operation of the legislation and streamlining the development approval process.

Some local governments already applied the legislation and carried out this process correctly prior to the abovementioned Judgments being obtained. Some local governments have accepted and applied the correct operation post-Judgment.

Some local governments have quasi adopted the Judgments by purporting to issue a planning development approval with an "early referral response" (despite the Court specifically noting this was inappropriate).[13]

However, enforcement of those Judgments continues to be a challenge among some local governments. The basis for some local governments rejecting the effect of the Judgments is typically by reference to the "type" of planning development application lodged, despite the Judgment and the legislation not limiting the "type" of planning application in any way.

Finally, as recently as 14 March 2025, the Noosa Council itself has deviated from the correct approach despite being the local government at the forefront of the Judgments and Queensland Ombudsman's investigation.

In terms of timeframes, the matter was brought before the Court in January 2022, the interim Judgment was made on 23 December 2022, the council had difficulty in accepting, understanding and/or adopting that Judgment, and the parties continued to be in dispute as to what was required. His Honour Judge Long reiterated the [2022] Judgment in his [2023] Judgment and the appeal was ultimately decided in favour of Project BA by Judgment dated 17 October 2023. Project BA was required to engage in an almost 2 year Court proceeding to confirm and enforce a process that was already prescribed by sections 54(3) and 60(4) of the *Planning Act*.

[13] See for example paragraphs [40] and [47] of *Leeward Management Pty Ltd v Noosa Shire Council [2022] QPEC 58*

Example 2: awaiting judgement

In 2023, a local government refused to accept the application of the legislation and precedent set by the abovementioned Judgments involving the Noosa Council.

Project BA has lodged an appeal with the Planning and Environment Court for a matter that closely mirrors the facts of the dispute involving the Noosa Council. The proceeding was heard by the Court in April 2024, however is still awaiting judgment.

Example 3: different type of application required

Project BA submitted a planning development approval to the local government proposing a shed be constructed on residential land.

As the property was the subject of a historical reconfiguration of lot, the approval of which conditioned that future development on the future allotments was required to comply with a plan of development. The proposed shed did not comply with conditions contained in that plan of development, and also did not comply with the setback requirements prescribed by the Local Planning Instrument under section 33 of the *Building Act 1975 (Qld)*.

The plan of development also involved a notation that any non-compliance with such conditions required a referral agency response. However, Project BA considered the Plan of Development could not prescribe when a referral agency response was required, that was a matter properly prescribed by the *Planning Regulation*.

It became evident that the local government had historically dealt with the same non-compliances inconsistently. Sometimes as a referral agency response, sometimes as a change application, sometimes and a planning development application, and sometimes as generally in accordance advice.

The council contended that a minor change application was required in respect of the existing plan of development as well as a referral for siting matters.

Project BA considered that a minor change application was inappropriate, particularly so where there are no appeal rights to the Development Tribunal and so Court intervention would be necessary for any such decision.

Accordingly, Project BA contented that the proposed construction of a shed on residential land required a planning development approval (building work) as it exceeded the maximum floor area and building height prescribed in a condition on the plan of development, and any design and siting matters (boundary setbacks) was a referral agency issue.

The crux of the matter was in respect to section 66 of the *Planning Act*, which allows an assessment manager to impose development conditions that are inconsistent with an earlier development approval, provided certain criteria are met.

The dispute was originally put before the Development Tribunal in or about March 2022, however after significant party liaison, a site meeting and various submissions (including a joint report by the parties), some 6 months later, on 6 September 2022, the Development Tribunal issued a decision that it did not have jurisdiction to determine the matter and finalised the appeal.

In September 2022, Project BA brought proceedings in the Planning and Environment Court for this matter. However, the matter was never determined by the Court as the parties agreed to a consent judgment in favour of Project BA, which was filed on 20 April 2023 (some 7 months after the notice of appeal was filed and over 1 year after the proper application/referral was provided to the council).

The local government later advised Project BA, and other private building certifiers, that council did not have jurisdiction to govern such aspects of the plan of development and that assessment of same was not a council requirement.

Example 4: reading and application of planning schemes

In 2023, Project BA filed an originating application in the Planning and Environment Court against the local government contending that a building development application, for a dwelling extension proposed to be constructed within the minimum boundary setbacks, required referral to the local government for design and siting only, and an impact assessable planning development application was not required.

The local government contended that the wrong type of application had been lodged because the proposed development was for building works assessable against the local planning scheme and, as the site was within a Mixed Use Zone, the proposal was categorised by the local planning scheme as material change of use tables of assessment as assessable development requiring impact assessment.

The matter was not determined by the Court because the local government, despite having in-house counsel, sought external legal advice and ultimately agreed Project BA contended for the correct procedure.

The dispute took almost 2 months to resolve, which is significant when considering it simply came to being able to correctly read and apply the council's planning scheme.

Example 5: further confusions between application type

Project BA was involved in a dispute with a local government where a building development application was referred for design and siting matters and the council responded contending that a planning development application requiring impact assessable was the correct type of application required for the proposal.

After failed discussions between the private building certifier and the local government it was to me as Project BA's in-house solicitor. A letter was forwarded to the local government detailing why the proposed works were "building work", not "material change of use", and the correct reading and application of the local planning scheme. The local government was also referred to previous proceedings involving and local government (example 4 above) as it had fallen into similar error as was involved in that proceeding.

The local government's coordinator for planning services engaged in discussion with Project BA in an attempt to understand how the relevant authorities fit together and ought to be applied. That officer also made an admission that she was not overly familiar with Schedule 9 of the *Planning Regulation* (which is alarming because it is the very provision which prescribes local government as referral agency for referral matters) and discussed the appropriate procedure and treatment for the proposal in respect of the existing material change of use permit. After such discussions, and a detailed work through of the legislative regime, the local government agreed with Project BA, the dispute was resolved and the appropriate referral response was issued.

Example 6: Project BA v Sunshine Coast Regional Council [2025] QCA 11

Recently, Project BA and the Sunshine Coast Regional Council were involved in a proceeding that was determined by the Supreme Court of Queensland – Appeal Division.

The Sunshine Coast Regional Council's Planning Scheme regulates the building height of dwellings by categorising development exceeding the prescribed height limit as triggering a material change of use requiring impact assessment.

Project BA made an application to the Planning and Environment Court and contended that the local council must not regulate building height for class 1 and 10 buildings as material change of use requiring impact assessment, because building height is a component of building work to be regulated by the building assessment provisions and relied upon section 8 of the *Planning Act* as authority for its position.

Project BA relied upon the following in support of its argument:

Sections 8(5) and (6) of the *Planning Act* prescribes:

"(5) A local planning instrument must not include a provision about building work[14], to the extent the building work is regulated under the building assessment provisions[15], unless allowed under the Building Act.[16]

(6) To the extent a local planning instrument does not comply with subsection (5), the local planning instrument is of no effect."

See also definitions in Schedule 2 of the *Planning Act* of:

- *"development"*;
- *"building work"*; and
- *"material change of use"*.

Relevantly, the Explanatory Note for the *Planning Act* also sets out, on pages 208-209:

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[14] *"building work"* is defined in Schedule 2 of the Planning Act.
[15] Building assessment provisions are defined in section 30 of the *Building Act*.
[16] What is allowed under the Act in respect to regulating the building assessment provisions? See sections 31 – 33 of the Building Act.

"Building and other work are not material change of use, and should not be described as such, even though material changes of use can often only occur after such work has been carried out. For example:

- *A change in building set-back for a residential allotment, a change in building height, or an extension to a residential dwelling is building work, not a material change of use. ..."*
- *...*

Planning Schemes have in the past often characterised development that is in fact only building work as material change of use, either in error, or in the expectations that this allows for the regulation of an aspect of building work that is in fact regulated under the building assessment provisions, so is unavailable to the local government to regulate independently.

Characterising building work under a planning scheme as a material change of use does not turn the building work into a material change of use. The test of whether something is a material change of use is an object text under the Bill, and cannot be changed under a planning scheme.

..."

The Sunshine Coast Regional Council relied upon the "type" of development application that was before the Court (being a Change Application to a material change of use) to support its position that building height could be regulated by the planning scheme as an assessment benchmark for a planning approval.

In the below Court, Planning and Environment Court found against Project BA without making any reference to section 8 of the *Planning Act*. Project BA appealed that decision to the Court of Appeal.

The Court of Appeal also found against Project BA and stated:

"[38] The definition of "building assessment provisions" in s 30(d) of the BA includes "any provisions of a regulation made under this Act relating to building assessment work or accepted building work" By s 6 of the Building Regulation 2021 (Qld), Design and siting standards for single detached housing, a local government planning scheme may provide for "all or some of performance criteria 4, 5, 7, 8 or 9 under QDC Part 1.1 [and 4, 5, 7 or 8 under QDC Part 1.2] and the acceptable solutions for the performance criteria" and "a qualitative statement for a matter provided for under the performance criteria mentioned in [s 6(b) of the PR], if the [planning scheme] also provides for quantifiable standards for the statements."

[39] The relevant planning scheme, insofar as it dealt with height of buildings and structures overlay, details maximum height from ground level to the top of a structure erected on that site, for the purposes of determining category of assessment. The planning scheme does not provide any performance criteria for "height" or any acceptable solution or quantifiable standards for heights.

[40] This may be contrasted with boundaries. Performance criteria is specified for boundaries, when the dwelling house is above certain heights.

[41] Section 5.10.4 of the planning scheme, insofar as it provides the assessment benchmark for

height of Building and Structures of Overlay, is not a provision about building work regulated under the building assessment provisions in the BA. ...”

As set out in the AIBS submissions, with respect to their Honours, we also invite you to consider how that Judgment operates with:

(a) section 8(5) and (6) of the *Planning Act*;
(b) the Explanatory Note to the definition of *material change of use*;
(c) section 43, and particularly 43(1)(c), of the *Planning Act*; and
(d) sections 30-33 of the *Building Act* (particularly 32, which is about making ‘provision’ as opposed to ‘alternative provision’ of QDC matters).

PROPOSED PATHWAY TO INCREASE PRODUCTIVITY

Industry stakeholders have suggested a proposed solution to increasing construction productivity is to adopt a State based standard for basic design and siting requirements for detached housing, for example by amending QDC MP 1.1 and 1.2 to adopt the *“Queensland Housing Code”*. The intent of this approach being that the same dwelling design could be constructed in the same location on any site within Queensland. While we support that approach, we consider legislative amendment is required in order for that proposed solution to be successfully implemented.

The *Planning Regulation* requires amendment to reduce procedural complexity. The *Planning Act* requires amendment to reduce regulatory complexity. We will address each of these in turn below.

Reducing procedural complexity

This involves amending the *Planning Regulation* to prescribe that, for assessable development involving a dwelling house and/or ancillary outbuildings on residential land, a building certifier will always be the prescribed assessment manager and the local government will only be a referral agency for any proposed non-compliance/s.

This would simplify the development approval process, because it would have the effect that:

(a) for all assessable development involving dwelling houses and/or ancillary outbuildings, a single development application would be required to be made;
(b) that development application would be made to a building certifier as the prescribed assessment manager;
(c) for any proposed non-compliances, the development application would be required to be referred to the local government for assessment and response as referral agency;
(d) there would be no circumstance where another type of application would be required for material change of use or building work of a dwelling house or associated outbuilding;
(e) some operational works, such as cut and fill not forming part of the building work (filling your back yard or a non-complying driveway) may still trigger operational works permits, or alternatively could also be prescribed in schedule 6 to be referral matters.

Such an amendment would not only significantly reduce complexity, it would also have flow on benefits, including preventing procedural duplication, faster turnaround times for the issue of development permits, significantly reduce wasted costs, and simplifying the appeal process. Local

government staff and personnel may also experience work experience benefits from such an amendment, however we are not in a position to provide comment on that.

This amendment would also likely be relatively simple to implement because it would likely be able to be achieved through amendment of the *Planning Regulation*, in particular:

(a) amending Schedule 6, Part 1 to prescribe that a local categorising instrument is prohibited from stating any building work for a dwelling house and/or ancillary outbuilding on residential land is assessable development;
(b) amending Schedule 6, Part 2 to prescribe that a local categorising instrument is prohibited from stating any material change of use for a dwelling house and/or ancillary outbuilding on residential land is assessable development;
(c) amendment to Schedule 8, Table 1A to make clear that table does not apply to a dwelling house and/or ancillary outbuilding on residential land;
(d) amendment to Schedule 9, Part 3, Division 2 to includes the matters referred to in Schedule 8, Table 1A are referral agency matters for a dwelling house and/or ancillary outbuilding on residential land. That being, the local government becomes a referral agency for any proposed non-compliances of the local planning instrument.

One obvious issue that could arise with this method is where there is an earlier development approval in existence, e.g. a plan of development (*"**POD**"*), and that development approval contains a condition that applies to a future dwelling and/or ancillary outbuilding. Homeowners should not be required to lodge change applications for such non-compliances, as such applications can be complicated, costly, and require judicial intervention. It would also not be appropriate to require homeowners to obtain *"generally in accordance"* advice from local governments as not only is there is no legislative provisions authorising such advice, there is also no appeal rights.

The most efficient resolution to this issue would be to amend Schedule 9, Part 3, Division 2 to include a table to the effect that any non-compliances with the conditions of earlier development approvals for reconfiguration of a lot requires referral to local government as referral agency. The local government, as referral agency, could then assess the proposal and direct the assessment manager to give the development approval subject to stated conditions. The current *Planning Act* would treat those conditions as being *"imposed"* by the local government[17] and the "inconsistent" development condition would be permitted[18] because both conditions were imposed by the *"same person"*,[19] being the local government.

To be clear, local governments would not be relinquishing authority to control what may be built and/or where it may be built. The above proposed method would still provide local government with the jurisdiction to assess and ultimately decide the legitimate non-compliances of proposed development. However, their regulation, assessment and decision making in respect of same would be carried out with dramatically reduced procedural complexity.

[17] See *Planning Act*, sections 56(1)(b)(i) and 63(2)(e)(iii).
[18] Subject to the other requirements of *Planning Act*, section 66(2)(b)-(c) being met.
[19] As required by *Planning Act*, section 66(2)(a).

Reducing regulatory complexity

This is arguably the single most important requirement to easing regulatory burden inhibiting construction productivity.

We reiterate:

(a) the intention of section 8(5) and (6) of the *Planning Act* appears to be in respect of preventing regulatory duplication and complexity by purporting to distinguish what are building matters and what are planning matters;

(b) the Explanatory Note to the *Planning Act* definition of "material change of use" appears to support an intention to prevent regulatory duplication and complexity by expressly stating that building matters do not become planning matters just because a local planning instrument states as such;

(c) the effect of the precedent of the Court of Appeal's Judgment in *Leeward Management Pty Ltd v Sunshine Coast Regional Council [2025] QCA 11* is that a local planning scheme can categorise development for a material change of use as assessable development, prescribed the level of assessment, and provide assessment benchmarks, for aspects of development that involve building work regulated by the building assessment provisions.

The *Leeward Management Pty Ltd v Sunshine Coast Regional Council [2025] QCA 11* is not an isolated example of this type of regulation through local planning schemes. Despite section 8(5) and (6) of the *Planning Act*, local governments appear to include overlays in their planning scheme as a loophole (sometimes lawful and complicated work arounds, and other times unlawful) to provide them with a mechanism to regulate matters that are properly regulated by the building assessment provisions for building work. Obvious examples of how this is:

(a) local governments making additional provisions for a building constructed in a bushfire zone, and/or categorising that development to trigger a development application. Local planning schemes should not regulate bushfire matters for building work as this is a building assessment provision regulated under the NCC. The Building Regulation 2021 only permits the local government to nominate a bushfire prone area (bushfire overlay mapping);[20]

(b) local governments making additional provisions for a building constructed in a flood hazard area, and/or categorising that development to trigger a development application. Local planning schemes should not regulate flood hazard matters for building work as this is a building assessment provision regulated under the QDC triggering local government as a referral agency to the extent of any non-compliance. The Building Regulation 2021 only permits the local government to nominate a flood hazard area (flood hazard overlay)[21];

(c) Regulation of other building matters similar to the above such as filling and excavation, fences, landslide, overland flow and stormwater, transport noise corridors, etc. All of these examples are

[20] Integrated building work in planning schemes – Guideline for local governments, section 3.9.1
[21] Integrated building work in planning schemes – Guideline for local governments, section 3.11.1

regulated by building assessment provisions and ought not to be separately regulated by local planning instruments 'Integrated building work in planning schemes – Guideline for local governments' section 3.

(d) local governments should not create blanket overlays to capture majority of (or every) site for the regulation of certain aspects of development. For example, the Brisbane City Council's Dwelling house character overlay, Sunshine Coast Regional Council's Height of buildings and structures overlay. In both these examples, the overlays were created to circumnavigate legislative provisions intended to simply or cut red tape;

(e) local governments including ***alternative provisions***,[22] where the ***"qualitative statement"*** is the same as that prescribed by the QDC (e.g. no change to height or boundary setback limitations), which then purports to regulated other aspects of development, change the type of development, or change the level of assessment for development.

The abovementioned amendment to the *Planning Regulation* may effectively prevent local government's utilisation of this loophole, however we consider section 8 of the *Planning Act* is also required to clearly define what can and cannot be regulated by local government instruments. The amendment could be by the inclusion of the following subsection (7):

(7) For the avoidance of doubt:

(a) a provision of a local planning instrument will be a provision about building work for the purposes of subsection (5) if it is a provision that does any of the things specified in section 43(1) of the Act:

(i) for building work; or

(ii) for any aspect of other development as a result of the building work necessary for, associated with, or incidental to, that other development; and

(b) a provision about building work will not comply with subsection (5) if it does any of the following:

(i) it categorises development as assessable development as a result of a failure to comply with applicable building assessment provisions under the Building Act;

(ii) it specifies a level of assessment for development as a result of a failure to comply with applicable building assessment provisions under the Building Act; or

(iii) it sets out assessment benchmarks other than as allowed under the Building Act.

This amendment would make clear what is *"a provision about building work"* as referred to in subsection (5) of section 8 of the *Planning Act*.

OTHER MATTERS

Further to the above, there are additional matters that we believe impede productivity in the construction sector. While we have not prepared detailed submissions on these matters, we have briefly included them below. Where the productivity commission is interested in these matters, we can provide more

[22] *Building Act 1975 (Qld), section 33 and 30(g)i.*

detailed submissions.

Inconsistency between local governments in defining what is an MCU and what is Building Works

The explanatory notes for the act clearly state the building work is the physical attributes of a building, while the MCU is the operation and function of the building once it is completed. This is inconsistently adopted with many councils, for example stating that a large extension to a dwelling house is a material change of use.

State Building Portal

This suggestion is for building approvals to be lodged to a central state building portal in lieu of the current process to lodge with local government. This could be funded by the document lodgement fees currently paid to local governments.

This would create a centralised database of each construction site and project, allowing trades to register as a person contributing to that project and gain access to the building development approvals, as well as uploading compliance documents and making declarations about the aspects of work they have undertaken.

This would improve productivity by having a centralised database of documentation, useful to both auditors (QBCC and QFES), as well as building certifiers carrying out future certification works on these buildings. Currently the process requires owners consent and a lengthly council application.

Forms

The mandatory forms are broad and could be reformed to better replicate the documentation and declaration of complying works for both persons carrying out inspections or aspects of building works. This leads to forms rarely being completed to a suitable detail, and wasted resources of both the building certifier and the trades as they negotiate the context of these forms.

This reform could include the following suggestions:

- Be in an electronic format or in a portal that could be linked both to the licence credentials of the person submitting the forms.
- Electronic format would require all mandatory forms to be completed prior to submitting.
- Automatically match the form to the aspect from the inspection guidelines. Exclusions need to be manually entered and explicit. Can also make it clear if the certificate covers the entire aspect or if additional aspect certificates are required for that aspect of that stage of construction.
- Have a much more obvious declaration section that the works were undertaken in accordance with he building development approvals.

This would not only derive better productivity, but also accountability and accessibility for those such as certifiers and regulators who audit these projects.

Administrative Burdens

With most certification being undertaken by private building certifiers, its important to consider that the cost needs to be proportionate to the service. Productivity benefits can be gained by reducing administrative burdens on building certifiers.

These might include removing the burden for the building certifier to sight the QBCC HWI Documents or the Qleave documents prior to issue of building development approvals. For some projects, its difficult to determine if they are required or not, leading to wasted certification resources on these tasks. This also limits Building Development Approvals from being issued prior to engagement of the builder. Having the approvals in place for the quote/tendering processes would allow more accurate quoting and less variations, leading to improved productivity.

Timeframe complexities

The building act prescribes a demolition/removal condition which prescribes that works must substantially commence within 2 months or the application lapses. In many cases, this creates a significant burden in the re-issue of development permits, as other permits such as road traffic permits, after hours works permits, etc are also required, can't be lodged until after a building approval for the works is obtained, and generally take more than 2 months to process, leading the building approval lapsing.

CONCLUSION

Procedural and regulatory complexity is a significant contributing factor to stifling production in the construction industry. Without legislative reform to clearly define regulatory jurisdiction and close legislative loopholes, it is unlikely other avenues will be implemented effectively for the desired outcome.

The changes proposed by the wider industry and relevant departments require legislative change to effect and enforce the intention of those amendments. Together, such changes would simplify the development process, reduce procedural duplication, reduce costs, increase certainty, and result in faster turn-around times for the issue of development permits.

Should the Commission be interested, we welcome further discussions on the proposals touched upon in this submission to support meaningful and practical reform.

Kind regards,

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