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Brown, Kerry A. and Furneaux, Craig W. (2007) Harmonising Construction Regulation in Australia: Potentials and Problems. In *Proceedings Public Policy Network Conference*, pages pp. 1-17, Adelaide, Australia.

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Harmonising construction regulation in Australia: Potentials and problems

Paper submitted to the Public Policy Network Conference, 1-2 February 2007, Adelaide.

Acknowledgement: This research has been conducted as part of a research project (Construction Industry Business Environment) funded by the CRC for Construction Innovation, Brisbane Australia.

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Introduction

Under the Constitution the Australian states joined together to form one indissoluble Commonwealth – a federation of states. A federation is a form of government in which power is divided between national governments and smaller regional governments, often referred to as states. This is an arrangement which combines “strong constituent units of government, each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of its legislative, administrative and taxing powers, and each directly elected and accountable to its citizens” (Watts 2001: 24 – 26). In federations the federal and regional governments are both independent and coordinated (Wheare 1963). “The jurisdictional contours of a federation rarely make political sense, conform to a rational or organisational logic, or are economically advantageous. They simply exist as an ongoing set of inherited but continually adapting practices and provision” (O’Faircheallaigh, Wanna & Weller 1999:98). In this sense federations are practical arrangements which are designed to help make a form of government work, adapting, adjusting and consolidating to deliver mutual benefits for all participating governments (O’Faircheallaigh, Wanna & Weller 1999: 100).

Under a federal system, powers are divided between a central government and several regional governments. In Australia, power was divided between the Commonwealth Government and the governments of the six colonies, which were renamed 'states' by the Constitution. Specific areas of legislative power ("heads of power") were given to the Commonwealth Government, including:

- taxation
- defence
- foreign affairs
- postal and telecommunications services (Australian Government 2005)
- The Commonwealth also has power to make laws for Australia's territories.¹

The states retained legislative power over all other matters that occurred within their borders, including:

- construction
- police
- hospitals
- education
- public transport (Australian Government 2005).

In federations multiple governments fragment policy processes and contribute a further set of complications or opportunities for public sector management. Policy must be negotiated between and across different levels of government, vertically between Commonwealth, state and local governments, and horizontally between states or local authorities. (O’Faircheallaigh, Wanna & Weller 1999:97).

Occasionally tensions develop between jurisdictions when there is no clear head of power arrangement, or where one jurisdiction seeks to enhance its policy influence. Construction is one of those areas. This paper explores a number of areas in which there are contentions in regulatory heads of power, together with various means to facilitate harmonisation across jurisdictions in Australia.

Mechanisms for achieving regulatory harmonisation

Harmonisation refers to the notion that differences in laws and policies between two jurisdictions should be reduced by adopting similar laws and policies (Leebron 1997). Harmonisation can be in

¹ A complete list of Commonwealth heads of power is at section 51 of the Constitution.

the form of specific regulations; it can facilitate more general policy objectives focussing on guidelines (eg. goals for pollution); there can be agreement on certain principles; and lastly, harmonisation of structures or procedures, usually to reinforce other types of harmonisation. Full harmonisation is only possible if states can agree converge around one commonly agreed standard (Fox 1992).

Majone (1998) argues that within harmonisation, or coordination, there are a number of different levels. Optional harmonisation aims to guarantee the free movement of goods and services, while permitting states to retain their traditional forms of regulation. Minimum harmonisation is where all governments agree to a specific set of minimum standards in regulations, but individual states are able to set higher standards individually (Majone 1998: 313). This case has also been referred to as the 'race to the bottom' in Europe as governments resort to the lowest common denominator in order to gain agreement of all parties (Leebron 1997).

The best known example of harmonisation within the construction industry in Australia is the Building Code of Australia which seeks to set a minimum standard of performance for buildings and building materials across Australia. This is not the only option available however, with a range of possible options outlined below. This range of options is useful to consider when contemplating how to achieve increased coordination in specific areas between governments.

Cooperative agreements are formal arrangements where two or more governments agree to work together. Such agreements include contracts, written undertakings, agreements on similar policies (Opeskin 2001). More informal arrangements also exist and range from conversations to intergovernmental committees (Opeskin 2001). Difficulties can arise from these intergovernmental committees however, as a state parliament is not legal bound by an intergovernmental agreement to enact legislation to implement a uniform scheme (Farina 2004). In practical terms, particularly if there is a financial grant being given by the Commonwealth, there is often strong incentive to pass the bill effectively endorsing the agreement.

There are a number of ways in which harmonisation can be achieved between various jurisdictions in a federated structure, which are summarised in Table 1 below:

Table 1 – Summary of Mechanisms for achieving regulatory harmonisation

| Option | Title | Description |
|--------------------------------------|---|--|
| 1 - Most coordinated | <i>Unilateral Exercise of Power by the Commonwealth</i> | One way to ensure uniformity in regulation in Australia is for the Commonwealth to legislate in such a way as to over-ride all similar state and territory regulations. The Commonwealth has tended historically not to legislate away the rights of states. For such an approach to work, legitimate authority in the constitution, termed a 'head of power', would need to be determined. If clear head of power for the Commonwealth government cannot be established, this option is difficult to enact. ² |
| 2 | <i>Reference of Power to the Commonwealth</i> | The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51, sub-section (37) of the Constitution (Farina 2004). Once a 'matter' is referred to the Commonwealth, the Commonwealth is able to legislate in the same way as any other head of power (Allen Consulting Group 2002). Referral of powers enables states to refer matters to the Commonwealth, and for federal parliament to make laws on the referred topic for the benefit of the referring state (Opeskin 2001). The Commonwealth government attempted this approach recently when the states were requested to refer their powers to the Commonwealth in order to achieve a uniform national workplace relations system. However, this attempt failed when the "states advised that they will not refer their [industrial relations] powers" (COAG Communiqué 2005) to the Commonwealth. The States have tended to be unwilling to utilise this option (Allen Consulting Group 2002). |
| 3 | <i>Incorporation by Reference</i> | This scheme is also referred to as 'template', 'cooperative', 'applied', 'adopted complementary' and 'application of laws' legislation. The application of laws mechanism is where the parliaments of one jurisdiction adopt the legislation of a single jurisdiction as amended from time to time in accordance with an intergovernmental agreement (Saunders 1997: 8). The advantage of this latter form of coordination is that there is need to only change a single piece of legislation, rather than several pieces of legislation (eg. Financial Institutions Act 1992) although it requires extensive consultation (Farina 2004: 41). An 'alternative consistent' legislative scheme is a variation of this option in which, each jurisdiction passes legislation which can be identical but can be more or less extensive than, the host legislation (Allen Consulting Group 2002). The Australian Building Codes Board utilises this approach with the Building Code of Australia, and each state refers to the single <i>Building Code of Australia</i> . |
| 4 | <i>Complementary or Mirror Legislation</i> | This option relies on the Commonwealth and states working together to achieve legislative coverage of a particular policy area. A typical scenario prompting such a scheme would see the Commonwealth, lacking complete control over a policy area, or where there are dual, overlapping to uncertain division of constitutional powers (Farina 2004: 41). Complementary legislation is needed in situations where no one government is limited by its constitution to legislate in a particular area. In these instances, each jurisdiction enacts laws to the extent of its constitutional capacity and the matter is addressed by the participation of all of the legislatures of the federation (Opeskin 2001). The Commonwealth and all participating states would pass separate, but totally consistent (although not necessarily identical) pieces of legislation. An intergovernmental agreement is likely to be used to set out the terms and understandings on which the scheme is based. |
| 5 – moderately coordinated | <i>Mutual Recognition</i> | Under mutual recognition, the rules and regulations of other jurisdictions are recognised (Farina 2004). Mutual recognition enables goods or services to be traded across jurisdictions. This approach can mean that if the goods or services comply with the legislation in their own jurisdiction, then they need not comply with the requirements of the second jurisdiction, or pathways for achieving compliance are clearly established. Mutual recognition is a one of the vehicles governments can utilise to reduce the regulatory impediments to goods and services mobility across jurisdictions (Productivity Commission 2003). A variation of this occurs, called adaptive recognition, occurs when a jurisdiction recognises the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual (Farina 2004). |

² In the Roads Case of 1926, the High Court found that the Commonwealth could attach conditions to grants of money given to the various state governments (Fenna 2004). These funding conditions can have similar uniform effects to legislative options, although they tend not to extend beyond the specific purpose of the tied grant.

| Option | Title | Description |
|----------------------------|---|---|
| 6 | <i>Agreed Legislation/ Policies</i> | This mechanism is where governments in question agree to implement similar legislation or policies, which is then implemented by local legislation (Allen Consulting Group 2002). |
| 7 | <i>Non-Binding National Standards Model</i> | A national authority is appointed to make decisions under legislation made by each jurisdiction. Such decisions are, however, typically variable by the respective state or territory ministers. |
| 8 | <i>Exchange of Information</i> | Such an exchange can take many forms, including: <ul style="list-style-type: none"> ▪ Ministers and/or public servants could meet on a more or less regular basis to exchange information; or ▪ jurisdictions could publish best practice guidelines or demonstration projects with the hope that they will be adopted (implicitly or explicitly) by other jurisdictions (Allen Consulting Group 2002). |
| 9 Un-coordinated | <i>Independent Unilateralism</i> | Under this option each jurisdiction goes its own way – so there is no coordination at all between governments (Farina 2004: 42). Unlike option one, this option means that the states and the commonwealth all act in an uncoordinated and pursue disparate policy objectives. |

Methodology

Trow (1957, cited in Bryman 1984, p. 76) argues that “the problem under investigation properly dictates the methods of investigation” and, accordingly the problem noted above should lead to conclusions about how best to conduct the research. This project employed an exploratory approach in order to answer the research question: What is the nature and extent of the inter-jurisdictional mechanisms to achieve greater harmonisation of the different regulatory contexts affecting the construction industry in Australia? The research questions suggest that a qualitative methodology may be appropriate.

Types of research questions for which a qualitative design is appropriate, include:

- When the focus is on the process, implementation or development of a policy
- When there is a need for detailed in-depth information
- When there is a focus on diversity among, and idiosyncrasies of, participants
- To understand the beliefs as to the nature of the problem and how a desired outcome could be achieved (Adapted from Mertens 2005: 233).

The criteria outlined by Mertens (2005) indicate that qualitative research approach is appropriate for this research into public policy.

Unit of analysis

Case studies typically examine an organisation or an industry. In this instance the regulatory environment affecting the industry is the unit of analysis, which is slightly more abstract than case studies of organisations (Yin 2003b). Additionally, the research is exploratory, as the questions are seeking to provide information to use in analysing a situation (Zikmund 2003:55). For exploratory research, case studies are considered an appropriate methodology.

Case study methodology

Case studies provide for in-depth analysis of a particular issue or technology as it impacts an organisation or industry, and can provide strong recommendations for improvements in theory, technology or policy. Case studies in the area of policy have been called for as a way of advancing public policy practice (Osborne & Brown 2005). A case study is “a method for learning about a complex instance, based on a comprehensive understanding of that instance obtained by extensive descriptions and analysis of that instance taken as a whole and in its context” (U.S. General Accounting Office 1990, cited in Mertens 2005:237).

Case studies can utilise a multitude of methodologies to achieve their outcomes (Yin 2003a, 2003b). Specific methods used to gather data about the case study in this paper are: Policy analysis & evaluation – to map, analyse and evaluate policy initiatives in different levels of

government, particularly identifying policy, legislative, and regulatory co-ordination and/or lack thereof.

Policy Analysis

There is no one approach to policy analysis. Policy analysis has been defined as “an applied social science discipline which uses multiple methods of inquiry to produce and transform policy-relevant information that may be utilised in political settings to solve policy problems” (Dunn 1981:35). Rather, policy analysis is by nature, a multi-disciplinary, problem focussed field; and is concerned with context, process, options and outcomes (Parsons 1995). The research project explicitly embraces this approach by drawing on multiple methods, discussed below. The context of the policy process is addressed in the first stage of the project, by completing a map of the macro policy environment, in which the construction industry operates. The project however, uses the term policy analysis in two ways: analysis of policy and analysis for policy. This can best be summed up in the following diagram:

Figure 1 – Approaches to Policy Analysis

| Analysis of policy | | | Analysis for policy | |
|----------------------------------|----------------------------|----------------------------------|------------------------|-----------------|
| Analysis of policy determination | Analysis of policy content | Policy monitoring and evaluation | Information for policy | Policy advocacy |

(From Parsons 1995: 55)

In this project, two approaches will be utilised: analysis of policy content – what is currently happening; as well as policy advocacy – arguing for change in particular policy environments (Dunn 1981: 48). This approach is necessary to answer the research question of the project.

Analysis of policies involves examination of the content of policies themselves. Content analysis is a technique for gathering and analysing the content of text (Neuman 2000: 292), and is an approach that is ubiquitous in policy studies (Marinetto 1999: 68). Greatest strength of content analysis is that it is unobtrusive and nonreactive, and is viewed as an objective way of obtaining quantitative data of the content of various forms of communication (Marshall & Rossman 1999: 117).

Findings and Discussion

A central thesis of this research project is that there are costs associated with the lack of harmonisation of regulation and policy between states in relation to the construction industry. It is beyond the scope of this paper to report in detail, the full extent of the regulatory burden of these differences on business. However a summary is possible. Construction regulation can be broadly classified into two areas: those that affect construction projects, and those that affect construction firms. Additionally, different levels of government become involved in different phases of building. Table 2 summarises the findings relating to the costs associated with both of these areas.

Table 2 – Summary of Regulatory Costs incurred by the Construction Industry

| | Planning Phase | Construct Phase | Ownership Phase |
|-------------------------------|--|--|---|
| Building Project Level | Payment of appropriate fees (local) as well as stamp duties and insurances (state) for building to commence. Adaptation costs when working across jurisdictional boundaries. | Possible contract specifications from government as client, and dispute resolutions. Socio-economic policy outcomes embedded in government building contracts (e.g. training, 'buy local'). Taxes and duties on materials and personnel. Adaptation costs when working across jurisdictional boundaries. | Ongoing provisions and responsibilities of ownership have implications in the design phase, particularly OH&S - ensuring 'buildability' of buildings and the ongoing issues of OH&S in buildings; the environmental design issues surrounding buildings such as impact, water use, retrofitting, grey water and inclusion of sustainability in the Building Code. Adaptation costs when working across jurisdictional boundaries. |

| | Planning Phase | Construct Phase | Ownership Phase |
|--------------------------|---|--|---|
| <i>Firm Level</i> | Licensing of builders, accreditation of inspectors. Adaptation costs when working across jurisdictional boundaries. | Direct costs include payment of taxation at local, state and federal levels, as well as insurance. Indirect costs include compliance with state regulations (such as OH&S), company reporting, contractual obligations, and the Building Code. Adaptation costs when working across jurisdictional boundaries. | Implications of OH&S, building maintenance (in most states), GST on fittings and consumables, Commonwealth, state and local taxation regimes. Adaptation costs when working across jurisdictional boundaries. |

It is beyond the scope of this paper to discuss in detail costs associated at the firm level. Therefore the rest of the paper will focus on the regulations affecting specific construction projects.

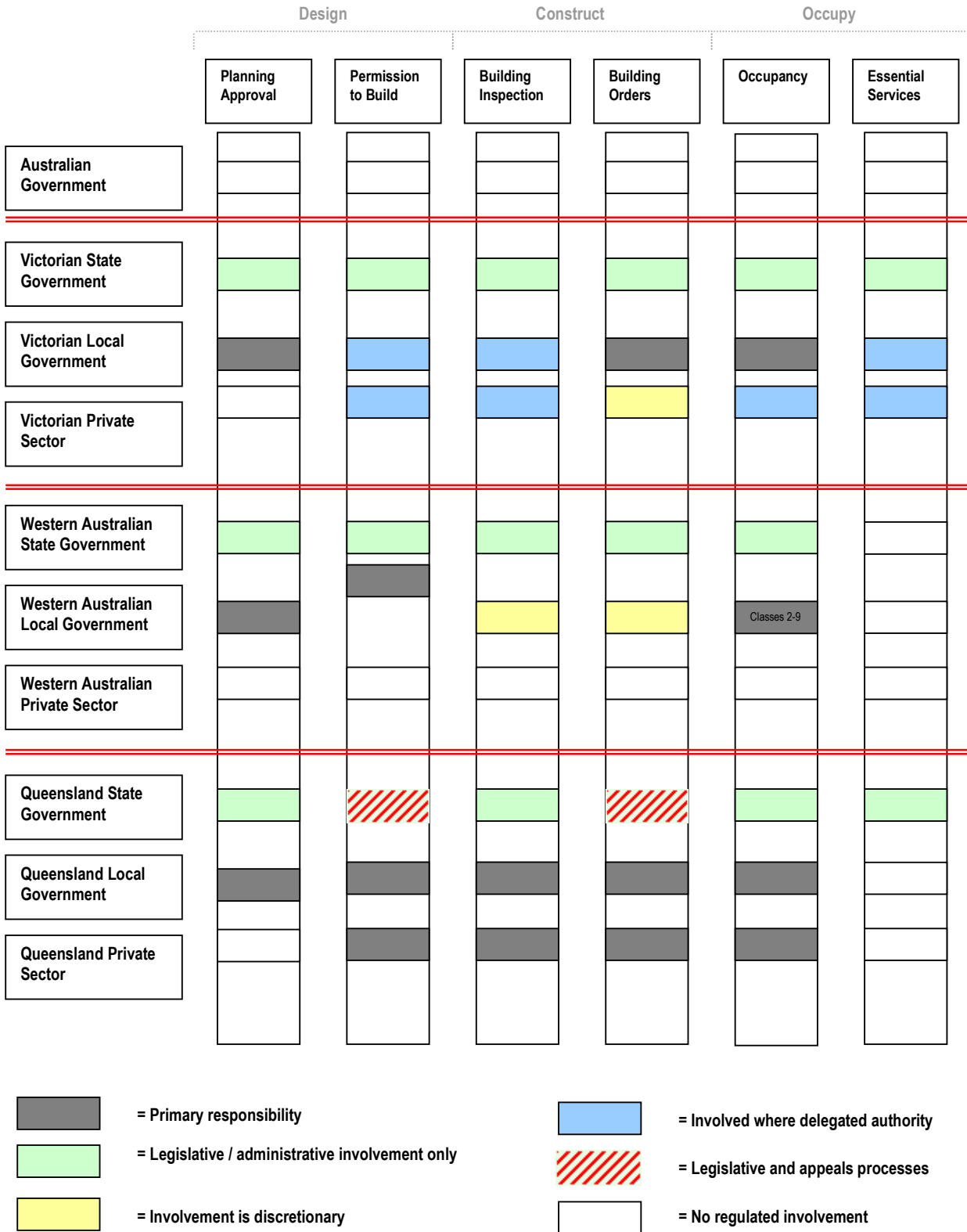
Firstly the current regulatory environment is discussed, particularly in relation to the roles of various spheres of government in the construction process. Secondly, the costs associated with this regulatory environment are discussed. Lastly, ways of reducing the regulatory costs on business are also discussed, particularly the mechanisms for improving harmonisation.

Regulatory environment affecting construction projects

The findings from the scan of construction requirements in each state have been compiled into a table format for ease of reference. The data are arrayed into the phases of the building process, such that diagrammatically, there is a flow from the design stage, construction phase through to occupation of the building. The different spheres of government are identified and each level of federal, state and local government action and response has been documented. It was found that a new development is that the private sector has also been drawn into the policy and regulatory mix in some state level arenas.

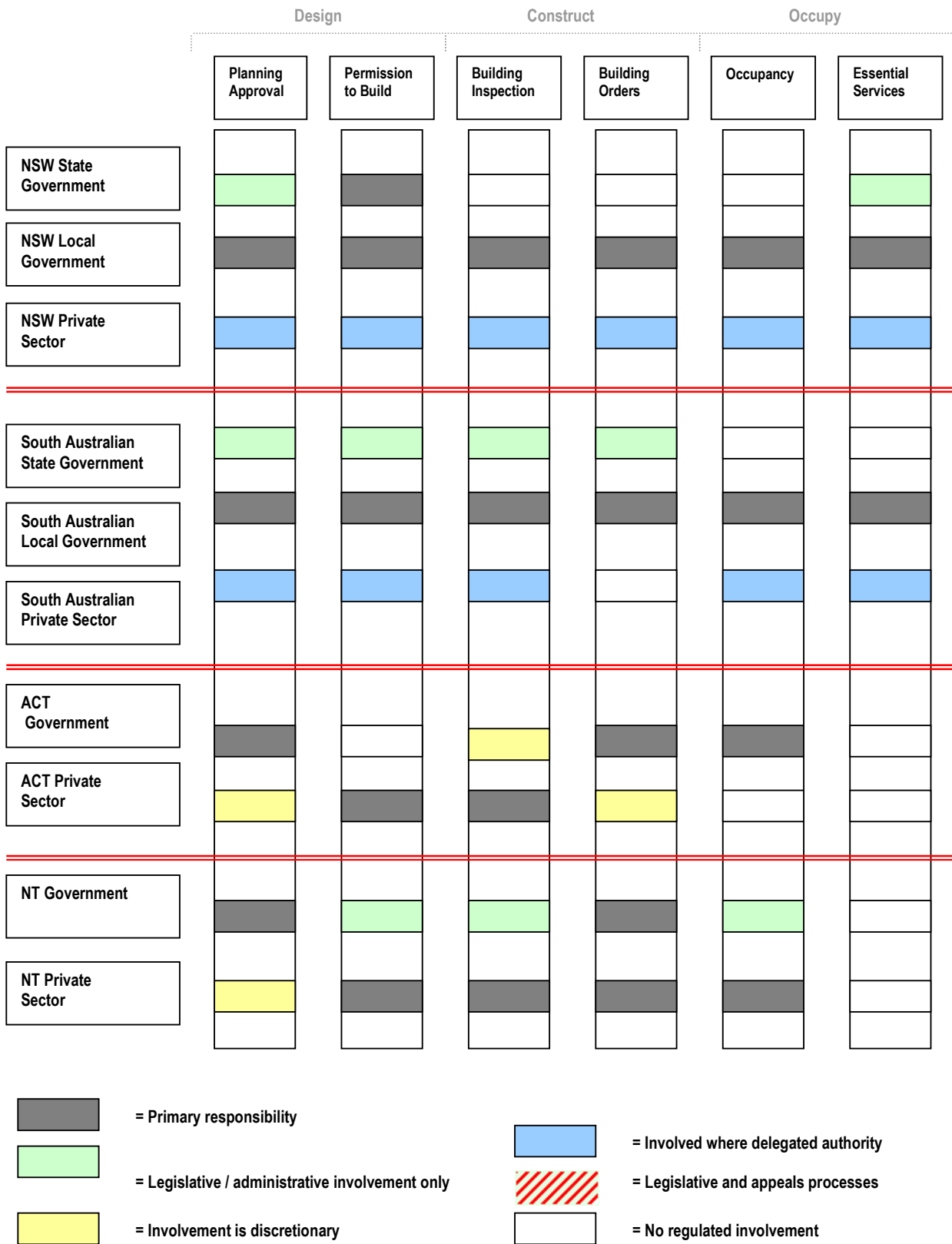
Detailed empirical evidence is set out in Figures 2 and 3. It is evident from reviewing Figure 2 and Figure 3 that little harmonisation occurs between the states on construction. These diagrams depict the involvement of government agencies from an institutional perspective, determining the involvement of various institutions at different phases of the building project. Apart from the Building Code of Australia, variation exists between the states and territories of Australia, with each jurisdiction developing distinct approaches from each other, for a variety of reasons.

Figure 2 – Regulations affecting construction projects³



³ Source: Chun (2000), Collie Planning and Development (2002), and Productivity Commission (2004). Building orders refers to those orders which follow inspection of a building, normally requiring correction of a fault. Occupancy refers to the permission given to occupy a building.

Figure 3 – Regulations affecting construction projects⁴



⁴ Source: Chun (2000), Collie Planning and Development (2002), and Productivity Commission (2004). Building orders refers to those orders which follow inspection of a building, normally requiring correction of a fault. Occupancy refers to the permission given to occupy a building.

When analysing regulation of the phases of construction projects, it is possible to differentiate between jurisdictions based upon the involvement of the various spheres of government in building regulation. These roles vary from providing regulation (which is undertaken predominantly by the states, to developing specific town plans, development assessment, inspection of buildings and certification of buildings. These are summarised in Table 3:

Table 3 – Summary of government involvement in development assessment and building inspection

| Jurisdiction | Role of state / territory government overall | Role of local governments overall | Engagement of Private Contractors |
|-------------------------------------|---|---|---|
| Australian Capital Territory | Primarily policy and legislation. Also responsible for development assessment, planning, and occupancy certification. May also undertake building inspections. | | Private contractors undertake vast majority of building inspections and certification (design, build, occupy) |
| Commonwealth | Primarily legislative and policy setting. Establishes the Building Code of Australia which is adopted by the states and territory governments. Also oversees establishment of national standards. | Some engagement with ACT government for specific commonwealth buildings (eg Canberra Airport) | Appears subject to state / territory legislation |
| New South Wales | Primarily legislative and policy setting. | Responsible for development assessment, planning, and occupancy certification. Undertakes building inspections. | Private contractors may be engaged were delegated authority (design, build, occupy)? |
| Northern Territory | Primarily legislative and policy setting. Also responsible for planning, development assessment and building orders. Does not inspect | | Private contractors undertake vast majority of building inspections and certification (design, build, occupy) |
| Queensland | Primarily legislation and policy setting. | Responsible for development assessment, planning, and occupancy certification. Undertakes building inspections. | Private contractors undertake vast majority of building inspections and certification (design, build, occupy) |
| South Australia | Primarily legislative and policy setting | Responsible for development assessment, planning, and occupancy certification. Undertakes building inspections. | Private contractors may be engaged were delegated authority (design, build, occupy) |
| Tasmania | Primarily legislative and policy setting | Responsible for development assessment, planning, and occupancy certification. Undertakes building inspections. | Private contractors may be engaged were delegated authority (design, build, occupy) |
| Victoria | Primarily legislative and policy setting. Does inspection of public structures | Responsible for development assessment, planning, and occupancy certification. Undertakes building inspections. | Private contractors may be engaged were delegated authority (design, build, occupy) |
| Western Australia | Primarily legislative and policy setting | Planning approvals, and certification of most building classes. Building inspections not mandatory by government. | Limited involvement in building design. |

The various organisations within each jurisdiction and the primary pieces of legislation which control construction are noted in Table 4.

Table 4 – Relevant acts and organisations involved in construction project regulation

| Jurisdiction | Main regulatory instruments | Main organisation involved |
|-------------------------------------|---|---|
| Australian Capital Territory | ACT (Planning and Land Management Act 1988; Land (Planning and Environment) Act and Regs 1991; Territory Plan, National Capital Plan; Building Code of Australia. | ACT Planning and Land Authority |
| Commonwealth | Building Code of Australia. | Australian Building Codes Board |
| New South Wales | Environmental Planning and Assessment Act 1979; Environmental Planning and Assessment Regulation 2000; Regional Development plan, State Environment Planning Policy; Building Code of Australia. | Dept. of Infrastructure, Planning and National Resources |
| Northern Territory | NT Planning Act 1993; NT Lands and Mining Tribunal Act; Land Use Objectives; Control Plan; Building Code of Australia. | Minister for Lands and Planning; Building Advisory Committee; Director of Building Control; Building Appeals Board; Building Advisory Services Branch |
| Queensland | Integrated Planning Act 1997; Integrated Planning Regulation 1998; Building Act 1975; Standard Building Regulation 1993; Building Code of Australia. | Department of Local Government Planning Sport and Recreation; Building and Development Tribunal; Commercial and Consumer Tribunal. |
| South Australia | Development Act and Regulations 1993; Building Rules; Planning Strategy; Building Code of Australia, | Planning SA; Building Rules Assessment Commission; Development Assessment Commission |
| Tasmania | Land Use Planning and Approvals Act 1993; Public Land (Administration and Forests) Act 1991; State Policies and Projects Act 1993; State Policy (Tasmanian Sustainable Development Policies; Building Code of Australia. | Resource Planning and Development Commission |
| Victoria | Planning and Environment Act 1987; Planning and Environment Regulations 1988; Planning and Environment (Fees) Regulations; Planning and Environment (Planning Schemes) Act 1996; Environment Effects Act 1988; Subdivision of Land Act and Regulations; State Planning Policy Framework; Building Code of Australia. | Department of Planning; Building Commission |
| Western Australia | WA Planning Commission Act; Metropolitan Region Town Planning Scheme Act 1959; Town Planning and Development Act 1928; Town Planning Regulations 1967; Planning and Development Act 2004; State Planning Strategy; Local Government (Miscellaneous Provisions) Act; Building Regulations; Building Code of Australia. | Department of Planning and ; Western Australian Planning Commission Department of Housing and Works |

It is possible to categorise the involvement of various jurisdictions, according to their involvement in the different phases of building construction. This can be seen in Table 5:

Table 5 – Engagement of State / Territory Governments in Building Construction

| <i>Legislation and policy</i> | <i>Legislation, policy planning, development assessment, and some certification</i> | <i>Legislation, policy, inspection of specific classes of buildings</i> |
|---|---|---|
| Commonwealth government New South Wales government Queensland government South Australia government Tasmania government Western Australia government | Northern Territory government Australian Capital Territory government | Victorian government |

Not surprisingly territory governments are more involved in development assessment and certification than other state governments, due to there only being one level of government in these jurisdictions. What is surprising is that Victorian government still undertakes inspections of certain classes of buildings (public entertainment), which may be due to risk mitigation.

It is also possible to classify the involvement of territory and local governments in the various phases of building construction. This can be seen in Table 6:

Table 6 - Engagement of Territory and Local Governments in Building Construction

| <i>Planning, development assessment, and certification. Undertakes building inspections</i> | <i>Planning, development assessment, and certification. May undertake building inspections</i> | <i>Planning, and development assessment, and certification. Building inspection optional or not done by government</i> |
|---|--|--|
| <ul style="list-style-type: none"> • New South Wales local governments • Queensland Local Governments • South Australian local governments • Tasmanian local governments • Victorian local governments | <ul style="list-style-type: none"> • Australian Capital Territory • Northern Territory | <ul style="list-style-type: none"> • Western Australian local governments |

Local governments in most states undertake building inspections. The territory governments rely upon building certifiers to undertake much of the inspections, presumably due to resource constraints. The surprising state is Western Australia, who do not undertake compulsory building inspections (Chun 2000, Collie Planning and Development 2002). This legislation is currently under review so may change.

Likewise the level of involvement private industry is permitted by various jurisdictions in the various phases of building construction can also be classified. Table 7 summarises these:

Table 7 – Engagement of Private Contractors (designers, inspectors, surveyors)

| <i>Undertakes the majority of building inspection and certification (design, build, occupy)</i> | <i>Undertakes building inspection and certification if delegated authority to do so</i> | <i>Only involved in design phases of construction</i> |
|--|--|---|
| <ul style="list-style-type: none"> • Australian Capital Territory • Northern Territory • Queensland local governments | <ul style="list-style-type: none"> • New South Wales local governments • South Australia local governments • Tasmania local governments • Victoria local governments | <ul style="list-style-type: none"> • Western Australia |

The engagement of private contractors is strongest in the territories and Queensland. In most other states, inspection and certification is undertaken by a private contractor if they are delegated the

authority to do so. Western Australia is different again, with contractors involved only in the design stage (Chun 2000, Collie Planning and Development 2002). As noted above, this is currently being reviewed and may change in the near future.

The unique role of territory governments necessitates that they undertake a different approach to their involvement in building projects, as they are involved in regulating and town planning. In other states, the role of regulating and town planning are separated between state and local government. Likewise state governments tended not to undertake building inspections, leaving that responsibility to local governments, whereas territory governments undertake the dual role again.

The reason for the exceptions noted above, are not clear at this stage. For example:

- Why does Victoria inspect specific class of building, whereas other states do not?
- Why does Western Australia seem to not undertake inspections of construction projects on a regular basis?
- Why are private contractors in Western Australia less involved in building inspections and certification, than in other states?

Costs incurred by construction firms

As noted in the introduction, regulation can exact a number of costs on industry. These can be categorised into direct, indirect and adaptation costs (OECD 1994). Each of these costs can be identified per sphere of government.

Direct Costs

The most significant area of direct costs is associated with financial payments to government – typically in the form of taxes, fees and duties.⁵

Direct costs levied by the Australian government

Costs levied by the commonwealth government on construction firms includes taxation on company income, goods and services tax, and payroll tax (Department of Industry 2007). Additionally firms typically subscribe to copies of the Building Code of Australia and Standards Australia, as these specify the performance required of various buildings and building components. Income for the commonwealth government directly related to property was in the order of \$14 million in the 2004-2005 financial year (Australian Bureau of Statistics 2006:11). Unfortunately, income from GST, payroll tax, and company tax by industry is not available from current sources.

Direct costs levied by state and territory governments

State governments gain income from construction related activities in the form of property taxes, land tax, stamp duty on conveyancing, payroll tax, and land tax (Department of Industry 2007). Income for state and territory governments from property (excluding payroll tax which could not be disaggregated) was \$2,330 million for the 2004–05 financial year (Australian Bureau of Statistics 2006:18). “Taxes on property were the single largest taxation revenue source (38.5%) for state governments in 2004-05” (Australian Bureau of Statistics 2006:4).

Direct costs levied by local government

Local governments gain income from property primarily from rates, although they also derive some income from application and inspection fees (Department of Industry 2007). Income from municipal rates was \$6,080 million for the 2004–05 financial year (Australian Bureau of Statistics 2006:12). Taxation from rates on real property, “are the sole form of taxation income for local governments” (Australian Bureau of Statistics 2006:4).

⁵ The various forms of taxation income for all spheres of Australian government are described at www.business.gov.au/Business+Entry+Point/Business+Topics/Taxation/

Direct costs on the construction therefore were in the order of at least \$8,553 million dollars in the 2004-05 financial year.

Indirect Costs and Adaptation Costs

Indirect costs are associated with companies needing to comply with government regulations. For the Australian government, this means taxation returns and GST reporting; for State government, this means business registration and licensing, insurances, compliance with planning acts, occupational health and safety, and training obligations; and for local government, this means application and inspection processes, for construction. However, in a fragmented regulatory system, such as Australia, costs can also be incurred due to procedural delays, when industry has to adapt documentation for different spheres of government; lack of predictable outcomes, with variations occurring between spheres of government; and lost business opportunities, with delays and red tape preventing realisation of business venture (OECD 1997).

Indirect costs and adaptation costs are particularly hard to quantify, with no agreed on method of estimating this established in Australia. The *Construction Industry Business Environment* project is working with the Productivity Commission on their commissioned study entitled *Performance Benchmarking of Australian Business Regulation*. This study is seeking to identify ways of benchmarking regulation, including the costs incurred by organisations working across jurisdictional boundaries, and estimating the compliance costs in various organisations.

In respect to adaptation costs resulting from differences in regulation, the issue of development assessment and building permits is compounded by the fact that these activities fall under the jurisdiction of local governments. As the Productivity Commission (2004) has noted, local governments often seek to protect client interests through regulation catering for local needs, however, this local innovation leads to increasing national inconsistency between local councils.

Table 8 summarises the costs identified in this project for construction projects.

Table 8 – Summary of regulatory costs incurred by construction projects

| Sphere of government | Building Code and Standards | Planning / Design Phase | Construction Phase | Occupancy Phase |
|-----------------------|--------------------------------|--|--|--|
| Australian Government | Direct costs Indirect costs | | | |
| State Governments | Adaptation Costs | Direct Costs Indirect Costs Adaptation Costs | (Some states) | |
| Local Governments | | Direct Costs Indirect Costs Adaptation Costs | Direct Costs Indirect Costs Adaptation Costs | Direct Costs Indirect Costs Adaptation Costs |

Possible means for reducing regulatory costs

Having established that there are a variety of costs levied on construction projects are there ways in which these costs can be reduced? Firstly, is a reduction in the category of direct costs likely? The Commonwealth gains income from the construction sector through company taxes, income taxes, and the GST. State governments gain income from construction and property through property taxes, stamp duties and the like. In fact, 38.5% of the income received directly by states, not through grants from the Commonwealth, was derived through property tax in 2003-2004 (Australian Bureau of Statistics 2006). Local government derives income from construction and property through application fees, development fees, and rates. While every jurisdiction derives significant income from an industry, relinquishing authority and reduction of the burden would appear unlikely. While it is possible that the states may reduce their direct taxes on construction related duties (e.g. property taxes and stamp duty) in lieu of increased distributions from the Commonwealth GST income, the spectre of increased reliance on the Commonwealth for funding,

and the forgoing reduction in direct income and therefore independence, would appear to make this unlikely (Hamill 2005). Is a reduction in indirect costs more likely then?

In the Australian Constitution, infrastructure, public works and main roads are the responsibility of the states. Each state has enacted building acts and regulations and some have developed integrated planning acts. Additionally, each state has regulations which address construction related activities – occupational health and safety, builders licensing, and training; as well as specifications for various types of buildings and building products. Moreover, many state government departments become involved in construction activities: public works authorities in the construction of roads, infrastructure and public works; environmental authorities to monitor the impact of construction projects and firms of the environment; and heritage departments to preserve buildings of historical significance. In addition to the roles of the states in construction regulation, much of the day to day construction activity in Australia is overseen by local councils – particularly the provision of development assessment and town planning, building inspections, and local roads and drainage. The Commonwealth government has also become increasingly involved in construction, primarily through tied grants. Indeed part of the increasing role of the Commonwealth government is in the provision of funding to the states of major grants for infrastructure – to which the Commonwealth can attach conditions (Fenna 2004). Through this mechanism, the commonwealth appears to also be pursuing a range of other agendas, particularly in the industrial relations and occupational health and safety areas. Thus all three spheres of government have regulatory responsibilities and interests in construction industry. While minor adjustments may be possible, large scale reduction in regulation in direct and indirect costs appear unlikely in the near future. This leaves a reduction in adaptation costs as a possible area of reduced regulatory burden.

While the source of direct and indirect costs are directly tied to the constitutional and historical role of various governments – taxation and regulation – adaptation costs are the simple result of differences between jurisdictions. At least at a theoretical level, increasing harmonisation would reduce the adaptation costs noted above, and potentially have a positive impact on productivity, and therefore GDP.

As noted in the introduction – unlikely that government will reduce direct costs as these are source of income. Likewise regulatory areas which are the constitutional or historical responsibility of a jurisdiction will not be reduced easily. The most promising area of regulatory change is in the area of improving regulatory harmonisation. Jurisdictions still obtain revenue, still remain responsible for areas of regulation important to the jurisdiction.

What mechanism is likely to achieve regulatory harmonisation?

In order to discuss the most likely mechanism for achieving regulatory harmonisation, the heads of power needs to firstly be established. A head of power is the level of government charged with constitutional responsibility for a particular area of regulation. Table 9 outlines the heads of power for the regulatory areas covered in this paper.

Table 9 – Summary of Heads of power

| Area | Head of power |
|---|---|
| <i>Building Code of Australia</i> | Commonwealth develops the Building Code through consultation with the states. The states adopt the Building Code of Australia into their state regulation. This is the most unified area of regulation in the industry. |
| <i>Development planning and assessment</i> | States have constitutional authority for construction, all of these have building acts, and integrated planning acts or similar. However, pragmatically the role of town planning and development assessment most often falls to local government . |
| <i>Building inspections</i> | Territory and local government |
| <i>Permission to occupy</i> | Local government |

The Building Code of Australia is the best example of regulatory harmonisation in the construction industry. In other areas, achieving harmonisation between the states, territories and Commonwealth governments has proved difficult in Australia. However, much of the planning,

development assessment, construction, and ownership activities are overseen by local governments. If achieving regulatory harmonisation with 9 jurisdictions (at the national, state and territory levels) has proved difficult, then achieving harmonisation with 350 odd local government authorities is likely to be even more difficult. Most of the harmonisation mechanisms précised in the introduction would not easily apply to local government, with the exception of sharing of information or demonstration projects. Table 10 outlines the most likely mechanism for achieving harmonisation .

Table 10 – Most likely mechanisms for achieving regulatory harmonisation

| Policy Area | Most likely way to achieve harmonisation | Current situation |
|--|---|---|
| Building Code of Australia | Incorporation by reference | Already in place. More recently, state variations in the code has caused concern to industry. |
| Development planning and assessment | Non-binding standards, demonstration projects, sharing of information | A protocol for sharing of planning and development application data between different government agencies has been agreed on. Significant funding is now underway to develop web based platforms to share information between government agencies |
| Building inspections | Non-binding standards, demonstration projects, sharing of information | A nationally consistent system appears unlikely in the short term |
| Permission to occupy | Non-binding standards, demonstration projects, sharing of information | A nationally consistent system appears unlikely in the short term |

Conclusion

This paper sought to outline the different approaches to regulation across a federal system of government and examine the ways in which the regulatory environment affects construction firms,. In the area of the phases of construction projects, a variety of construction regulations have been identified, and the relevant sphere of government responsible for each phase delineated. Costs associated with each phase have been outlined.

It was found that direct costs are primarily levied by state, territory and local governments, and the power to do so, derives from constitutional authority or, in the case of local governments, from authority delegated from the jurisdiction with the authority. This taxation income is the main income for the states and the only income for the local authorities. Consequently, it is unlikely that savings for industry can be achieved in the form of direct or indirect reduction of regulatory burden.

It is concluded that increased harmonisation is the most likely area of savings and an area that is under-explored in construction research. It is acknowledged such harmonisation is difficult due to the sheer number of local governments involved. Certain strategies are in place to examine ways of reducing differences between local governments, however mechanisms for achieving harmonisation are currently restricted to sharing of information and agreeing on specific standards. There have been a range of policy and regulatory approaches identified and reviewed in this research and accordingly, it is concluded there may be many different possible ways of ensuring that those firms and projects that cross jurisdictional boundaries may operate in cost-effective and consistent ways.

Future Research

There are a number of areas in which regulations could be harmonised. These include training and licensing, occupational health and safety, procurement and sustainability. Another intriguing area of investigation is the use of various web based technologies to enhance the assessment of development applications.

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